

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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In re:) Civil 05-MD-1708 (DWF/AJB)

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GUIDANT CORPORATION) STATUS CONFERENCE

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IMPLANTABLE DEFIBRILLATOR

PRODUCTS LIABILITY)

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This Document Relates

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) 9:15 o'clock, a.m.

To All Actions

) April 4, 2007

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) St. Paul, Minnesota

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THE HONORABLE JUDGE DONOVAN W. FRANK

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THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN

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UNITED STATES DISTRICT COURT JUDGE AND MAGISTRTE JUDGE

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STATUS CONFERENCE PROCEEDING

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1 (In open Court.)

2 THE HONORABLE JUDGE FRANK: You may be
3 seated. Apparently we didn't pay our heating bill or
4 something, so they turned off the heat.

5 I would like to welcome everybody to
6 beautiful Downtown St. Paul. It may not be on the radar
7 screen of every lawyer or other individual in the
8 courtroom. It is, I think, on the radar screen of the
9 lawyers at counsel table. But, as we get closer to the
10 trials in this matter, in large part, to expedite and
11 not delay deadlines and move things along, the website
12 will show kind of some modified procedures we put in
13 place, nothing from our point of view terribly unusual,
14 on getting letter briefs or motions in. And then with
15 the agreement of the Court, either to do an immediate
16 turnaround written order, or to make rulings off the
17 Bench in anticipation of a hearing like today based upon
18 the submissions that were made over the last couple of
19 weeks. And so, I am going to begin the hearing.

20 And I hadn't told the lawyers in the room
21 that were with Judge Boylan and myself earlier this
22 morning what those rulings were. But, my intent before
23 we go down the agenda is to go ahead and read into the
24 record in summary form, a decision on a number of
25 outstanding issues that have arisen, and some need

1 immediate attention from the Court in the interest of
2 all of the parties. What I would then envision, I would
3 go ahead and make these rulings by reading it into the
4 record so there is an available transcript if any one is
5 so interested.

6 I will then ask if there is any request for
7 clarification, which is not tantamount to asking for
8 additional argument on the cases and whether there
9 should be some immediate, but immediate not as in during
10 this hearing, request for reconsideration by the Court,
11 because there's a couple of these issues that need
12 immediate turnaround time, whether it is today,
13 tomorrow, because there are things coming down the pike,
14 so to speak.

15 So, I will go ahead. I have approximately,
16 probably, five minutes. I will take it slow. And then
17 I will put this into the record, because we kind of
18 prepared it consistent with a procedural outline to do
19 this, in fairness of time.

20 Before the Court, then, for the record, there
21 are, at least that we are aware of, at least four issues
22 that have been raised in the letter briefs that were
23 filed March 29th of this year. And to the extent it is
24 relevant, those are docket numbers 1400 and 1402.

25 And then there is one motion relating to what

1 I will refer to as Defendant Fact Sheets. Again, for
2 the record, those are docket numbers 998 and 1338.

3 First, in response to the Plaintiffs'
4 assertion that Guidant has untimely produced documents
5 in Duron, to the extent that Guidant has not produced
6 all of the documents in Duron, I will direct that they
7 do so by April 9th, absent stipulation of the parties,
8 because we talked about some rolling discovery
9 issues this morning.

10 With respect to the documents in the other
11 bellwether trials, those discovery cut-off dates
12 initially were announced in Pretrial Order 31. And the
13 parties, as we discussed this morning, may agree to some
14 slight changes in those dates. One characterization was
15 rolling -- some rolling dates, and I am confident in
16 light of the relationships the parties have and our
17 discussions this morning, that there are going to be
18 some changes, mostly by agreement, to those -- some of
19 those dates. And actually, those changes make sense to
20 the Court, as well.

21 Plaintiffs have requested that Guidant be
22 precluded from using any of the documents related to
23 Duron produced after March 7, 2007 in their briefing,
24 which is the due date of Plaintiffs' expert reports in
25 the case. That motion is denied by the Court.

1 I do reserve the right to exclude evidence at
2 trial, as most of us do in any trial, depending on the
3 nature of the documents, the impact of the exclusion to
4 each party, and whether Guidant's experts used such
5 documents in their reports that were either not
6 disclosed, or untimely disclosed. And I assume that if
7 there is an issue there in light of the Court's ruling,
8 that that will be raised appropriately at the pretrial
9 of the matter, if it doesn't come up beforehand because
10 of some critical piece of discovery.

11 And so it is clear, that to the extent the
12 motion is to exclude the use of any documents related to
13 Duron produced after March 7th, that is respectfully
14 denied; but, reserving the right, as I have outlined,
15 depending on where we are at, if that remains an issue
16 on how critical something is and how it was used or will
17 be used.

18 Second, with respect to the deposition of Dr.
19 Jewell. Guidant, I direct, shall take his deposition in
20 London at a mutually agreeable time to the parties, and
21 Dr. Jewell, provided that the Plaintiffs pay for
22 Guidant's airfare consistent with their prior offer that
23 was described in the letters that I received.

24 Third, that Guidant has acknowledged its
25 responsibility to post documents in the repository and

1 it has been represented -- and this came up this
2 morning, so it is kind of an add-on -- well, that is not
3 fair to the parties. It was brought to our attention
4 before this morning, but we discussed it at the
5 conference this morning. It has been represented that
6 all bellwether documents have been posted. And the
7 Court will direct that Guidant continue to post
8 documents as required by the parties' agreement. And
9 there was some downtime on some documents this last week
10 on our website that is unrelated to this issue, because
11 one of our individuals who posts such documents were
12 gone.

13 With respect to the Deposition of Dr. Hauser,
14 who I will describe at least at this time as a
15 third-party witness, Guidant's request and Plaintiffs'
16 response on this issue both assume, at least from where
17 I see it, that the Court will automatically allow Dr.
18 Hauser's testimonial deposition be admitted at trial.
19 And I define testimonial -- there's different words for
20 it -- as a trial deposition prepared that way, as
21 opposed to a discovery deposition. That assumption is
22 not a foregone conclusion by any means.

23 In my experience, parties either prepare for
24 a discovery deposition, or they prepare for a
25 testimonial or trial deposition, because they are two

1 very different creatures. And the lawyers behave
2 differently in terms of, if not the questions they ask,
3 the objections they make and the scope of the
4 examination. So, my view today is this, absent an
5 agreement between the parties that allows them to
6 mutually prepare for a testimonial deposition, and it
7 doesn't appear that there is such an agreement, a
8 deposition normally proceeds as a discovery deposition,
9 not a trial deposition.

10 And I actually suggest that Plaintiffs'
11 concede this point when they state that they have
12 subpoenaed him for a, quote, "deposition as a
13 third-party fact witness." But then, the letter that I
14 received states that such testimony can be used for
15 numerous purposes, including presentation at trial.

16 Whether they should be used for trial is for
17 me to decide at some later date. And I would not make
18 that decision at this time until I saw the contents of
19 the deposition and the reason why Dr. Hauser is
20 unavailable or uncooperative or otherwise why the
21 deposition should be used in lieu of his testimony. And
22 that may be left for another day.

23 So, where does that leave us today with
24 respect to the upcoming Deposition of Dr. Hauser?
25 Plaintiffs and Guidant are instructed to agree in

1 consultation with him -- apparently they already have,
2 to a time to take a deposition that I will characterize
3 as a discovery deposition. In advance of that
4 deposition, I expect the parties if they haven't
5 already, to exchange any additional discovery to the
6 extent it is relevant to the deposition, itself, that
7 relates to Dr. Hauser.

8 The parties may, however, if they wish, agree
9 to -- this deposition will be a testimonial deposition.
10 If they do not, the Court will already reserve the
11 right, as it does in every case, to entertain motions at
12 the time of trial if it is requested that it be used in
13 lieu of his testimony, to exclude his testimony as a
14 trial deposition in lieu of live testimony depending on
15 the circumstances.

16 I guess what that means in a nutshell, I
17 assume this deposition is going to be essentially a
18 discovery deposition unless the parties agree otherwise,
19 because I am not setting up a two-tier, absent agreement
20 of the parties, discovery deposition, then a trial
21 deposition. If the parties decide to agree to that, so
22 be it.

23 With respect to the Defendant Fact Sheets,
24 then, the dispute, as I understand it, centers around
25 whether there are certain Plaintiff Fact Sheets that are

1 substantially complete, which would then trigger
2 Guidant's obligation to produce certain Defendant Fact
3 Sheets.

4 At this time, today, I am going to
5 respectfully deny Plaintiffs' motion to compel and
6 Guidant's request for a stay from production of
7 Defendant Fact Sheets until after the bellwether trials
8 are completed; that is granted. In other words, they
9 requested, but there is going to be a quid pro quo,
10 here.

11 I will grant Guidant's request for the stay
12 from the production of Defendant Fact Sheets until after
13 these bellwether trials are completed. However, in
14 addition to the stay, the Court also stays the filing by
15 Guidant of any motions to compel or motion to dismiss
16 related to the completion of Plaintiffs Fact Sheets
17 until after the bellwether trials are completed. I
18 assume that after the trials are completed, the parties
19 will agree to a schedule under which the stays can be
20 lifted.

21 However, these stays do not excuse individual
22 Plaintiffs from continuing to complete their fact
23 sheets, as required by the existing Pretrial Order 29.
24 That is to say, individual Plaintiffs must still
25 complete their sheets within a time frame that we set up

1 in 29, and Guidant may, but is not required to complete
2 certain Defendant Fact Sheets if it desires to do so
3 after getting the completed Plaintiffs Fact Sheet.

4 As I understand it, Guidant has been sending
5 deficiency letters typically to individual Plaintiffs
6 after receiving incomplete Plaintiff Fact Sheets. If
7 Guidant does not continue this practice during the stay,
8 then it will be required to build in some time for such
9 deficiency letters before filing any new motions to
10 compel or to dismiss, filing a motion to dismiss after
11 the stay would be lifted by the Court.

12 I remain of the view, before I ask for any
13 clarification, this is kind of an experiment, this
14 letter brief process to see if we can get the briefs in,
15 maybe with a ruling from the Bench, or a short order,
16 because I have been doing some of those during the last
17 few months, where we get an order out a day or two
18 before everybody comes into town.

19 However, I don't want to send the wrong
20 message. I am assuming the meeting and conferring will
21 continue to go on as the Federal Rules contemplate
22 before these letters come in, and I think it has been.
23 So, those are the rulings. I will entertain any request
24 for clarification. I will start with Plaintiffs.

25 MR. ZIMMERMAN: Your Honor, again, I am not

1 sure I understood the Defendant Fact Sheet ruling.

2 THE HONORABLE JUDGE FRANK: All right. I am
3 granting moratoriums to both -- I guess the word that
4 Guidant used is moratorium.

5 Do you want me to just repeat what I -- or
6 you just asked the question that you have?

7 MR. ZIMMERMAN: I think maybe Seth will take
8 it and maybe clarify it through his question, you know,
9 this question.

10 MR. LESSER: The problem, as we perceive, is
11 there's perhaps no safety valve built in. What has
12 occurred was ever since the Defendant Fact Sheets became
13 required, if you notice in Mr. Pratt's Affidavit, which
14 was sent in, many of the cases are now, quote, moved to
15 "IMPASSE," all capital letters. Impasse means, as far
16 as we can tell, that Guidant no longer contacts the
17 Plaintiffs' lawyers to try to resolve any of the
18 deficiencies. We suspect, Plaintiffs suspect, of
19 course, that is because Guidant realizes it declares an
20 impasse and there is no agreement, then there is no
21 requirement for the Defendant Fact Sheets to have to be
22 produced.

23 So, to the extent that Plaintiffs are maybe
24 facing sanctions once the essential stay lifts, we're
25 being put in a rather awkward position. And part of our

1 problem, Plaintiffs' problem is with the reply, for the
2 first time we saw some of these individual cases, some
3 of the supposed reasons as to why the Defendants Fact
4 Sheets hadn't been produced, and we went back and looked
5 through some of the correspondence and we were finding,
6 to our great chagrin, once again many objections in many
7 of these cases that we thought we weren't supposed to be
8 seeing anymore, petty objections, such as: If yes,
9 provide the documents. Answer, blank.

10 Letter from defendants' counsel that says:
11 We didn't fill in the blanks, but the person didn't
12 respond yes, so there were no documents and it didn't
13 have to be filled in.

14 I could go through numerous of these. For
15 example, or repeatedly, provide the name and address of
16 the doctor. The Plaintiff put in the name, but not the
17 address. At the same time attached to all of the
18 medical records, yet many of those are now "impasse"
19 which means no Defendant Fact Sheet will be forthcoming.

20 Defendant's counsel has said, it is deficient
21 and the process has basically stopped entirely. It is
22 not insignificant, particularly in some areas, if we are
23 going to start moving towards, at some point as we
24 suggested in chambers, the CONTAK RENEWAL 1 and 2
25 selection process, you know, we need Defendant Fact

1 Sheets for those.

2 For example, I am not sure the Duron case
3 would have been the very first case up as a bellwether
4 trial. I don't think it is a particularly
5 representative bellwether trial from many respects, not
6 the least is Dr. Higgins, as Your Honor has seen from
7 some of the briefing. He is not your average doctor by
8 any stretch. So, I think maybe we might want to
9 readdress: One, that there will not be a sanction for
10 the Plaintiffs, supposedly, who have not completed their
11 Plaintiffs Fact Sheets; and two, how we can address and
12 bring out some of the information as we move forward on
13 the CONTAK, RENEWAL 1 and 2 schedule.

14 THE HONORABLE JUDGE FRANK: That is fair
15 enough. Does Guidant want to briefly respond to that?

16 MR. CARPENTER: Your Honor, I can briefly
17 respond to that. I think Mr. Lesser's representations
18 illustrate the entire problem with the process. At a
19 certain point, we don't continue to send vane deficiency
20 letters. We have sent over 2,000 deficiency letters in
21 this MDL.

22 Many Plaintiffs we have sent four or five
23 deficiency letters and we just don't get anywhere. What
24 our practice has been is, originally, we had moved the
25 Court to compel or moved to dismiss. We are all mindful

1 of how much resources or how much time of the Court that
2 takes.

3 We stopped doing that at a certain point
4 because we wanted to focus on issues that moved this MDL
5 forward, and not get distracted into that. So, it is
6 true that at a certain point, we stopped sending vane
7 deficiency letters that simply either don't get
8 responded to, or we just get argument back on.

9 Now, our agreement is that Plaintiff Fact
10 Sheets have to be substantially complete. We are not
11 intending to stand on technicalities. If the Plaintiffs
12 have some examples where they think we are being over
13 technical, I said it repeatedly, I am happy to sit down
14 and go through them one by one and see where we are.

15 I think a lot of these issues seem to be
16 mooted by the Court's current ruling, that we are not
17 going to worry about these issues for now and focus on
18 the representative trials. I think that is clearly what
19 discovery and probably the parties efforts would be best
20 focused on, but I am happy to sit down and go through
21 these one by one and see if they need to be moved off
22 the impasse list. Although in the near future I don't
23 see that benefiting the MDL process very much.

24 THE HONORABLE JUDGE FRANK: Anything further?

25 MR. LESSER: I guess I would be concerned if

1 the bellwether trials would take us through the end of
2 the year. As I hear, strictly speaking, according to
3 your Order, the Defendant doesn't like to worry about
4 Defendant fact sheets unless --

5 THE HONORABLE JUDGE FRANK: Well let's --

6 MR. LESSER: -- unless it wishes to do so.
7 There are some that are past dues, for instance. But.
8 The MDL process, to some measure, to the extent this is
9 a process whereby cases get addressed for pretrial and
10 the litigation moves along, a substantial piece of that
11 is Defendant Fact Sheets. And we worked our tail off
12 last year dealing with these issues. And I think we
13 just created a nine to ten-month hiatus that nine to ten
14 months from now we will be hearing -- you know, we are
15 now so busy having to do the Defendant Fact Sheets at
16 this late date, we now need six more months, nine more
17 months to do the backlog. We could have a year or two
18 of delay.

19 THE HONORABLE JUDGE FRANK: Well, that is not
20 going to happen. But, I do -- what I would suggest is
21 this. In light of the concern about the floodgate being
22 busted open, and late in the day, much down the road,
23 rather than some transition plan, I will take the
24 comments that have been made and then we will probably
25 revisit with you at the next private conference. And if

1 something needs to be done in light of what you said, we
2 may have a proposal for you that at least addresses that
3 concern, if not the overall motion.

4 So, does anybody else want to -- other than I
5 will note the objection by Plaintiff, anyone want to be
6 heard on that issue?

7 MR. PRATT: On that issue, Your Honor?

8 THE HONORABLE JUDGE FRANK: On that one.

9 MR. PRATT: (Shaking his head negatively.)

10 THE HONORABLE JUDGE FRANK: Are there any
11 other requests for clarification on the other issues I
12 addressed?

13 MR. PRATT: Yes, with respect to Dr. Hauser's
14 Deposition. Dr. Hauser is Plaintiffs' non-retained
15 expert. Typically, the way it is done with non-retained
16 experts, whether we list the company witness or
17 otherwise, the other side gets a chance to take a
18 discovery deposition.

19 What we ask with respect to Dr. Hauser is
20 that we be allowed to take a discovery deposition of
21 their non-retained expert before they take a deposition
22 of their own non-retained expert.

23 We have Dr. Hauser's deposition scheduled for
24 this Friday, Good Friday.

25 THE HONORABLE JUDGE FRANK: Let me ask this,

1 Mr. Pratt, but doesn't that assume that the purpose for
2 their deposition is in fact -- there are different words
3 for it -- I think the word in one of your briefs was
4 trial deposition.

5 I used the word testimonial deposition, but
6 that assumes that that decision has been made, that Dr.
7 Hauser -- this is in lieu of his testimony that there
8 will be a deposition, whether it is this one -- it won't
9 be this one, obviously, but a deposition taken, and that
10 decision has been made by one or both parties, whether
11 your deposition occurs or not?

12 MR. PRATT: Yeah, but here is my concern,
13 that there are circumstances under which perhaps a
14 deposition designated as a discovery deposition might be
15 useful at trial.

16 THE HONORABLE JUDGE FRANK: Or try to be?

17 MR. PRATT: Yeah, or try to be.

18 THE HONORABLE JUDGE FRANK: And that happens,
19 not on an irregular basis.

20 MR. PRATT: So, and I realize some State
21 Courts have different rules on trial discovery
22 depositions. I don't know why they want to take a
23 testimonial deposition as they characterize their trial
24 deposition of Dr. Hauser. I don't know if they believe
25 he is going to be gone come July 30, or thereabouts.

1 And I am uncomfortable with the uncertainty over that.
2 All I know is the typical practice has been with respect
3 to non-retained experts, that the party against whom
4 that non-retained expert is going to testify, they get
5 the first shot at finding out what that witness has to
6 say. That is why I proposed in a letter to you that
7 with respect to Dr. Hauser that we be allowed to take a
8 discovery deposition before their questioning of the
9 witness, whether you call that questioning testimonial
10 or discovery. And I think just in terms of the way we
11 have handled every aspect of this MDL at this point,
12 that we ought to be allowed on the defense side to take
13 the first shot at Dr. Hauser. So, that is one issue.
14 We ask that.

15 And now, I think it is a little unclear, and
16 I don't want to leave it to arm wrestling with the
17 Plaintiffs with who gets to say, state your name, for
18 the first time Friday morning.

19 The other issue is you mentioned that we are
20 to meet and talk about the gathering of documents --

21 THE HONORABLE JUDGE FRANK: Maybe there is
22 nothing to gather, in light of what you just said.

23 MR. PRATT: Sure. My assumption is that if
24 we go on Friday, that because it is their non-retained
25 expert, I am the one who is allowed to start the

1 questioning. They may agree with that, maybe not.

2 The other aspect of it is I heard you rule
3 something to the effect that the parties are going to be
4 getting together and try to reach some agreement on the
5 production of these documents in advance of the
6 deposition?

7 THE HONORABLE JUDGE FRANK: Well, my concern
8 was this, that we -- however, this will be resolved
9 before people leave this building today, but that you
10 not get to the deposition. And regardless of how you
11 are each characterizing it, because after all, the
12 Plaintiffs' letter, it reads like a discovery
13 deposition. I mean, there are other words. And then
14 the first line of the second page of the letter brief
15 says, well, but these depositions can be used for a
16 variety of purposes. And that is true.

17 But, usually, people prepare one way for a
18 trial deposition, and another -- and I agree with you
19 that it is not infrequent that something that appeared
20 to be a discovery deposition, parts of it, or some of
21 it, emergencies present themselves used at trial, but I
22 wanted to make sure there wasn't an issue, as there has
23 been in a couple of depos.

24 Well, we are now at the deposition and we are
25 going to have to reschedule this because they have

1 promised us X number of documents. We thought we could
2 review some exhibits before the depo. That may not be
3 an issue here, and --

4 MR. PRATT: I think it is an issue, Your
5 Honor, and that is why I raised it. We had asked Dr.
6 Hauser to produce certain documents in response to
7 categories of a subpoena duces tecum. I'm fairly sure,
8 and I am asking for verification from my colleague, that
9 we have not received all of those documents.

10 MR. HOPPER: You have received them all.

11 MR. PRATT: So, if there is an issue about
12 that, you know, I want to be sure of that. If there is
13 going to be objections to the production of certain
14 things, we need to know that and get it resolved before
15 this deposition.

16 So, that is something I think we need to talk
17 about from a timing standpoint, just to be sure we have
18 all of the documents we are entitled to. Mr. Hopper
19 tells me that we have them all. We will find out what
20 my colleagues have to say on that. So, those are the
21 two issues with respect to Dr. Hauser.

22 THE HONORABLE JUDGE FRANK: All right, that
23 is fair enough.

24 MR. HOPPER: Your Honor, may we be heard?

25 THE HONORABLE JUDGE FRANK: Oh, yes,

1 absolutely.

2 MR. HOPPER: Mr. Shkolnik, my colleague and I
3 both --

4 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Would
5 you identify yourselves for the Court Reporter?

6 MR. HOPPER: Randy Hopper for the Plaintiffs
7 Steering Committee, Your Honors. Mr. Shkolnik and I
8 both have kind of double duties on this, but --

9 THE HONORABLE JUDGE FRANK: Is this going to
10 be a trial deposition?

11 MR. HOPPER: Just a couple of preliminary
12 points first, Your Honor, if I may. We noticed this
13 deposition first. And we sent a subpoena duces tecum on
14 this deposition.

15 Defendants had -- we have had this
16 litigation, as the Court knows, for well over a year
17 now. And they have had ample, more than ample time to
18 notice Dr. Hauser's deposition if they wanted to, or so
19 chose to. Plaintiffs did. It is our deposition. We
20 noticed it as a third party, as your Your Honor rightly
21 acknowledged in the Court's order as a third-party
22 witness and as a fact witness.

23 Obviously, Dr. Hauser is situated as he is as
24 a cardiologist and an electrophysiologist and he has
25 certain knowledge. But, be that as it may, we noticed

1 him as a third party, as a fact witness, as a discovery
2 deposition. And we fully intend to go first in the
3 deposition because it is our deposition. And we think
4 because we took the -- we were the first bird off the
5 telephone wire, as the old saying goes, that we are
6 entitled to move forward with our deposition and then
7 the Plaintiffs in due course can respond and direct or
8 redirect -- or recross, or whatever they choose to do at
9 that point following the deposition, given the protocol
10 that the Court has laid out in the deposition protocol
11 and how that deposition may be structured for them to
12 proceed. But, it is our deposition, Your Honor, and we
13 certainly feel that we should be allowed to move forward
14 with it as our deposition.

15 Mr. Shkolnik has a couple of final points on
16 this.

17 MR. SHKOLNIK: Good morning, Your Honor,
18 Hunter Shkolnik from Rheingold Valet on behalf of the
19 Plaintiffs, as well. I am not going to repeat
20 everything Mr. Hopper said. This deposition is one of a
21 series -- I throw it in with Dr. Myerburg, some
22 corporate -- some other higher-level corporate
23 executives that seem to be getting pushed off to the end
24 of the litigation. And it seemed like nobody was
25 noticing them. As discovery cutoff came along, we chose

1 to serve the notice of deposition on Dr. Hauser, because
2 he certainly is probably the most key witness in this
3 case, fact witness.

4 Your question is, is it going to be used as a
5 testimonial deposition? It is our intention to take
6 this deposition under the Federal Rules for all
7 purposes. If this witness is not available at the time,
8 subject to whatever the Court's rulings are, it will be
9 used however it can be used.

10 However, the intention is that Dr. Hauser
11 needs to give his factual testimony to us as a discovery
12 deposition, there are the New York Times articles, there
13 are meetings between Dr. Hauser and Guidant, high-level
14 meetings that went on over a period of weeks that we
15 don't have any details of, as Plaintiffs, here.

16 We need to know what went on between Dr.
17 Hauser and Guidant when this whole Oprah situation came
18 to light. We know from the times that these occurred,
19 we know from the statements he gave before the FDA, or
20 for the Heart Rhythm Society, that these meetings were
21 going on. As Plaintiffs going forward in this case, we
22 need to know what was said between the doctor, who was a
23 former executive of the predecessor to Guidant, why
24 there were these high-level meetings, to what extent
25 they discussed becoming transparent or coming clean on

1 the problem or not, and why it ended up in the New York
2 Times. That is clearly as factual a discovery
3 deposition as any witness that has come forward to date.
4 Certainly Dr. Hauser, given the fact that he is probably
5 one of the preeminent electrophysiologists in the
6 country, or in maybe the world, is going to be an
7 expert. And that is why, pursuant to the Court's
8 ruling, if any witness was potentially going to give
9 expert opinions, we listed him.

10 He was never intended as the Plaintiffs'
11 expert in this case in that regard. But, he had to fall
12 under that sort of quasi-expert category that the Court
13 directed us to fill out. And if we had not designated
14 him for that, much of the testimony that we think may
15 come out of this regarding the high-level conversations
16 that he had in meetings with Guidant may never be usable
17 by either side or by us, because we didn't err toward
18 the side of designating as a non-retained expert. But,
19 certainly, this is our one shot at getting discovery.
20 And like every other witness in this case, there has
21 been 100 depositions. Guidant can go second and do
22 their part of the discovery, just as we are doing the
23 same thing. I don't want to beat a dead horse, but that
24 is the purpose of why we noticed it first. We chose to
25 go forward without a discovery deposition. And if this

1 witness, like any other witness, is not available, the
2 Court will have to decide how it is used.

3 THE HONORABLE JUDGE FRANK: Thank you.

4 MR. PRATT: May I, Your Honor? Just a quick
5 point on this. And there is a uniqueness to this issue.
6 And I think Mr. Shkolnik hit on it. Dr. Hauser has said
7 a lot in the press very critical of Guidant.

8 So, the question is, we had a chance to take
9 his deposition. We didn't know the Plaintiffs were
10 going to use Dr. Hauser in any capacity in the course of
11 this trial until they noticed his deposition. Dr.
12 Hauser is a former president of Cardiac Pacemaker, a
13 predecessor to Guidant. Back in the early '90's he left
14 the company. So, there is a story about Dr. Hauser that
15 is really almost unique to him.

16 Mr. Shkolnik says that he is one of the key
17 witnesses in the litigation. I don't know whether that
18 is the case or not, but the fact that he believes that
19 causes me to have a great deal of concern about how we
20 proceed with his deposition. I think that is why this
21 deposition, in particular, has gotten highlighted
22 attention.

23 Mr. Shkolnik says, he doesn't know what Dr.
24 Hauser is going to say. Well, we will find out when we
25 take his deposition what contacts there have been

1 between Dr. Hauser and the Plaintiffs Steering
2 Committee. Clearly they have noticed his deposition.
3 They have picked a time. Maybe they have no idea
4 because they have not talked to him substantively about
5 his opinions. All I am telling you is I have never
6 talked to Dr. Hauser in my life. So, I want this
7 deposition to proceed, this important deposition, in a
8 right and careful way.

9 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Let's
10 suppose it is a discovery deposition, pure and simple,
11 and the typical rules that would govern testimony at
12 trial are not a concern to the parties. It is pure and
13 simple discovery, and that is obviously much broader
14 than might be allowed during the trial process.

15 Do you have any particular problem if you
16 have all of the documents of Dr. Hauser?

17 MR. PRATT: Yes, I do.

18 THE HONORABLE MAGISTRATE JUDGE BOYLAN: That
19 are appropriate? And I know that is a question. But,
20 presuming you have all of the documents, they go first
21 and you go second, if it is a discovery deposition, pure
22 and simple, do you have any problem with that?

23 MR. PRATT: I do. I think it would be just
24 like, you know, Judge Boylan, the notion of my saying, I
25 am going to use a company witness that they have never

1 seen before. And I am going to do a trial direct before
2 you get a chance to do a cross. I think under those
3 circumstances, they would have the right to come in and
4 say, if you are going to do trial direct of a company
5 witness, then we get a chance to do discovery
6 depositions. In fact, I would agree with that.

7 THE HONORABLE MAGISTRATE JUDGE BOYLAN: That
8 is what I am saying. If it was only a discovery
9 deposition, do you have any particular problem with
10 their going first?

11 MR. PRATT: Yeah, because I think I am
12 entitled to a discovery deposition of their non-retained
13 expert before they question that witness. That is the
14 way we have done it in this litigation. We listed Dr.
15 Higgins out of a precaution as a non-retained expert,
16 though he is a treating physician. They are going to be
17 able to depose Dr. Higgins first, before us. Every
18 company witness has been deposed before our direct
19 examination. They get to take a discovery deposition of
20 our company witness in advance.

21 So, I am just trying to do the protocol,
22 here, that he is their non-retained expert, they believe
23 he is going to say critical things.

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Apart
25 from the protocol --

1 MR. PRATT: Right?

2 THE HONORABLE MAGISTRATE JUDGE BOYLAN: What
3 is the particular problem in a discovery deposition,
4 assuming you have got all of the documents, about
5 whether you go first or second if it is a discovery
6 deposition, period? I don't care about the protocol. I
7 don't care what happened elsewhere, what has happened in
8 this case beforehand, if it is a pure and simple
9 discovery deposition, what is the problem about who goes
10 first and who goes second?

11 MR. PRATT: Because I think there is a
12 strategic advantage in going first. And that is why I
13 am urging it and that is why they are insisting on it,
14 Your Honor. That is why.

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN: What
16 is the strategic advantage if it is a discovery
17 deposition?

18 MR. PRATT: I think you get a chance to find
19 out what the witness has to say in the background with
20 your own form of questioning -- in my case to find out
21 from a witness who I have never spoken to about what he
22 has to say and why he says it. I think that is the
23 advantage.

24 The documents are a different issue. I mean,
25 the documents, I understand, have not all been provided

1 and made available to us. I am still checking that out.
2 I talked to Mr. Hopper about it, who thinks they have
3 been. Last I heard, there were some that were over at
4 Zimmerman Reed at Mr. Hopper's office.

5 I don't believe I have seen all of those
6 documents. We are also sitting here, not only with the
7 disagreement over who goes first, we have no agreement
8 over how long this deposition is going to be, who has
9 how much time, you know, how we are going to allocate
10 sort of the seven hours that the Court has imposed for
11 the deposition to be taken. There is a lot of
12 uncertainty about this. Maybe we could solve this in
13 the next 24 hours, but I mean, I will urge again. I
14 want to be sure we get the documents. I am not sure we
15 got them. I think we ought to do it first. I think we
16 ought to have some agreement among ourselves on how it
17 is going to proceed.

18 (Discussion off the record.)

19 THE HONORABLE JUDGE FRANK: Whenever you are
20 ready.

21 MR. HOPPER: Thank you, Your Honor. I think
22 what Mr. Pratt is trying to do is what we have seen
23 before. It puts me in the mind of the way at times the
24 defense will try to convert a 12(b) motion into summary
25 judgment.

1 And as I mentioned, they have had over a
2 year. If it was so important for them to go first, then
3 why didn't they notice the deposition? They could have
4 very easily noticed the deposition as a discovery
5 deposition or as a trial deposition. And now that we
6 noticed the deposition, certainly it is strategic in the
7 sense that we know what defense is attempting to do.
8 They want to chill him. They want to in any way try to
9 quash him. They want to try to usurp our opportunity to
10 take the discovery deposition of a fact witness.

11 We never retained Dr. Hauser at any time
12 during this litigation. He never received a penny from
13 the Plaintiffs Steering Committee. We never designated
14 him as an expert witness. And they now are coming along
15 after we noticed the deposition and they are trying to
16 convert this into a full-fledged designated Rule 26
17 expert depo, and that is not what it is.

18 THE HONORABLE MAGISTRATE JUDGE BOYLAN: There
19 is going to be efforts by the Plaintiffs?

20 MR. HOPPER: Sorry, Your Honor?

21 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Is
22 there going to be an effort by the Plaintiffs to prep
23 Dr. Hauser for his depo?

24 MR. HOPPER: No, no.

25 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Have

1 there ever been any meetings between Plaintiffs' counsel
2 and Dr. Hauser in prepping him for the deposition?

3 MR. HOPPER: No, Your Honor, there has not
4 been.

5 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Are
6 you in fact in a position to provide to the defense a
7 complete documentation from Dr. Hauser, not only the
8 documents that would be used during the direct
9 examination of Dr. Hauser if you in fact are allowed to
10 go first, but also any other documents that were
11 prepared by Dr. Hauser and in his possession that have
12 some relevance to this inquiry?

13 MR. HOPPER: That is absolutely my
14 understanding, Your Honor. And the only documents that
15 I know of -- and my colleagues, if they know of others,
16 can certainly inform the Court. But, the only documents
17 that I know of are the documents that Dr. Hauser
18 tendered to us, which we immediately sent to Shook
19 Hardy.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
21 Refresh my recollection. Did you subpoena Dr. Hauser
22 for the depo or just noticed the depo?

23 MR. HOPPER: No, we noticed and subpoenaed.

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: And
25 was the subpoena a duces tecum?

1 MR. HOPPER: Yes, Your Honor.

2 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
3 Okay.

4 MR. PRATT: I'm sorry, I have one bit of -- I
5 have information on the documents. I just got it. I
6 wanted to be sure.

7 MR. SHKOLNIK: If I could just fill you in a
8 little bit on that, Your Honor. Sorry for the bouncing
9 back and forth. The documents that were produced by Dr.
10 Hauser are in the possession of his counsel. He has
11 retained personal counsel. And my understanding is as
12 of earlier this week -- late last week, sorry, that
13 attorney -- I don't know the individual's name. I
14 think, Randy, you know him?

15 MR. HOPPER: Tom Keller, Your Honor.

16 MR. SHKOLNIK: Keller, has the documents and
17 was transferring those to counsel. I don't know what
18 has transpired, but I believe we could even make them
19 available, too; but, I believe they were transferred
20 over last week.

21 More importantly, in responding to your
22 question, Judge Boylan, we actually served the subpoena
23 and noticed this deposition so that it was returnable on
24 February 14th. And a group of us were down in Florida
25 meeting and we were all going to come up and do this

1 deposition and an agreement was reached to put it off so
2 that issues could be resolved. And that is how the
3 reschedule date came about.

4 THE HONORABLE JUDGE FRANK: Mr. Pratt?

5 MR. PRATT: Yes, I actually have
6 communication from Mr. Keller, himself, on the status of
7 the documents. There are two subpoenas that have been
8 served on Dr. Hauser. One accompanied the Plaintiffs'
9 subpoena on him, and we have received some documents in
10 connection with that.

11 We, though, Guidant, served our own subpoena
12 duces tecum on him. And what Mr. Keller, Dr. Hauser's
13 personal lawyer says is that he has retrieved from the
14 Zimmerman firm the documents that Dr. Hauser provided to
15 them in connection with the original subpoena. And I
16 believe we do have those.

17 We asked for a whole host of additional
18 documents beyond that. And what Mr. Keller said is they
19 received back from the Zimmerman office the documents
20 that Dr. Hauser or his counsel provided to that firm.

21 He also says that in response to the request
22 for additional documents, Dr. Hauser has not looked at
23 those Zimmerman documents to determine whether they
24 comprise the universe of everything that we on Guidant's
25 side ask for.

1 He is not going to be able to do that until
2 April 6th, according to Mr. Keller, to determine whether
3 it is a complete production or not. And if there is
4 anything missing at that point, he will let us know.
5 Mr. Keller says, I have not seen these documents
6 previously, so he is not in a position to comment on
7 whether they are an adequate and complete production of
8 what we asked to produce.

9 So, that is what I understood to be the
10 uncertainty. I think Mr. Hopper is right, that in terms
11 of the documents they asked Mr. Hauser to produce, they
12 got them and we got them. But, as to the additional
13 documents that we asked for, I have not seen them and
14 Dr. Hauser, himself, and his lawyer are saying that we
15 haven't looked at them to insure they are a complete
16 production.

17 THE HONORABLE MAGISTRATE JUDGE BOYLAN: So,
18 April 6th is the same date as the depo was set for?

19 MR. PRATT: Yes.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Does
21 he give you any indication as to how long it might take
22 him to review those documents to insure that in fact
23 they are the set of documents as subpoenaed by either
24 party?

25 MR. PRATT: He doesn't say that. He says

1 he -- I want to be sure I am stating this right. He
2 will not have an opportunity to conduct the examination
3 prior to April 2, the return date of the subpoena. He
4 will review them prior to April 6. If there are any
5 missing, we will advise you of the fact and endeavor to
6 locate them. I have not seen the documents previously.
7 So, apparently Dr. Hauser has said through his counsel
8 that he will take a look at these and let us know
9 whether they are complete or not.

10 THE HONORABLE MAGISTRATE JUDGE BOYLAN: The
11 next question is a little difficult, given that
12 response. But, one of the issues that you raised was,
13 not only who goes first, but how long is the depo and
14 how long will each side take in reference to
15 examination, et cetera.

16 Let's presume that it is returnable at 9:00
17 a.m. on Friday, and that he takes two hours to review
18 those documents and it takes you another hour to look
19 through the additional documents that he pulls out of
20 the file cabinet and he has supplied, in answer to your
21 subpoena.

22 So, the depo begins only after a short,
23 somewhat, somewhat short delay in reference to the
24 document question. So, the clock starts ticking on the
25 number of hours that the parties can conduct a depo.

1 How long does the Plaintiff think they need for their
2 depo?

3 MR. PRATT: I think this deposition is going
4 to be at Faegre, too, I believe, or it is going to be a
5 law office, not in his office. So, incomplete documents
6 will be hard to retrieve, immediately.

7 MR. HOPPER: As I understand it, Your Honor,
8 the documents are two inches thick. There aren't that
9 many. And I believe I want to be sure I'm clear. These
10 are additional documents, because we gave you what we
11 had, that the additional documents were documents you
12 requested of his counsel.

13 MR. PRATT: Yeah.

14 MR. HOPPER: Well, you said that we
15 requested, but you didn't say of whom. I wanted to be
16 sure the Court understand we didn't have an obligation.

17 THE HONORABLE MAGISTRATE JUDGE BOYLAN: We
18 got it. We got it.

19 MR. HOPPER: Okay.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: So,
21 how long do you think you need for your examination?

22 MR. HOPPER: Roughly, five hours.

23 MR. SHKOLNIK: We think we could probably
24 tighten it down to a half a day.

25 THE COURT: How long do you think the Defense

1 will need?

2 MR. PRATT: Well, if they are taking a
3 five-hour discovery deposition for their witness, I
4 mean --

5 MR. HOPPER: Four, four hours.

6 MR. PRATT: I have got to have an equal
7 amount of time, Your Honor. Again, I don't know all of
8 what this witness is going to say and I don't have the
9 documents. So, I think it may take five --

10 THE HONORABLE JUDGE FRANK: You raised the
11 question. I wanted to tee it up, okay?

12 MR. PRATT: So, that is complicating a Friday
13 afternoon deposition, is sort of my point, in addition
14 to the document issues. Timing issue, document issues,
15 and uncertainty over who goes first.

16 (Discussion off the record.)

17 THE HONORABLE JUDGE FRANK: We have
18 tag-teamed you, so Judge Boylan is going to go ahead and
19 we will go ahead and make the call right now.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: We
21 are going to order that the deposition begin on Friday,
22 as noted. It is only going to take place after the
23 complete documentation has been delivered, not only in
24 furtherance of the subpoena issued by the Plaintiffs,
25 but also by the Defense, so the time clock we are going

1 to talk about starts the moment he asks the first
2 question, not at the time the document review starts, so
3 that is clear to everybody. It will take place at the
4 place and at the time indicated in the notice of
5 deposition.

6 The Plaintiff will go first. The Plaintiff
7 will have four hours. You are going to have to wrap up
8 your examination in the four hours, following which will
9 be a 45-minute break, then the Defendant will have four
10 hours to completes their portion of the deposition.

11 This is being ordered without prejudice of
12 either party to come back to the Court and make a
13 showing that they need additional time to complete the
14 deposition of the deponent.

15 THE HONORABLE JUDGE FRANK: With this
16 footnote, consistent with the earlier order, that I
17 think you should presume that this is -- understanding
18 what the Federal Rules say, presume that this is in
19 substance a discovery deposition, which means, if that
20 is indeed the case, it is a very difficult proposition
21 and that is why it rarely occurs in most complex civil
22 trials, that that ends up in any substantial way of
23 being used in lieu of the testimony of the witness at
24 trial. So, that is kind of the lay of the land.

25 MR. HOPPER: Well, we understood from Your

1 Honor's Order from the Bench a moment ago that the Court
2 will then decide at a later date as to the treatment of
3 the deposition, as to its purpose for trial by Dr.
4 Hauser's availability, et cetera.

5 THE COURT: It is true. It just seems if you
6 were to say, what is the pattern and practice in such
7 cases, it is more the exception than the rule that sets
8 a deposition that ever sees the light of day as a
9 testimonial deposition, because if that is the case,
10 then the parties probably ought to think, unless
11 something is truly beyond the control of both parties,
12 that becomes --

13 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
14 Presume it is just going to be a discovery deposition,
15 pure and simple.

16 THE HONORABLE JUDGE FRANK: Presume it is
17 going to be a discovery deposition.

18 MR. SHKOLNIK: Just one follow-up. This four
19 hours per side, Plaintiff going first, could we withhold
20 one of our hours, and if there is some follow-up, we
21 want to do clean-up questioning, is that -- we don't
22 want to quibble about all of these things that quite
23 possibly could happen at the end of the hours.

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I
25 think four hours, you don't have to take it all at one

1 point. Defense gets four hours. They don't have to
2 take it all in one point. And presuming that you are
3 going to give the doctor a fifteen-minute break, in the
4 first part a fifteen-minute break, and second, in
5 addition to the 45-minute lunch break, I order. So, the
6 fifteen minutes won't count against anybody's time.

7 But, if you want to redirect and recross
8 after the other party is done, I have no problem with
9 that so long as it doesn't exceed the four hours in
10 total.

11 MR. SHKOLNIK: Thank you very much, Your
12 Honor.

13 THE HONORABLE JUDGE FRANK: It is going to be
14 a wonderful Friday, too.

15 MR. PRATT: Could I just raise one point on
16 it? I have not spoken to Dr. Hauser about his
17 availability. I mean, you just set up a structure, and
18 of course we accept it, of about nine hours of
19 questioning after we review documents on a Good Friday.

20 He may say, I have to leave at 3:00. There
21 may be some issues that come up, but let me just put
22 this out so if it works out, and we get your blessing on
23 it, we won't have to call you on Good Friday in your
24 chambers.

25 If by the time he looks at documents and we

1 get them and they finish their three and a half, four
2 hours of questioning of Dr. Hauser, we run into a
3 situation either by our choice or Dr. Hauser's choice
4 that it will be hard for us to finish the deposition
5 throughout the rest of the day, and might me agree to
6 suspend it, find another time to come back after we have
7 a more complete opportunity, perhaps, to look at the
8 documents and finish the deposition along the terms that
9 you proposed?

10 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Sure.

11 MR. PRATT: I just want to be sure you are
12 not telling us that we have got to stay until eight or
13 nine o'clock -- and that may be a necessary alternative
14 if Dr. Hauser says, I ain't staying past three. It may
15 be a desirable alternative on the defense side depending
16 on the resolution of the document issues.

17 MR. HOPPER: Will we have access to the
18 Court's transcript before the deposition on Friday just
19 so we know we have this protocol and structure that Your
20 Honors have laid out?

21 THE HONORABLE JUDGE FRANK: We will get it
22 out to you.

23 MR. HOPPER: Thank you so much.

24 MR. SHKOLNIK: Thank you very much.

25

1 THE HONORABLE JUDGE FRANK: Okay. Anything
2 else under the guise of request for clarification? That
3 was --

4 MR. ZIMMERMAN: I am not going to do that.

5 THE HONORABLE JUDGE FRANK: Whatever.

6 MR. ZIMMERMAN: Is an hour 60 minutes? Just
7 being silly, sorry.

8 THE HONORABLE JUDGE FRANK: It depends on the
9 time you are on.

10 MR. ZIMMERMAN: It depends on if it is me or
11 not.

12 All right. Now, we are going to go to the
13 joint agenda, I believe, Your Honor. We have gotten the
14 Court's rulings on the matters that were submitted in
15 letter briefs and the motion which regard to the
16 Defendants Fact Sheet. These are items number 4 and 5
17 on the published agenda, so I guess we will be
18 suspending with those.

19 But, the first issue on the agenda, Your
20 Honor, is the status of cases filed in Federal Courts
21 and transferred into the MDL. And I think, included
22 with that is the number of claimants, if we have it, and
23 what is filed in State Court, as well. I think that
24 would also be helpful. And Mr. Pratt usually has that
25 information.

1 MR. PRATT: There have been 26 conditional
2 transfer orders issued by the Judicial Panel on
3 Multi-District Litigation. The result of those is there
4 have been 1,243 cases actually transferred to the MDL,
5 or filed here directly in the MDL, 1,243. There are 19
6 in Federal Court in front of the Judicial Panel pending
7 transfer. So, the total number of Federal Cases
8 presently is 1,262.

9 We have 100 State Court cases presently.
10 Some of those are removable and will be removed, but the
11 current number I have as of the 3rd of April, 2007, is
12 100 State Court cases, 1,262 total Federal Court cases.

13 MR. ZIMMERMAN: Do you have the number of
14 plaintiffs represented, Tim, by any chance?

15 MR. PRATT: The total number of Plaintiffs in
16 the MDL, 2,107. I don't know that number for the State
17 Court cases, but --

18 THE HONORABLE JUDGE FRANK: Thank you.

19 MR. ZIMMERMAN: The next item, Your Honors,
20 is a report on the representative trial process. And I
21 don't know that much needs to be said on that. We are
22 working hard. We are working cooperatively. Issues
23 come up. They have been resolved expeditiously. We
24 have done all of the meet and confer requirements, and
25 we have developed a good communication on this process.

1 I don't think, other than reporting that it is going
2 appropriately, it is subject to ebbs and flows. But,
3 with the Court's direction and with the even hand of the
4 Court and cooperation of counsel on both sides, we seem
5 to be working that process through. I don't know, Tim,
6 if you have any --

7 THE HONORABLE JUDGE FRANK: There is a rather
8 detailed schedule that is out on the web, too, if people
9 are trying to figure out, well, which cases, and what
10 schedule, it is all there.

11 MR. ZIMMERMAN: As well as your Court's
12 Order, or letter, which is also on ECF dated March 27,
13 2007, which is setting up another level of communication
14 with the Court, and access to the Court as we navigate
15 through the issues.

16 We have set up -- the Court has set up a
17 Tuesday morning -- a Tuesday hearing, as needed, for
18 issues that might arise during the subsequent -- or the
19 prior week.

20 THE HONORABLE JUDGE FRANK: I think it would
21 be fair to say that Mr. Pratt said he doesn't care much
22 about talking to Judge Boylan and I by phone, he would
23 rather be here and present, so we remodified the
24 schedule. I didn't look around the room to see what the
25 reaction was of other lawyers. I don't know if you

1 noticed anything, but we will get to the schedule
2 because we have modified that a little bit.

3 MR. ZIMMERMAN: Right. I think we are going
4 to handle that under nine, perhaps.

5 The report on the Duron pretrial process and
6 discovery, I think we just did that, Your Honor, with
7 the rulings that just came from the Court and the
8 discussion we just had on Dr. Hauser. I think it is
9 really the report on the Duron pretrial process and
10 discovery. It is ambitious. We are working hard and it
11 is getting done.

12 There will be more issues that will come up.
13 We previewed some with regard to, say, the Independent
14 Panel issues and the parameters of Dr. Myerburg's
15 upcoming deposition. We previewed that with the Judge.
16 That will be an issue that will probably percolate up
17 very soon.

18 We discussed with Your Honors perhaps during
19 the Dr. Myerburg Deposition, which was tentatively set,
20 I think, for the middle of May, we may ask for a
21 judicial officer to be available to make sure we stay
22 within the parameters that the Court has set out in its
23 previous orders. And I believe the Defense has said
24 that they may be making some kind of an additional
25 motion and will be prepared to address that as we must.

1 THE HONORABLE JUDGE FRANK: You know, Judge
2 Boylan and I talked as we came down the hallway here for
3 this hearing. And I think what is going to happen on
4 the Independent Panel issue is, in light of the rulings
5 that have been made, there may be by agreement or
6 otherwise a letter brief issued, schedule that will
7 address the scope of the deposition. But, apart from
8 that, we were discussing -- and I think we would have
9 been discussing it even if Mr. Pratt hadn't used the
10 word Special Master in this regard. Is that an issue
11 that one or both of you are considering? And you and I
12 had talked about it when we were in --

13 MR. ZIMMERMAN: I don't think that level of
14 supervision is necessary. I know Mr. Pratt mentioned it
15 in chambers. The problem with a new Special Master, as
16 opposed to perhaps one of the -- either Judge Boylan or
17 Your Honor, would be just the educational curve and kind
18 of the nuances that have been created by just our
19 exposure to the litigation through all of these years or
20 months.

21 However, we said before we may not be opposed
22 to that idea. We don't know if we need it. But,
23 certainly, what we probably might need is the access to
24 the chambers, or to one of Your Honors, so that if there
25 is a question as to where these boundaries are, or are

1 we at the boundary of the guideline set by the Court,
2 that the deposition doesn't get interrupted or in any
3 way terminated, because Dr. Myerburg is a very busy man.
4 We are all going down to Miami to take it. He is
5 important as the chair of the Independent Panel.

6 MR. PRATT: No, we don't need a Special
7 Master. And I think I used that -- I think the context
8 in which this came up is Mr. Zimmerman talking about
9 perhaps having some judicial officer involved in
10 monitoring, sort of, Dr. Myerburg's Deposition, then I
11 suggested, maybe we need someone to be there.

12 Actually what I had in mind when I said
13 someone to be there was actually maybe Judge Boylan
14 being there, if schedules permit and it all works out.
15 I think that is a separate issue. I think the Myerburg
16 situation is fairly unique. We may or may not need
17 judicial involvement.

18 But, my view is we do not need a Special
19 Master. We have adequate resources there on the Bench
20 to take care of all of the issues. I think, in fact, a
21 Special Master might impede some of the progress we are
22 making in getting these cases ready for trial.

23 MR. ZIMMERMAN: I think we would both support
24 the idea that Judge Boylan, if his schedule permits be
25 there. It probably would be helpful. We are happy to

1 participate in how that could occur. The other thing,
2 through the modern technologies, as we all know, we have
3 real-time depositions. These could be streaming right
4 into the Court's chambers. And we could certainly make
5 sure that is available, so even though you are not
6 watching it regularly, it is available on your screen.
7 And so, it is amazing technology as they work today.
8 And we can certainly make that available, anticipating
9 this important deposition, we can stream -- I don't know
10 if streaming is the right word, but I will use that,
11 stream that right into your desktop and I think that
12 might really make matters even more appropriate under
13 these circumstances.

14 THE COURT: Is it likely that, that all
15 aside, we had discussed this letter brief schedule, that
16 it is likely that something is going to come, be it
17 initiated by one or both parties on at least the scope
18 issue on the Doctor?

19 MR. PRATT: Yes. I think in the next two to
20 three business days, we will just get you a letter that
21 tees it up. I suspect you will also get a supplemental
22 letter from Peter Saphire, who has already submitted one
23 on the Independent Panel transcripts. And I think it
24 will take a quick response. I think that will get
25 resolved.

1 I don't want to create this big hubbub about
2 whether we need, you know, Judge Boylan or anybody else
3 there at the deposition. I mean, we have gotten along
4 very well with him, we understand Court Orders, but
5 there are some sensitivities to Dr. Myerburg's
6 situation, depending on how the Court rules that might
7 require some on-the-scene application of those
8 principles. I think that is actually unlikely, but it
9 is possible.

10 THE HONORABLE JUDGE FRANK: And actually, the
11 bottom line may be in light of the earlier ruling that I
12 made if these letters come in, we are probably going to
13 know to a point, maybe to a great extent, the issues
14 most likely to come up at the depo. So, to the extent
15 we anticipate them, maybe we can deal with at least
16 subject matter areas, if not specific questions. So --

17 MR. ZIMMERMAN: Sure.

18 THE COURT: All right.

19 MR. ZIMMERMAN: The next item on the agenda,
20 Your Honor, really, that was under the heading of Duron,
21 number three. The issues raised in the parties' letter
22 briefs has been addressed. I don't want to have to
23 revisit it. The record speaks for itself.

24 The Defendant Fact Sheet, which is number
25 6 -- excuse me, number 4 was the schedule for the

1 following representative trial, cases, and that has all
2 really been addressed in PTO 31, which was issued after
3 this agenda came out. So, it is on ECF. PTO 31 is a
4 very detailed order setting down the deadlines for
5 everything in the subsequent bellwether process or
6 representative case process. And I don't think it needs
7 any highlighting at this point. It is available for
8 counsel.

9 We know there are some glitches perhaps
10 contained within it. We know that there may be some
11 discussions with regard to it as we get closer to, and
12 we drill down within them. But, it is there, the
13 schedule exists, we understand it. And if we have any
14 comments on it, we certainly have the process in place
15 to deal with it in real time.

16 MR. PRATT: Just one issue we raised in the
17 informal conference is the fact that the discovery
18 deadline for all of the bellwether trials of May 1,
19 2007. We talked about some of the impracticalities of
20 that getting accomplished. That is one point that we
21 are going to be in discussion with the Plaintiffs
22 Steering Committee on. If we reach agreement to remove
23 that deadline consistent with all of the other
24 commitments that we have in those succeeding bellwether
25 trials, so that is one issue, number one, that we are

1 going to be addressing with the Plaintiffs Steering
2 Committee.

3 THE HONORABLE JUDGE FRANK: And I think our
4 sense was during this meeting that there was probably
5 some agreement on that between the parties, whether
6 there are some rolling deadlines or modifying some of
7 those.

8 MR. ZIMMERMAN: Right.

9 THE HONORABLE JUDGE FRANK: Is it the
10 proposal that you are going to submit a stipulation and
11 proposed order to the Court, then, in reference to that?

12 MR. ZIMMERMAN: I think we are going to meet
13 and confer on it, first. And then hopefully we will
14 come up with a stipulation we can provide to the Court.

15 MR. PRATT: We are going to meet and confer,
16 and by golly we are going to send Judge Frank his
17 proposed revised schedule about anytime he wants it.

18 THE COURT: It really wasn't intended to be
19 mean spirited, Mr. Pratt.

20 MR. ZIMMERMAN: In the subtext it was, Your
21 Honor.

22 The CONTAK RENEWAL representative trial
23 process, I think we kind of agreed to just say that that
24 is on our radar screen. That is the next wave after the
25 first wave of bellwethers.

1 Okay, in fact it is not on the agenda. It
2 was on my draft of the agenda. So, we don't have to
3 deal with it today.

4 The motions with regard to Vega Cabrera,
5 apparently that has been taken off calendar, so that
6 item does not need to be addressed.

7 With regard, then, to scheduling, there are a
8 number of things. The Court will probably -- should
9 address them rather than -- I have notes on them. I am
10 happy to address those dates, and I think I know the --

11 THE HONORABLE JUDGE FRANK: Why don't I -- I
12 think -- I am going to guess that Ms. Gernon has or Ms.
13 Mair has -- they used the most care, no offense.

14 Do you want to just read those into the
15 record, Amy, and then we will see if they square up with
16 everyone's?

17 MR. ZIMMERMAN: Very good.

18 MS. GERNON: Our next status conference will
19 be on April 25th at 8:00 a.m. in Minneapolis.

20 THE HONORABLE JUDGE FRANK: So, it is in
21 Minneapolis, if you heard that, on April 25th.

22 MS. GERNON: The next status conference was
23 going to be on May 17th at 5:00 p.m., and I wasn't sure
24 if we decided on a location.

25 MS. HOLLOWAY: Faegre.

1 THE HONORABLE JUDGE FRANK: Faegre.

2 MS. GERNON: And the final status conference
3 that we have set would be on June 18th at 8:00 a.m. in
4 St. Paul. And then we will push the dispositive motions
5 that would be heard that day in Class B, and it would
6 start at 10:30 or so.

7 THE COURT: Does that square with everybody's
8 notes? And what we did say in chambers, it probably
9 bears repeating here, is there was communication between
10 the law clerk for Judge Leary in Ramsey County, and Ms.
11 Gernon. And they just asked if we can -- the more
12 advanced notice they get, they are willing to move their
13 schedule around. So, they are trying to coordinate
14 their conferences with ours.

15 So, we will communicate these dates to Judge
16 Leary's chambers because they have shown a willingness,
17 if they have a little lead time, they will make the
18 change on their schedule and find time for their
19 conference. So, we will communicate these dates.

20 MR. ZIMMERMAN: And with regard to that, I
21 understand today's conference in front of Judge
22 O'Leary -- is it Leary.

23 THE HONORABLE JUDGE FRANK: Leary.

24 MR. ZIMMERMAN: Leary. Has been cancelled
25 due to illness by the Court. So, that conference which

1 normally coordinates with this conference having it in
2 the afternoon in St. Paul while we do this in the
3 morning has been cancelled, just so people know.

4 The only other thing I would mention, Your
5 Honor, is there is a dispositive motion hearing on May
6 18th in St. Paul that has to do with the several motions
7 that were filed yesterday. And my understanding is it
8 is in St. Paul at nine o'clock.

9 THE HONORABLE JUDGE FRANK: That is true.

10 MR. ZIMMERMAN: And Plaintiffs and Defendants
11 are going to be conferring about how to properly respond
12 to the motions in that the way they were filed and the
13 page limit issues were raised by the court, I would
14 leave it to the Court to address how the Court feels
15 about that. But, we will meet and confer on our side,
16 and then discuss with the defense side how we are going
17 to respond because of the way it was filed with seven
18 different motions or nine different motions, as opposed
19 to an omnibus motion.

20 But, that is our commitment to decide how we
21 are going to respond, what kind of page limit, if any,
22 what kind of word limit, and then meet with the other
23 side, see if we can come up with an agreement and if we
24 can't, obviously would have to bring it to the Court,
25 which I would not anticipate would be the --

1 THE HONORABLE JUDGE FRANK: I think it will
2 be quickly resolved either way.

3 MR. ZIMMERMAN: The only other thing I would
4 say is there is still a Daubert hearing set for June 8th
5 at 1:30 in St. Paul. And then there is the motions on
6 June -- I guess Amy did say on June 18th that will
7 follow the status that is also going to be set in St.
8 Paul. And lastly, there are some Duron pretrial
9 hearings on July 9th and July 23rd.

10 MR. PRATT: Just one quick point with
11 reference to Judge Leary's overture to your chambers
12 about setting these conferences in conjunction with his.
13 We were planning to talk about that this afternoon with
14 Judge Leary letting him know when you had set these.

15 Now that we are not having one, I propose,
16 unless you direct otherwise, we will provide the
17 plaintiffs' counsel in the Minnesota state proceedings
18 with the dates of our MDL conference to try to get an
19 agreement from them that sometime those days will work
20 for them and we will communicate that to Judge Leary's
21 law clerk, unless you all want to communicate directly
22 to Judge Leary. I just don't want it to fall through
23 the cracks.

24 THE HONORABLE JUDGE FRANK: We will give the
25 dates. I think out of professional courtesy, since they

1 called us -- do as you will, but we will go ahead and
2 make those and inform them of those dates and times.

3 MR. PRATT: That is all on this side, Your
4 Honor.

5 THE HONORABLE JUDGE FRANK: Mr. Zimmerman?

6 MR. ZIMMERMAN: Your Honor, that does
7 complete the agenda, and there is no further comments on
8 the PSC. I don't know if anyone else in the courtroom
9 has any comments, which we normally open it up to at
10 this time.

11 THE HONORABLE JUDGE FRANK: Well, I suggested
12 for some of us old enough to come up in the '60's and
13 70's that we could meet and confer to these sensitivity
14 groups. And Ms. Cabraser said there actually are those
15 going on out in California.

16 MR. ZIMMERMAN: What they do in California,
17 look forward to doing here. It always comes our way.

18 THE HONORABLE JUDGE FRANK: I always thought
19 what goes on in California stays there. Ms. Cabraser,
20 do you want to be heard on that?

21 MR. HOPPER: She has a lava lamp, Your Honor.

22 THE HONORABLE JUDGE FRANK: Oh, yeah, she has
23 a lava lamp in her office, as well.

24 MS. CABRASER: I would be happy to facilitate
25 such a happening at any time.

1 MR. HOPPER: Can we get the lava lamp, on the
2 record?

3 THE HONORABLE JUDGE FRANK: There is one
4 matter that I have under advisement. I will get the
5 decision out in the next few days on TPP's and the
6 connected issue. And that will be out between now and
7 mid next week.

8 So, anything further on behalf of the
9 Defendants?

10 MR. PRATT: Nothing, Your Honor.

11 THE COURT: Thank you, all. Anything
12 further, Magistrate Boylan?

13 THE HONORABLE MAGISTRATE JUDGE BOYLAN: No.

14 THE COURT: Thank you all for coming. We are
15 adjourned. Thank you.

16 (Adjournment.)

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20 Certified by: _____

21 Jeanne M. Anderson, RMR-RPR
22 Official Court Reporter

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