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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re:) Civil 05-MD-1708 (DWF/AJB)
))
GUIDANT CORPORATION) STATUS CONFERENCE
IMPLANTABLE DEFIBRILLATOR))
PRODUCTS LIABILITY))
LITIGATION,))
))

This Document Relates)
))
To All Actions) 9:17 o'clock, a.m.
) July 18, 2006
) Minneapolis, Minnesota

BEFORE THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

CIVIL STATUS CONFERENCE PROCEEDINGS

* * *

CARLA R. BEBAULT, RPR-CSR
Suite 646, 316 North Robert Street
St. Paul, Minnesota 55101
(651) 848-1221

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APPEARANCES :

LEAD PLAINTIFF COUNSEL :

Richard Arsenault, Esq.
Neblett, Beard & Arsenault
2200 Bonaventure Court
Alexandria, LA 71301
(318) 487-9874

And

Elizabeth Cabraser, Esq.
Wendy Fleishman, Esq.
Lieff, Cabraser, Heimann
& Berstein, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
(415) 956-1000

And

Seth R. Lesser, Esq.
Locks Law Firm, PLLC
110 East 55th Street
New York, NY 10022
(212) 838-3333

And

Charles S. Zimmerman, Esq.
Zimmerman Reed
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402-4123
(612) 341-0400

PLAINTIFF LIAISON COUNSEL :

Charles S. Zimmerman, Esq.
Zimmerman Reed
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402-4123
(612) 341-0400

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APPEARANCES (Continued):

FOR THE PLAINTIFFS:

Silvija A. Strikis, Esq.
Kellogg, Huber, Hansen,
Todd, Evans & Figel, PLLC
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7939

LEAD DEFENDANT COUNSEL:

Timothy A. Pratt, Esq.
Deborah Moeller, Esq.
Shook, Hardy & Bacon, LLP
2555 Grand Boulevard
Kansas City, MO 64108-6550
(816) 474-6550

LIAISON DEFENDANT COUNSEL:

Joseph M. Price, Esq.
Faegre & Benson
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402-3901
(612) 766-7000

* * *

FOR THE DEFENDANT:

Andrew D. Carpenter, Esq.
Shook, Hardy & Bacon, LLP
2555 Grand Boulevard
Kansas City, MO 64108-6550
(816) 474-6550

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 caught up in the various tagalong notices we have filed. So
2 there are only three pending actions pending before the
3 panel right now to which oppositions have been filed.

4 So I think that the fair call is that most of the
5 cases that are caught up in tagalongs will eventually move
6 through the panel and be consolidated with all of the cases
7 here in St. Paul. As Mr. Zimmerman mentioned, there are
8 some state court cases mentioned. We have 49 state court
9 cases in addition to the 402 actually pending here in the
10 MDL. Several of those cases are recently enough filed that
11 they will likely be removed. Some will be caught up, I
12 believe, in the MDL. That's the totality of the cases that
13 we have both in federal and state court, your Honor.

14 MAGISTRATE JUDGE BOYLAN: Okay. How many of those
15 state cases are in Minnesota? Do you have any idea?

16 MR. PRICE: Your Honor, I don't have an exact
17 number but it's approximately 15 to 20.

18 MAGISTRATE JUDGE BOYLAN: Okay.

19 MR. PRICE: Joe Price, sorry, representing
20 Guidant.

21 MAGISTRATE JUDGE BOYLAN: And, Mr. Pratt, just so
22 I understand, it's 402 pending, 62 tagalong. Most of them
23 will come in. So is that 462 is probably the number that we
24 think will be pending here?

25 MR. PRATT: I'm sorry, 61 tagalong.

1 MAGISTRATE JUDGE BOYLAN: I beg your pardon.

2 MR. PRATT: So 463 according to the present
3 constitution of pending and tagalong cases.

4 MAGISTRATE JUDGE BOYLAN: Okay. We have some
5 discovery status matters.

6 MR. ZIMMERMAN: Yes, your Honor. First off, if we
7 could just give you a brief report. Richard Arsenault will
8 give you a brief report on the depositions that have taken
9 place and the discovery that's been concluded so you have
10 some idea of what the scope of what's going on in the last
11 month is.

12 MAGISTRATE JUDGE BOYLAN: Very good.

13 MR. ARSENAULT: Good morning, your Honor. Richard
14 Arsenault, Plaintiff lead counsel committee. Thus far,
15 Judge, we have concluded or are dangerously close to
16 concluding ten depositions. Five of those are 30(b)(6)
17 depositions. They involved information technology and
18 document management, warranties, medical advisories, sales
19 and marketing, and communications with regulatory agencies.

20 Five individual depositions have been taken and
21 most of them are either concluded or are, again, dangerously
22 close to being concluded: Russini, Laurel, Tisch, Gorsett,
23 and Sheridan.

24 There are about 15 depositions currently in play,
25 four of those have been noticed and are relatively firm in

1 terms of the dates and locations. There are 11 that we are
2 in the process of either noticing and/or re-noticing.

3 The depositions of the Plaintiffs in connection
4 with the representative trials, it is our understanding as
5 of the close of business today all 40 of those will have
6 been concluded.

7 And lastly, Judge, with regard to the subpoenas
8 issued to non-parties, we have issued 22 of those; 14 have
9 been served and we continue to monitor that. Thank you.

10 MR. ZIMMERMAN: Jim, do you have any comments?

11 MR. PRATT: I think that pretty well summarizes
12 where we are, your Honor.

13 MAGISTRATE JUDGE BOYLAN: Okay.

14 MR. ZIMMERMAN: We did take up with the Court in
15 chambers the fact that there will be some motions being made
16 on discovery matters that are kind of clean-ups to the
17 discovery. There are some discovery disputes that are going
18 towards resolution by motion. And I think we had agreed in
19 chambers that by this Friday, which will be I guess the
20 21st, Plaintiffs will file their motion and by the following
21 Friday the Defense will file their motions if they have
22 some, or their reply, and that these matters will be heard
23 if they are not resolved at the next telephonic conference
24 on August 2nd, which will be at 8 o'clock.

25 We're not going to go into what the motions are

1 today. We're just saying we're going to send some out. If
2 Defendants have some, they are going to send them out and
3 this is the schedule to brief them and to resolve them
4 through hearing on the 2nd of August at the 8 o'clock
5 Central Daylight Time conference call.

6 MR. PRATT: Excuse me. One clarification on that.
7 That wasn't exactly what I thought we had agreed to. I
8 thought the agreement was that anyone who wants to bring up
9 a matter for resolution on the August 2nd conference call
10 will file its motion this Friday and then the opposition to
11 all of those will be filed the following Friday. So we're
12 on the same track.

13 MR. ZIMMERMAN: I beg your pardon. I stand
14 corrected. Either party will file their motion if they are
15 moving for something on this Friday. All responses, be it
16 Plaintiffs or Defendants, will be filed the following
17 Friday; and then the issues will be joined and they will be
18 heard on August 2nd. I stand corrected.

19 MAGISTRATE JUDGE BOYLAN: You talked during the
20 conference that sometimes those would be by letter brief and
21 somewhat informal. I did want to caution the parties that
22 it's important I think for the law clerks serving Judge
23 Frank that they keep a good log of what's pending before the
24 Court so that nothing slips through the cracks.

25 So despite the fact that we described those as

1 informal briefs, I think it's still important that the
2 parties file the briefs, even if they are letter briefs, on
3 ECF and provide two courtesies copies to Judge Frank's
4 chambers and in that fashion we will make the business of
5 keeping track of that a lot easier for these folks. So I'm
6 hopeful that we haven't confused the issue, the judges that
7 is, by suggesting to the parties that can just be informally
8 placed in front of us. Because while that's fine for us,
9 it's also important that the administrative help that we
10 have keep track of everything that's before us. Because
11 otherwise it really can get lost in the shuffle. So if you
12 would do that, that would be great.

13 MR. PRATT: That's a good point.

14 MR. ZIMMERMAN: And we appreciate those
15 instructions, your Honor, and we will certainly do so
16 because we know that there are a lot of eyeballs coming onto
17 this and we want to make sure that it gets to the right
18 place. So we understand the instruction.

19 There are two issues, your Honor, that I think are
20 waiting for decision. One on the Defendant fact sheet,
21 which we plan on getting out very quickly after the order is
22 issued to the Defense. We're waiting for clarification of
23 some disputed language. We discussed this with your Honor
24 in the pre-hearing conference and we understand that that
25 will be -- a decision on that will be forthcoming. And if

1 there's any confusion about where those motions might be
2 because of what you just stated about the electronic filing,
3 we understand you're going to contact us.

4 MAGISTRATE JUDGE BOYLAN: Sure.

5 MR. ZIMMERMAN: And the same is true with the
6 stipulated order that's also out there that I think was
7 attached to a disputed issues filing from the last
8 conference in June that is also awaiting execution. We
9 understand that that will be forthcoming.

10 MAGISTRATE JUDGE BOYLAN: In fact in that regard,
11 I know it's just administrative details, I would like to see
12 Mr. Pratt and Mr. Zimmerman, I don't think I need to anybody
13 else, just the two of you, in chambers and I would like the
14 law clerks to come back with me as well so that I can make
15 sure that all of that is taken care of. So if the two of
16 you would just come back through this desk or behind the
17 desk and into the anteroom for five minutes after we're
18 finished, I would appreciate that.

19 Okay. Anything else on that point?

20 MR. ZIMMERMAN: Not on that point, your Honor. I
21 think that takes us -- I think we've really done the
22 bellwether depositions in report; but, Mr. Pratt, I don't
23 know if you have anything further on bellwether depositions
24 report, which is number 2-A?

25 MR. PRATT: Not really, your Honor. As mentioned,

1 we are finishing the last of the bellwether Plaintiff
2 depositions today. We have a meeting scheduled with the
3 Plaintiffs lead counsel on Friday of this week to do our
4 striking to reduce the number of bellwether candidates to
5 20. I think we're, at least to this point, fairly much on
6 track and we'll keep trying to stay as much on track as we
7 can.

8 MAGISTRATE JUDGE BOYLAN: Okay.

9 MR. ZIMMERMAN: The next issue, your Honor, is
10 under 2 B, status of documents and information in connection
11 with a June 23rd, 2006 re-call. We're still meeting and
12 conferring on this. We don't have a final position on it.
13 We're learning more about it and so at this point we're just
14 meeting and conferring and we'll probably have a report on
15 where we're going with that at the next status.

16 MAGISTRATE JUDGE BOYLAN: Okay.

17 MR. ZIMMERMAN: The privilege and redaction
18 issues.

19 MR. PRATT: I think what we have had discussed,
20 your Honor, and have agreed to on counsel is that there are
21 two motions to compel that are pending. They have been
22 briefed. One involves the efforts of the Plaintiffs
23 steering committee to get certain documents that we put on a
24 privileged log in connection with the Ernst & Young
25 third-party subpoena. There's also an issue regarding

1 Plaintiffs steering committee's claims regarding the
2 redaction of certain information and material we provided to
3 them.

4 We've agreed that rather than have oral argument
5 on those motions today, which have been fairly completely
6 briefed, that the Plaintiffs will submit their additional
7 views on those two motions to compel by this Friday, the
8 21st. By the following Tuesday the Defendants will file a
9 brief response to that. Both of the submissions to be no
10 longer than two pages a piece, your Honor. At that point we
11 would then submit it to the Court's consideration and will
12 have no need to do an oral argument.

13 MAGISTRATE JUDGE BOYLAN: Okay.

14 MR. PRATT: The only other matter is the Stauder
15 motion to dismiss, which from the standpoint of all parties,
16 I believe, has been fully briefed and from our standpoint it
17 stands ready for resolution by the Court.

18 MAGISTRATE JUDGE BOYLAN: Okay.

19 MR. ZIMMERMAN: Your Honor, the next issue is the
20 update on Defendant's compliance with the March 2, 2006
21 discovery order. It's our understanding that we're awaiting
22 a response from the Defense as to whether or not there has
23 been compliance and the scope of the compliance. I think we
24 discussed this at the last status and are awaiting your
25 response. Can we get some idea where we are with that?

1 MR. CARPENTER: Your Honor, Andrew Carpenter for
2 the Defendants. The last status conference we talked about
3 this issue and we represented that we would be in a position
4 in about two weeks to give a more fulsome report that's
5 exactly where we stood, and we're on track for that in the
6 next couple of days being able to share that.

7 MR. ZIMMERMAN: Couple of days?

8 MR. CARPENTER: Yeah.

9 MR. ZIMMERMAN: Thank you.

10 Jim, do you have anything on that?

11 MR. PRATT: Judge, nothing more on that.

12 The next two items on the agenda, your Honor, 2-F,
13 are both Defendants issues. One relates to the spousal
14 consortium Plaintiffs fact sheet. The other deals with he
15 authenticity of Plaintiffs fact sheet. We're continuing to
16 discuss those matters with the Plaintiffs lead counsel. I
17 don't see any reason to discuss them further at this
18 hearing.

19 MR. ZIMMERMAN: We're awaiting input on that and
20 we'll meet and confer and discuss further.

21 Representative trial process update. I think
22 Mr. Pratt gave us a brief update on that. We are meeting in
23 Kansas City on Friday to do our first round of strikes.
24 There is an expert defendant -- an expert deposition
25 protocol that needs to be worked out that I think we're

1 going to meet and confer on with -- on Friday as well. If
2 we don't have that worked out as per the instructions of the
3 Court, we will say -- tell the Court what we have worked out
4 and what we don't agree on and the Court will then make the
5 call. But we should have that expert deposition protocol
6 meet and conferred upon this Friday, and anything we cannot
7 agree on with regard to that we will have submitted.

8 Is that your understanding, Mr. Halpern?

9 MR. HALPERN: Thank you.

10 MR. ZIMMERMAN: Is that your understanding?

11 MR. PRATT: Yes, sir.

12 MR. ZIMMERMAN: Motion to dismiss for failure to
13 file plaintiff fact sheet. I understand there is one
14 matter, the Stauder matter, that is ready for argument.
15 Although I don't think it's going to be argued unless
16 there's someone here on that matter. It was going to be
17 submitted as -- on the briefs.

18 MAGISTRATE JUDGE BOYLAN: The record should
19 reflect the fact that there appears to be no one in the
20 courtroom willing to make an oral argument in reference to
21 Stauder so it's the Court's determination that that will in
22 fact be decided on the written briefs.

23 MR. ZIMMERMAN: The next item, your Honor, is the
24 motion to compel. Briefly that was referred to as the Ernst
25 & Young motion. We have again indicated to the Court that

1 we are going to submit short letter briefs with regard to
2 that motion and a motion with regard to the HIPAA
3 disclosures or HIPAA issue under these motions. Both the
4 Ernst & Young and the HIPAA, Plaintiffs asked for until what
5 date was it, Friday, I believe, we were going to submit a
6 one- or two-page letter brief and that Defendants will have
7 until the following Friday.

8 MR. PRATT: The following Tuesday.

9 MR. ZIMMERMAN: I beg your pardon, the following
10 Tuesday to submit any response and that will be considered
11 fully submitted and then we will await resolution by the
12 Court. Is that your position?

13 MR. PRATT: I apologize, your Honor. I'm kind of
14 jumping around on the agenda here trying to keep track of
15 it. So, yes, that's a proper statement of where we are in
16 the motion to compel.

17 I do want to go back to a matter that I alluded to
18 just a moment ago dealing with the Plaintiffs fact sheets.
19 We have encountered a problem -- fortunately a very rare
20 problem -- with respect to Plaintiff fact sheets. Most of
21 the fact sheets have been fairly completed and we're
22 satisfied with them. We have run into a situation, though,
23 where there have been some boilerplate responses in the
24 Plaintiff fact sheets. We have situations in which the
25 Plaintiffs themselves have not reviewed or have actually

1 attested to the contents of the Plaintiff fact sheets.

2 We're running into some fairly highly legalistic claims that
3 Plaintiffs themselves do not understand or have not the
4 capacity to attest to.

5 Our position is that Plaintiff fact sheets ought
6 to be -- actually contain the actual positions of the
7 Plaintiffs themselves. They ought not to contain sort of
8 boilerplate characterizations by the Plaintiffs lawyers.

9 It's going to facilitate the process if instead of
10 boilerplate responses we actually get the actual individual
11 Plaintiff's position on claims and things like that.

12 As I said, fortunately it's a rare situation, your
13 Honor. We have not filed a motion with respect to that
14 officially yet. I hope we don't have to. But I wanted to
15 alert the Court that, again, on the few instances we've had
16 some problems along with the bellwethers and potentially
17 other Plaintiffs as well.

18 MAGISTRATE JUDGE BOYLAN: Well, I think the record
19 should be clear that the Court took this matter up during
20 the conference before we came on the record and wanted to
21 make sure that everyone understood the Court's position that
22 the Court expects that reasonable efforts will be made to in
23 fact authenticate the Plaintiffs fact sheets, to-wit: that
24 the individual Plaintiffs in fact have signed it after it's
25 been fully completed so that Plaintiffs have in fact

1 reviewed it and have adopted whatever is on that particular
2 fact sheet as their position and not that it contain legal
3 boilerplate arguments.

4 And to the extent that various Plaintiff's fact
5 sheets have been identified as either not being the position
6 of individual Plaintiffs and simply a rehash of legal
7 arguments, I think it's incumbent upon those Plaintiff's
8 lawyers and individual Plaintiffs themselves to revise
9 the -- their Plaintiff's fact sheets, sign the revisions and
10 have those resubmitted.

11 It's the hope that the Court can avoid having the
12 parties engage in a formal motion practice in reference to
13 that, especially given the Court's directive as I've stated
14 here on the record.

15 Update defendant's corporate disclosure.

16 MR. ZIMMERMAN: We were advised by counsel that
17 they -- given the merger and the addition of Boston
18 Scientific to the corporate Defendants, that they just
19 needed some time to coordinate this in all the pending
20 cases, the 400 and some cases that are now before the Court.
21 And we're perfectly willing to work with the Defendants on
22 that and I think Mr. Pratt can properly explain the concern
23 that they are having at this time.

24 MR. PRATT: No concern, your Honor, but we do have
25 an ongoing obligation to provide updated corporate

1 disclosures given the acquisition issues involved, and will
2 be prepared to file an updated corporate disclosure by July
3 28, a week from Friday.

4 MAGISTRATE JUDGE BOYLAN: Okay. I have next on
5 the agenda the scheduling of the next discovery conference
6 call and status conference.

7 MR. ZIMMERMAN: Can I interrupt for one second,
8 your Honor?

9 MAGISTRATE JUDGE BOYLAN: Go ahead, Mr. Zimmerman.

10 MR. ZIMMERMAN: We did discuss in chambers two
11 motions or several motions to dismiss. It has to do with
12 device recipient claims, third party payor claims, and
13 medical -- Medicare secondary payor act claims.

14 We came very close to getting a stipulation as to
15 the briefing schedule and the argument and then we found
16 that there was a Court conflict on the date scheduled for
17 the preemption arguments, our third motion to dismiss or a
18 fourth motion to dismiss that originally had been set for
19 October 19th.

20 What we agreed to do, your Honor, was a meet and
21 confer on these dates; prepare a proposed stipulated order
22 for the Court on the dates for preemption hearing, motions
23 to dismiss with regard to the three items I just stated,
24 device recipients, Medicare secondary payor and third-party
25 payor, and submit that to the Court as an agreed schedule.

1 And subject to the Court's approval it will then be entered
2 into an order so everyone knows when the -- what the
3 briefing schedule is and when the oral argument will be.

4 We think we kind of know the parameters of it but
5 rather than putting it on the record now I think what we've
6 agreed to do is again we're going to meet in Kansas City on
7 Friday, work this out, probably have an agreed stipulated
8 order subject to approval of the Court, and get it to the
9 Court.

10 If there's some tinkering of that, the Court will
11 let us know when we submit.

12 MAGISTRATE JUDGE BOYLAN: Okay. Sounds great.

13 MR. ZIMMERMAN: But that's our plan.

14 MR. PRATT: The only other issue that I think that
15 Mr. Zimmerman didn't make clear is that we're also going to
16 discuss the expert witness protocol in connection with the
17 preemption matter, the order in which the reports are to be
18 prepared and all of that. So in addition to the final
19 argument date, we would propose we're going to work out the
20 expert protocol.

21 MR. ZIMMERMAN: And as Tim said, we're going to be
22 in his town in Kansas City and he's going to bring barbecue
23 from the famous Kansas City barbecue. So that we're all
24 looking forward to Kansas City on Friday. He says he's
25 going to keep the temperature and humidity down as well, as

1 we did for him in Minnesota today.

2 MR. PRATT: For everyone in the courtroom as well.

3 MR. ZIMMERMAN: Your Honor, that takes us then to
4 the scheduling and I believe the Court has set a schedule
5 for the next status. And that date is October -- August
6 16th, I believe.

7 MAGISTRATE JUDGE BOYLAN: The next telephone
8 conference will be the first Wednesday of August. I think
9 one of the clerks has that in hand. Amy, do you have that
10 down?

11 MS. GERMON: August 2nd.

12 MAGISTRATE JUDGE BOYLAN: August 2nd at 8 o'clock
13 a.m. will be the telephone conference which will be
14 scheduled at least on the Court's calendar for one hour
15 between 8 and 9 o'clock that morning. And then the status
16 conference here in person will take place in Minneapolis,
17 two weeks thereafter, which will be August?

18 MS. GERMON: 16th.

19 MAGISTRATE JUDGE BOYLAN: 16th with a pre-hearing
20 conference in chambers at 8 o'clock a.m. And 9:15 will be
21 the start of the in-court proceedings.

22 Anything further from the Plaintiffs?

23 MR. ZIMMERMAN: Anything further from anybody?

24 Not from the Plaintiffs side, your Honor.

25 MAGISTRATE JUDGE BOYLAN: From the Defense?

1 MR. PRATT: Not from the Defense, your Honor.

2 MAGISTRATE JUDGE BOYLAN: Anyone here who is not
3 on either the Plaintiffs' committee or Defense committee
4 that wishes to bring anything to the Court's attention? I
5 see not. So we are in recess. Thank you very much.

6 Can I see Mr. Pratt and Mr. Zimmerman back here as
7 well as Judge Frank's law clerks? Thank you.

8

9

10 (Court adjourned at 9:42 a.m.)

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14 I, CARLA R. BEBAULT, certify that the foregoing is
15 a correct transcript from the record of proceedings in the
16 above-entitled matter.

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Certified by: _____
Carla R. Bebault, RPR, CSR

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