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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

This Document Relates)
To All Actions) 8:00 o'clock, a.m.
) August 2, 2006
) Minneapolis, Minnesota

BEFORE THE HONORABLE JUDGE DONOVAN W. FRANK AND
THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN
UNITED STATES DISTRICT COURT JUDGE AND MAGISTRATE JUDGE
CIVIL STATUS TELECONFERENCE PROCEEDINGS

* * *

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1 (In open court.)

2 THE HONORABLE JUDGE FRANK: Judge Frank and
3 Judge Boylan, here. Everybody here? Is Amy Gernon on
4 the phone, too?

5 MR. PRATT: I think she just went to call
6 you, Your Honor.

7 THE HONORABLE JUDGE FRANK: I was going to
8 say, if she was on there, we could just get back off and
9 see if she could work all of these things out with
10 everybody there. She is at a different site.

11 Judges Boylan and Frank, we have my Court
12 Reporter, here, so I think you should assume that unless
13 we all agree to go off the record, that we will just
14 keep a record of this.

15 And then if there is some mutual agreement by
16 everyone, including Judge Boylan and myself, we can step
17 off the record, as well. So, is that agreeable to
18 everyone?

19 MR. ARSENAULT: Yes, Your Honor.

20 MS. FLEISHMAN: Yes, Your Honor.

21 MR. PRATT: Hey, Judge, this is Tim Pratt.
22 How are you this morning?

23 THE HONORABLE JUDGE FRANK: Just fine.

24 MR. PRATT: Just a quick point before we get
25 into this, I know we have a fairly ambitious agenda this

1 morning. I don't know how much time the Court has. I
2 am in a place where because of my previous phone
3 problems, I want to be on a land line as long as
4 possible. So, I can be on a land line for about another
5 35 minutes. Then I will have to step off and try to get
6 back on by cell phone, as I have to head to the airport
7 to catch a flight. So, that is kind of where I am this
8 morning. So, I apologize for that, but it is the best I
9 can do.

10 THE HONORABLE JUDGE FRANK: I thought
11 somebody of your stature would have one of those
12 satellite phones you would just travel with 24 hours a
13 day.

14 MR. PRATT: I keep telling you, Judge, I'm
15 not a Plaintiff's lawyer that has those gadgets.

16 THE HONORABLE JUDGE FRANK: Do you want to
17 just begin down the list? Judge Boylan and I have been
18 through this together earlier this morning. So, you
19 will probably see us both at different times stepping
20 in. And then on a couple of these issues, a couple of
21 orders have been filed in the last couple of days. I
22 think if we are talking about the same orders, and on a
23 couple of these issues it may be that we will be
24 prepared to file an order or two like on the Dan Tich
25 matter, unless somebody suggests there is other material

1 we need, we can file an order on that matter before the
2 week is out. So, we will make sure that we are on the
3 same page.

4 And I would say this, before we roll down the
5 agenda, Judge Boylan and I have looked at a -- have no
6 particular complaints about how we have been proceeding
7 with filing papers, motions and such. And we want to
8 emphasize we will keep it streamlined. But, we will be
9 filing sometime in the next few days a relatively short
10 order on kind of a uniform protocol. I know everybody
11 overuses these words protocol on filing of documents for
12 motions and contact with the Court, just so we can make
13 sure everybody knows what we have and how it is supposed
14 to come in to us.

15 It is the type of thing that once you get it,
16 because there is no magic to it, and one or all of you
17 say, well, we think the judges should tweak this a
18 little bit and this would streamline how we would submit
19 papers to the Court for some of these get-togethers and
20 motions, and part of it is just how they attached to
21 certain documents when they come in under CM/ECF.

22 We can have some give and take on that,
23 because we are just looking for a way, one, to
24 streamline things a little bit better; and two, to make
25 sure that even if it is our own doing -- and I will

1 speak for myself, my doing, that I make sure that I have
2 everything that you think I have and I know that I have
3 it. And we have got something that we are looking at
4 now, so kind of a procedural thing like that will come
5 out, not changing anything too dramatically, shortly.

6 So, we can roll down the list, then, and you
7 will probably hear Judge Boylan and I intermittently
8 coming in and out on some of these. So, you can go
9 ahead whenever you are ready.

10 MR. ZIMMERMAN: The first -- this is Bucky
11 Zimmerman, Your Honor. The first is representative
12 trial --

13 THE HONORABLE JUDGE FRANK: Can you speak up
14 just a little bit, Bucky?

15 MR. ZIMMERMAN: Yeah, I beg your pardon. Can
16 you hear me better now?

17 THE HONORABLE JUDGE FRANK: Yes.

18 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Yes.

19 MR. ZIMMERMAN: The first one is
20 representative trial process update from our side. I
21 think Richard Arsenault is going to respond to that.

22 I don't think it is controversial and I don't
23 know if anybody from the Defense is going to speak up on
24 that, but he can give you an update.

25 MR. ARSENAULT: Good morning, Judges. We are

1 pleased to report that there has been excellent
2 cooperation with regard to this process. It has moved
3 together rather smoothly. It was an ambitious
4 undertaking with many depositions that had to be taken
5 in a rather compressed time frame. That was
6 successfully concluded.

7 We agreed to travel to Kansas City to the
8 offices of the Defendant, of Defense counsel to proceed
9 with the first phase of a strike process last Friday.
10 We did that. You know, it went smoothly. So, we are
11 down to the second stage and proceeding with depositions
12 associated with that. And we are ready to and actually
13 proceeding with that protocol.

14 So, everything moving along essentially as
15 anticipated with regard to the trial selection process.

16 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
17 Sounds good.

18 MR. PRATT: On the Defense side, Your Honor,
19 Tim Pratt. I agree with what Mr. Arsenault had to say.
20 We have been moving ahead right away with a high degree
21 of cooperation. That is going to be tested, I think, as
22 we move through the second phase because we begin to
23 lose a little bit of control over the timing of
24 depositions as we start to deposing doctors and other
25 fact witnesses, potentially.

1 The scheduling may be a little more
2 difficult. So, we are going to continue to work
3 together and try to keep things on track as much as we
4 can.

5 MR. HOPPER: This is Randy. Did you want to
6 share any of the dates, Richard, that we arrived at?

7 MR. ARSENAULT: In terms of what, Randy, now?

8 MR. HOPPER: In terms of the protocol, the
9 schedule that we put together.

10 MR. ARSENAULT: On the motions to dismiss or
11 --

12 MR. HOPPER: The whole schedule, Richard,
13 from front to back.

14 MR. ARSENAULT: No, I don't think they need
15 to be bored with those details right now. It is still a
16 little bit of a work-in-process. And I think the fact
17 that it is running smoothly is all we need to bore them
18 with right now.

19 MR. ZIMMERMAN: Number two, Your Honor, is
20 the entry of submitted briefing schedule, apparently as
21 an exhibit.

22 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
23 Bucky, I think we can cut you short on that. This is
24 Judge Boylan. We have looked at it and we don't see a
25 problem with it. And it sounds like it is agreed to,

1 right?

2 THE HONORABLE JUDGE FRANK: I may have even
3 signed it yesterday.

4 MR. ZIMMERMAN: I think you did, Judge.

5 MR. FLEISHMAN: I think you did sign it
6 yesterday.

7 THE HONORABLE JUDGE FRANK: Yeah, I think I
8 signed it yesterday. And since I am always on Lowell
9 about getting this stuff out on the web, it's probably
10 already out there.

11 MR. ZIMMERMAN: It is, Your Honor. I
12 thought, actually, this morning, I think it entered
13 yesterday. It just happened to be on the agenda. And I
14 am just following up as a matter of completion. But, I
15 think that exhibit or that order is now entered.

16 THE HONORABLE MAGISTRATE JUDGE BOYLAN: How
17 about number three?

18 MR. ZIMMERMAN: Number three is an important
19 one. It is an objection to excessive third-party
20 discovery, a Defendant's issue.

21 MR. PRATT: Bucky, can I go ahead and take
22 that since it is our issue --

23 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Well,
24 Tim, before you do that, this is Judge Boylan, one of
25 the complaints that the Plaintiffs had was there was not

1 a meet and confer on that, and then later on there was
2 another issue where the Defendant's are complaining
3 there was not a meet and confer.

4 And I am thinking of number 3 and number 6, I
5 believe. And we were -- at least Judge Frank and I were
6 talking about directing the parties in both, in
7 reference to number three and number six to meet and
8 confer and to the extent there are still some matters at
9 issue at our next conference to bring that to our
10 attention. Does that make sense?

11 MR. PRATT: I think it makes a lot of sense
12 from our side, Your Honor. I know we sort of jumped on
13 them a little bit because we thought some discovery
14 issues that were under discussion and potentially
15 resolvable got incorporated into a letter, I'm sure in
16 good faith.

17 I think on the issue that we have in hand
18 here, number three, we might be able to work out an
19 agreement that limits the scope, maybe potentially the
20 numbers. I just frankly am an in-person, old school
21 kind of guy. I like to get up and sit around a table
22 and see people eye to eye as opposed to telephone stuff.
23 So, I would actually encourage it if the PSC agrees to
24 sort of tries to put those issues off until -- we will
25 try to resolve them in the next two weeks, but we will

1 be together then and we can report on our progress or
2 lack thereof.

3 THE HONORABLE MAGISTRATE JUDGE BOYLAN: So,
4 maybe rather than wading into it this morning, we should
5 just ask the parties to meet and confer both in
6 reference to number three and number six with the
7 understanding that if you haven't completely resolved
8 it, that you would tee it up for Judge Frank and myself
9 at that time.

10 THE HONORABLE JUDGE FRANK: And then before
11 we --

12 MR. ZIMMERMAN: Could I just -- could I just
13 add --

14 THE HONORABLE JUDGE FRANK: Bucky, Judge
15 Frank, here. The other thing that Judge Boylan -- not
16 to cut you off, but before you respond, the other thing
17 that Judge Boylan and I talked about, in addition to
18 what he just laid out, is that by my count, excluding
19 Ernst and Young, the Ernst and Young issue, there's 20
20 third parties that you set forth in the letter. And
21 they all can't be similarly situated in the sense that
22 in the next two weeks if there's one or two deal
23 breakers, or if there aren't deal breakers, but then on
24 the 16th unless there is some other urgency, some type
25 of presentation, written or oral about which ones are

1 more problematic than others. Because I'm assuming they
2 all don't sit on the same plane with respect to
3 discovery that you have that is in Guidant's files and
4 such issues like that, so --

5 MR. ZIMMERMAN: Judge, that is really what I
6 was addressing. And I appreciate it. What I think we
7 should do is meet and confer. On this side we agree
8 with that process, obviously; but, I would like to just,
9 as a caveat, if we can't reach resolution, at least we
10 could have a time with the Court either formally or
11 informally in the court or in chambers to resolve that
12 which we can't resolve, because I think that the
13 third-party issue is one of those things that we may
14 need direction, because it is sort of sitting out there,
15 and I know the Defendants want to -- same with the
16 discovery in the pre-months approval stuff --

17 THE HONORABLE JUDGE FRANK: You are trailing
18 off on us, Bucky.

19 MR. ZIMMERMAN: I beg your pardon. Anyway,
20 the point is if we could just -- we will have to meet
21 and confer and meet with the Court with regard to what
22 we can't agree on, if we can't agree on the 15th or the
23 16th, and hopefully we can get it resolved by then.

24 If not, we will tee it up for the 16th.

25 THE HONORABLE JUDGE FRANK: That is what we

1 assumed you would do. And then we can make a ruling
2 shortly thereafter.

3 MR. LESSER: In the meantime, this is Seth,
4 this is a point of clarification. With respect to some
5 of these third parties, obviously, we have been -- every
6 time we have sent out a subpoena and the like, we have
7 actually been working quite diligently with the third
8 parties to narrow and to deal and to effect their
9 production. And I assume that process should not stop
10 from our side.

11 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
12 Correct.

13 THE HONORABLE JUDGE FRANK: Hope not.

14 MR. LESSER: Okay, thank you.

15 MR. ZIMMERMAN: Number 4, Your Honor, is
16 disputed issues regarding Defendant's case profile form,
17 and I my understanding is there has been an order issued
18 on that, as well.

19 THE HONORABLE JUDGE FRANK: If that is the
20 same issue, there was an order earlier in the week, a
21 couple of days back.

22 MR. ZIMMERMAN: Right. And we have that.

23 Tim, you didn't have anything else regarding
24 that, did you?

25 MR. PRATT: I do not believe so.

1 MR. ZIMMERMAN: Remaining issues regarding
2 the Dan Tich Deposition?

3 THE HONORABLE JUDGE FRANK: If I have
4 everything, unless one of you assert that I don't, then
5 just -- we will have an order out before the week is
6 done. If I don't have everything or somebody wanted to
7 tee up something right now, then go ahead, but
8 otherwise, if you just confirm that we have what you
9 want me to have, we will have an order out before Friday
10 is over.

11 MR. PRATT: Debbie is there anything from
12 that perspective on our side?

13 Debbie Moeller is handling that, Your Honor,
14 for us. Debbie? Is Debbie Moeller on? How about Andy
15 Carpenter?

16 MR. CARPENTER: Yeah, I am here, Tim.

17 MR. PRATT: All right. Anything else from
18 your end, Andy, on that?

19 MR. CARPENTER: You know, let me take a look
20 real quick on that. Plaintiff submitted their position
21 on it just real recently and we didn't have a chance to
22 respond since Friday. Let me put my head together with
23 Debbie and see if maybe by tomorrow we can get one last
24 recapitulation of our position out. I'm not sure we got
25 anything actually in writing on our position.

1 THE HONORABLE JUDGE FRANK: That is fine, and
2 we will get an order out.

3 MS. MOELLER: I'm sorry, this is Debbie
4 Moeller, here.

5 MR. ZIMMERMAN: Maybe we don't need a
6 recapitulation. Maybe Debbie can answer the question
7 for the record.

8 THE HONORABLE JUDGE FRANK: Can we speak up
9 again, please?

10 MS. MOELLER: Certainly. And I'm sorry, we
11 have nothing further to submit on the Dan Tich issue.

12 THE HONORABLE JUDGE FRANK: All right. We
13 will have an order out before the week is over.

14 MR. ZIMMERMAN: Number 6 we have dealt with,
15 Your Honor. Number 7 is Plaintiffs' Deposition
16 confirmation issues.

17 MS. FLEISHMAN: And I think we are working on
18 that, Your Honor, so that is off the table for now.
19 Wendy Fleishman.

20 THE HONORABLE JUDGE FRANK: Who is speaking?

21 MS. FLEISHMAN: Wendy Fleishman, Your Honor.

22 THE HONORABLE JUDGE FRANK: For the benefit
23 of the Court Reporter, as well as Judge Boylan and
24 myself, so we are certain who we are talking to. Okay.

25 THE HONORABLE MAGISTRATE JUDGE BOYLAN: How

1 about number 8?

2 MR. PRATT: Your Honor, that is the -- this
3 is Tim Pratt, the defense issue on dealing with the sort
4 of continuing issue of failure to submit Plaintiff fact
5 sheets. I think Andy Carpenter is going to address that
6 from our side.

7 MR. CARPENTER: Sure, just real briefly. It
8 is the same issue we have seen before, just kind of
9 round three. Round 2 went away before the Court had to
10 obviously issue any orders. There are about 50
11 additional cases in which the deadline for submitting a
12 Plaintiff fact sheet has come and gone with no fact
13 sheet.

14 I think we will do the same thing. We will
15 file a motion here shortly. We will send letters to
16 everyone telling them were are going to file a motion to
17 dismiss unless they give us a Plaintiff fact sheet. If
18 anyone in the interim sends us a Plaintiff's fact sheet
19 that is relatively complete with proper authorizations,
20 we will take the motions down.

21 THE HONORABLE JUDGE FRANK: All right.

22 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Okay,
23 number 9.?

24 MR. ZIMMERMAN: Dismissal of all non --
25 recall, nonphysician communication cases.

1 MR. PRATT: We are moving through this with
2 great speed and that is very good. Here is the point on
3 that, Judge. That is a defense issue. Tim Pratt,
4 again.

5 Discussions we have had with the Plaintiffs'
6 Steering Committee and indeed I have had with other
7 counsel, there is an issue, for example, on what we do
8 with PRIZM 2, Model 1861 devices that were made after
9 November of 2002 that have not failed.

10 We have several of those, sort of caught up
11 in the mix of the MDL. There are some other kinds of
12 non-recall devices that have been captured by this MDL.
13 And we could certainly talk about this informally when
14 we get together in a couple of weeks.

15 Particularly when we move toward the
16 September 11 get together, I think it may be helpful to
17 the process to tee up some of these issues by legal
18 motion where even the Plaintiffs' may -- I am not
19 speaking for them, even the Plaintiffs would say that
20 those cases have little or perhaps no legal merit. I
21 will leave it to them to address it at a certain point.
22 But, there are lots of cases that populated this MDL
23 that are clearly not caught by any recall that have
24 clearly, according to what we have, have not failed in
25 any way. And I would like to sort of winnow out that

1 process a little bit, and maybe in a couple of weeks we
2 could sit down and talk about a mechanism for trying to
3 get that accomplished, by agreement or otherwise. That
4 is why the issue is up there, Your Honors.

5 MR. ZIMMERMAN: We hear you, Tim, and we are
6 happy to discuss that one. That seems not to be a
7 controversial issue.

8 MR. PRATT: Let's build that, Bucky, into the
9 meet and confer. Maybe we can talk about getting
10 together even a day before the MDL conference. I think
11 I am going to be up there in Minneapolis, anyway. So,
12 maybe we could put some of these items on the agenda for
13 a more robust discussion at that time.

14 MR. ZIMMERMAN: Would it make any sense right
15 now to set a time and a place for the meet and confer?

16 THE HONORABLE JUDGE FRANK: We're losing you,
17 Bucky.

18 MR. ZIMMERMAN: I beg your pardon. Would it
19 make any sense to set up a meet and confer right now,
20 Tim, a time and place?

21 MR. PRATT: Let's check some scheduling.
22 Some of it is mine, but some of it has to do with what
23 is going on in the State Court consolidated proceedings
24 up there. We have a hearing in front of Judge Leary,
25 Your Honor, you may know that. But, we have a hearing

1 in front of Judge Leary, I believe, on Monday the 14th
2 before the MDL conference we have before you on that
3 Wednesday. So, I think we can find a time to do it,
4 Bucky, on, say, Tuesday, but I can't be more precise
5 than that. Let's get that pinned down in the next
6 couple of days.

7 MR. ZIMMERMAN: Very good.

8 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
9 Number 10?

10 MR. PRATT: It is a defense issue, I think
11 Mr. Carpenter has that. Andy?

12 MR. CARPENTER: That is right, Tim. Your
13 Honor, this is kind of a logistical operations issue.
14 In pretrial order 14, I believe it was, the Court
15 decided that only in instances where the Plaintiff had
16 consulted with a health care physician or a health care
17 professional more than 10 years ago regarding explant or
18 implant issues, would Defendants be entitled to
19 authorizations going back ten years.

20 The trouble is, as Defendants, we don't know
21 which cases those are. What we have done is ask the PSC
22 to try to get that information and identify the body of
23 cases where Plaintiffs in fact consulted more than ten
24 years ago on those issues and which we would be entitled
25 to authorizations going back more than ten years. We

1 haven't been able to get more information yet. I'm not
2 sure what the PSC's current position is on whether they
3 are going to help us coordinate and get that information
4 from everybody or not. And the difficulty from our end,
5 Your Honors, is there is no way to enforce the terms of
6 PTO 14 without some help and information from the
7 Plaintiffs' end. So, that is basically what we are
8 asking for at this point.

9 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Andy,
10 couldn't that be part of Plaintiff's fact sheet, just a
11 question as to whether or not they met that condition
12 and would have been seeking treatment or talking to a
13 physician about to problems prior to a ten-year period?
14 That way you would have it highlighted -- maybe it is
15 too late because those are already in everyone's hands.
16 But, it seems to me that would have been a good way to
17 do it.

18 THE HONORABLE JUDGE FRANK: Let me jump in
19 here, and I may go back with Laura and look at this once
20 we get off the phone. I think it is broader than that.
21 I think that the Defense was not restricted to that
22 extent, Mr. Carpenter. I don't have the order in front
23 of me, but that was not our intent. And we will
24 probably try to run and get it now, but we don't delay
25 anything for the phone call.

1 I don't believe the intent of the order was
2 to have it implemented quite that way, that restrictive,
3 frankly. We will go back and look at it. If it needs
4 clarification, it does. But, I thought we were trying
5 to guard against exactly what Judge Boylan brought up so
6 we could minimize some of this work, not create another
7 layer of inquiry. But, I will go back and look. You
8 may be right, but that was not the intent to put it
9 quite that restrictive, so --

10 MR. LESSER: Your Honor, what we have done on
11 the Plaintiffs' sides, this is Seth Lesser. When PTO 14
12 came down, we provided it to all of the Plaintiffs'
13 counsel in the MDL. And more recently, we have sent a
14 specific communication to all of the Plaintiffs' counsel
15 in the MDL reiterating that they are bound by PTO 14 and
16 that they have to comply. And if they fit in the three
17 categories that you included in your order as to when
18 the 10-year period could be at issue, that they were
19 under obligation to provide those authorizations to the
20 Defendant. And if they don't, they could face
21 difficulty down the road.

22 THE HONORABLE JUDGE FRANK: I don't want to
23 sound like Pollyanna, but I have this order in front of
24 me and I am not suggesting anybody is violating
25 anything, because I don't have enough to know that.

1 For example, 1A on Page 2 of the Order
2 states: The parties shall be proactive in examining
3 each Plaintiff's fact sheets so that in those situations
4 where there is a reasonable basis for extending
5 discovery beyond the 10-year period, that will occur
6 without delay and involvement in cases where the
7 Plaintiff consulted with the doctor and other -- I mean,
8 I will not be a happy camper if we find out in some of
9 these cases that it was obvious by -- there were these
10 consultations in the ten-year period, and now we have to
11 go and do another screen to find out, well, they didn't
12 specifically ask for it, so we didn't give them anything
13 beyond the ten years. It goes right to, I think, what
14 Judge Boylan suggested.

15 Now, maybe I was a little naive when we put
16 it together this way in trying to strike a fair balance.
17 And maybe I'm creating more of an issue than it really
18 is. I don't mean to suggest that. But, we will
19 probably take a look at it after we get off the phone
20 and if there is something we can do on our end to
21 clarify this, because our intent was not to create a
22 whole second layer of discovery in the case, in terms of
23 a second look at it. So, I don't know if that answers
24 any of your questions, but --

25 MR. LESSER: I think -- Your Honor, this is

1 Seth, again. I think the difference between the
2 Plaintiffs and Defendants on this call was whether or
3 not the Plaintiffs' Steering Committee was to collect
4 somehow from all of the Plaintiffs, you know, who would
5 be -- which Plaintiff would or would not be required to
6 meet any of these three categories. And I think that is
7 what Guidant is essentially asking the Plaintiffs'
8 Steering Committee to do. And we can't really do that,
9 because even the way your Order is written, it is going
10 to depend on each Plaintiff's specific facts and
11 circumstances and that is going to be their own counsel
12 and their own counsel's requirement to deal with their
13 client and their fact sheet and their authorization.

14 And it makes little sense for us, which is to
15 say me and the other Plaintiffs' counsel to be an
16 intermediary to create lists on this. We won't be able
17 to do that. What we can do is what we have done, which
18 is to inform Plaintiffs' counsel that they have to
19 comply. Just say they have to comply with the
20 Plaintiffs' fact sheets

21 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Yeah.
22 Well, it is clear they have to comply under the Order.
23 And it is clear under the Order that we deemed it as
24 relevant discovery if the circumstances of a particular
25 plaintiff met the conditions set forth in PTO number 14.

1 So, Defendants are entitled to make some inquiries about
2 those things. And it sounds as though, because the
3 Steering Committee has already brought PTO 14 to the
4 attention of individual Plaintiffs' attorneys, I'm not
5 quite sure what else has to be done at this point.

6 Andy, did you have any particular relief you
7 were asking the Court to consider granting?

8 MR. CARPENTER: Your Honors, we need either
9 one or two things, because the bottom line is Plaintiffs
10 all pretty much universally revoked authorizations past
11 ten years across the board. And we have only had one
12 case the PSC has identified in which anyone consulted
13 with a health care professional more than ten years ago.

14 THE HONORABLE JUDGE FRANK: That is not in
15 compliance with my Order if that is what happened.

16 MR. CARPENTER: Yeah, and that is the reality
17 of it. And we need to figure out a better situation,
18 because there is no way as Defendants that we can look
19 in and get that information from the Plaintiffs.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Well,
21 why don't we do this? At least at this particular
22 juncture is the first time it has been brought to the
23 Court's attention. The Plaintiffs' Steering Committee
24 obviously is aware of what the Court's Order was. They
25 hear what the perceived problem is from the defense

1 standpoint. And I will presume that -- this is Judge
2 Boylan, by the way. I will presume that the Plaintiffs'
3 Steering Committee will kind of confirm with their
4 individual Plaintiffs' attorneys that what the
5 responsibilities of each of the Plaintiffs' attorneys
6 are, vis-a-vis Plaintiffs who would fit within the
7 parameters of PTO number 14. Okay?

8 MR. CARPENTER: Okay.

9 THE HONORABLE JUDGE FRANK: Well, and I don't
10 want to get philosophical or go back to Pollyanna again,
11 but I really think the Plaintiffs -- and there may be
12 other issues where it will be on the other side. You
13 know, apart from this MDL case, the literature is across
14 the board on abuse, abuses in discovery cases in terms
15 of going after all of the relevant material on
16 plaintiffs, apart from this MDL.

17 And so many judges, like myself and Judge
18 Boylan are trying to strike a fair balance, but that
19 assumes that Plaintiffs will individualize their own
20 case. Because, you know, their reaction to this, if it
21 comes down the road, whether it is in this MDL or
22 another case, is that they just did a black and white
23 ten-year revocation, which is what the complaint usually
24 is by Plaintiffs and other cases, that they just go
25 after everything in every case, like Mr. Schultz

1 suggested in his case not too long ago, well then that
2 is exactly what happens. Then we go back to the order
3 that the Defendants originally wanted, whether it is
4 this MDL or some other case.

5 But, maybe it will get resolved. I am
6 hopeful still that it is, because most of the lawyers
7 that we work with take these orders seriously, so maybe
8 it will get itself resolved. So --

9 MR. ZIMMERMAN: And just -- I hope you can
10 hear me. Just so the Court understands, we give pretty
11 explicit instructions to all of the lawyers in the
12 field. Obviously, we can't control all of the quality
13 control that happens in their office, but we try and be
14 very specific about what the Court is asking.

15 We hear you very clearly, now. We will send
16 out directions again. And if something isn't done
17 correctly, if we know about it, we will intercede and
18 try and work it through with that particular lawyer. We
19 have no interest in seeing anybody skirt away from the
20 rules. We are vigilant to this. It is just that with
21 four or 500 cases out there, and hundreds of other
22 people, we can't always control the quality of what
23 other people do, but we will do our best.

24 THE HONORABLE JUDGE FRANK: All right.

25 MR. LESSER: If I may add? This is Seth,

1 again. If there is a specific problem that arises that
2 you have, still, old authorizations, and I think what
3 Andy was referring to was the representative trial
4 process, bring it to our attention and we will do what
5 we did then. We rode hard on those folks. We really
6 tried. That is all we think we can do.

7 THE HONORABLE MAGISTRATE JUDGE BOYLAN:

8 Sounds great.

9 MR. CARPENTER: Seth, we appreciate your
10 efforts to help us with the representative cases,
11 although I have to say this issue goes to all cases, not
12 just the representative ones.

13 MR. PRATT: It sounds like we have an
14 agreement to work on it, Your Honor.

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
16 Number 11, the next status conference. I am kind of the
17 villain here. This is Judge Boylan. I have an all-day
18 settlement conference that I am commencing here in St.
19 Paul at shortly after 9:00. So, I asked Judge Frank if
20 he would be open to having the next status or the next
21 in-court meeting in St. Paul versus Minneapolis. And he
22 has agreed to do that, so that would allow me to at
23 least attend the prehearing conference between 8:00 and
24 9:15, and have the matters heard in one of the St. Paul
25 courtrooms --

1 THE HONORABLE JUDGE FRANK: On the seventh
2 floor here in St. Paul. And I thought you would all
3 just love to come to Downtown St. Paul and perhaps get
4 the word out that we will start in my chambers at 8:00,
5 or we will probably have room in this chambers. If not,
6 we will do it in a conference room. But, we will start
7 here at 8:00 on the 16th, and everything will be the
8 same, except we will do it in St. Paul.

9 Can we make that work for August 16th?

10 MR. ZIMMERMAN: Sure.

11 MR. PRATT: Sure, for the Defense side.

12 MR. ZIMMERMAN: We will be exploring some St.
13 Paul restaurants --

14 MR. LESSER: It is actually just as well,
15 because I tried to make a reservation last night in
16 Minneapolis, and I couldn't, at a hotel, at a hotel,
17 they were all booked.

18 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Well,
19 you will find that St. Paul is the side of the river
20 where things really happen.

21 THE HONORABLE JUDGE FRANK: Yeah, it is here.
22 Anything else?

23 MR. ARSENAULT: Judge, this is Arsenault.
24 Just one more thing with regard to Judge Boylan's
25 September 11th meet and confer. Judge Boylan instructed

1 us to conduct some meet and confers prior to the 9/11
2 meeting we will be having with Magistrate Judge Boylan.
3 We have exchanged e-mails and communications and we have
4 now set what we think will be a substantive meet and
5 confer immediately following the status conference on
6 August 15th.

7 We will be prepared at that time to make some
8 substantive suggestions to the Defense counsel. We hope
9 they will favor us with their ideas at that time. And
10 then following that, we will comply with July Boylan's
11 instructions to communicate with him, I am assuming in
12 writing, with some suggestions, ideas, recommendations,
13 proposed protocols, agendas, et cetera.

14 THE HONORABLE MAGISTRATE JUDGE BOYLAN: And
15 that can be ex parte communication to me if one side or
16 the other wants to do so in reference to the settlement
17 discussions. Or if on the other hand you want to share
18 with the other side, that is fine, too, but it need not
19 be necessarily done.

20 MR. ARSENAULT: Okay, Judge, thank you.

21 MR. PRATT: Your Honor, this is Tim Pratt. I
22 agree with Mr. Arsenault. We have set a date for doing
23 that. We will take the first step of meeting and
24 conferring in good faith and then we will sort of decide
25 what the next steps ought to be.

1 THE HONORABLE JUDGE FRANK: We can give you
2 some available space here in St. Paul after we are done.
3 You said you were going meet on the 16th, is it?

4 MR. ZIMMERMAN: Yeah, we were going to meet
5 after the conference. It might make sense to go to St.
6 Paul -- or I mean, to meet in St. Paul, but we haven't
7 really figured out those logistics, yet.

8 THE HONORABLE JUDGE FRANK: Well, if you want
9 a couple of rooms or something, let us know. Once we
10 are done, we can probably -- some of these conference
11 rooms are --

12 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I
13 think I have every conference room.

14 THE HONORABLE JUDGE FRANK: I think Art,
15 Judge Boylan has got them all locked up. If you need
16 some space, and it would work better for you to have
17 some space here on the 16th call somebody in my chambers
18 and we can probably rustle up a courtroom or a jury
19 assembly room and get you some coffee and beverages and
20 such.

21 MR. PRATT: I appreciate that, Your Honor.

22 MR. ZIMMERMAN: I appreciate it. I think
23 Pratt likes rooms that are wired for sound, so I don't
24 know if you can get him --

25 THE HONORABLE JUDGE FRANK: A couple of quick

1 things, if I may, before we -- or maybe counsel was not
2 done. Anything else you want to bring to --

3 MS. STRIKIS: Your Honor?

4 MR. PRICE: Judge, Joe Price. Just so that
5 it is clear, I think there was a question. I believe we
6 have now set the preemption motion hearing for November
7 9th, 9:00 a.m. to 1:00 p.m., is what I think Lowell told
8 us.

9 THE HONORABLE JUDGE FRANK: Okay, that works.

10 MR. ZIMMERMAN: Again, Your Honor, that is in
11 the order that just came out.

12 MR. PRATT: Yes.

13 THE HONORABLE JUDGE FRANK: Okay.

14 MS. STRIKIS: Your Honor, this is Sylvia.
15 Sorry to belabor anything that has already been covered,
16 but some of these discovery issues are near and dear to
17 my heart. And although some of the issues in the
18 Plaintiffs that were new, others have been pending for
19 months. I would ask that we get a commitment from
20 Guidant that they will meet with us before the August
21 15th date when perhaps Mr. Pratt can meet with us in
22 person to try to resolve anything that we can that won't
23 even need Mr. Pratt's guidance on that day in person.

24 MR. LESSER: Some of these things, I would
25 add this is Seth, are time urgent, particularly

1 regarding preemption.

2 THE HONORABLE JUDGE FRANK: Well, my --

3 MR. LESSER: Maybe we could remain on the
4 phone after the judges leave and try to work out when we
5 could have another meet and confer.

6 MR. CARPENTER: This is Andy carpenter. You
7 know, I am happy to meet, and we do weekly, and we have
8 been meeting on these ongoing issues. I'm available --
9 I have a commitment right after this call, but I am
10 usually available most days of the weeks to talk about
11 these things and I'm happy to do it.

12 MR. PRATT: Let's get together and talk
13 about -- not, not me, talk about things which have to be
14 put off and which ones have to be dealt with more
15 urgently, and maybe we will reach an agreement. But,
16 yeah, Your Honor, we speak to these fine people across
17 the table on a weekly basis on these kinds of matters.

18 THE HONORABLE JUDGE FRANK: Well, then,
19 looking at these, because you both submitted helpful and
20 quite detailed letters on these issues, it is obvious
21 that if you don't get them resolved, some are more
22 urgent than others. And if we need to break one or two
23 of these or more of them out from the pack so you really
24 need a quick turnaround decision by the Court, we will
25 do that.

1 We are not lumping them all in together,
2 except for the purpose of meet and confer. Because if
3 we need to break them out and they get a decision out,
4 if we -- near the 15th of August, because we don't want
5 to do anything that will cause delay of moving forward
6 with both settlement discussions and this representative
7 trial process, so we can move forward and not have
8 anything on the discovery side delay these deadline
9 dates and then push the trials back.

10 So, we will be here. If we need to break
11 some of these out, we will break them out.

12 MS. STRIKIS: Thank you, Your Honor.

13 THE HONORABLE JUDGE FRANK: So, two -- a
14 couple of quick things. We keep getting requests to
15 open up these status conferences. Not this one, but
16 when we are in Court to a live feed for lawyers calling
17 in. And there are two ways that those requests come in,
18 one is to call in and listen, the other is to call in
19 and participate. The latter is quite certainly
20 problematic.

21 And we have, without much consultation with
22 any of you folks, we have said, look it, we try to have
23 a transcript produced and put it out on the web ASAP,
24 because I see some problems, once we start having people
25 call in. I do know that is done in some MDL's. Do any

1 of you have a particular view on that? I mean, we won't
2 take much time here, but anybody have a strong view or
3 disagree with the notion that we will emphasize getting
4 a quick transcript out and getting that out on the web,
5 but we have said no to requests we have had from a
6 variety of lawyers to call in and participate or listen
7 during these -- like, say, for example, on the 16th,
8 because we have the technology in the courtroom to do
9 it, both here and in Minneapolis. So -- but, we have
10 said no. It is not a matter of technology. It is a
11 matter of case management.

12 Anybody have a strong view that we ought to
13 be opening this up?

14 MR. PRATT: I continue to believe on the
15 defense side, Your Honor, that we should keep it the way
16 it is. There are issues even on the technology side
17 that sort of makes it a little problematic to include,
18 you know, sort of an open feed into this. And I
19 continue to prefer to do it the way we are doing it and
20 leave it at that.

21 MR. ARSENAULT: Judge, this is Arsenault. It
22 seems like the transcript does provide a safety net.
23 People can obviously read that much quicker than they
24 can sit through the conference call if they are
25 participating by phone. And it seems inevitably every

1 time that happens, there is some kind of glitch or some
2 kind of feedback. I don't mean to speak for the rest of
3 the Executive Committee, but I think the transcripts
4 seem to do the trick.

5 THE HONORABLE JUDGE FRANK: Quickly, I am
6 going to call Judge Leary just to chat with him, not on
7 any particular issue on the case, but just to make sure
8 he is aware, which he already is, that both Judge Boylan
9 and I are available, whether it is to meet, to chat, or
10 to coordinate.

11 Is there anything from either side of the
12 aisle for any of the Plaintiffs or Defendant that you
13 want us to pass on, or anything that you were hoping
14 that we could do or you would like us to do with respect
15 to the state cases here in Minnesota?

16 MR. ZIMMERMAN: In that regard, Judge -- this
17 is Bucky Zimmerman. I plan on attending, I know Tim is
18 attending for the Defense. So, I think they will have
19 the voice of the MDL in the courtroom. And if anything
20 does come up, we can certainly bring it back to you.

21 I hate to -- I don't know what is on the
22 agenda, specifically, in front of Judge Leary, and I
23 don't even know what procedure has occurred in terms of
24 -- I know he want to coordinate discovery, but if there
25 are any outstanding issues at this point. But, we will

1 be there in real time and I think we will be able to
2 report to you the next day or two days later what, if
3 anything, has occurred, and what, if any, problems have
4 arisen. I just can't predict at this point.

5 MR. PRICE: This is Joe Price. There is a
6 pretty extensive agenda. The Court set an agenda and
7 sought input from the parties. I believe that we sent a
8 letter to the Judge, adding and expanding on some of the
9 agenda items. I don't think we received anything back
10 from some of the Minnesota Plaintiffs.

11 THE HONORABLE JUDGE FRANK: Well, we will
12 just probably make the call and let them know that if we
13 can be of help, as long as we are not trying to
14 interfere with his work, and I know he doesn't want to
15 interfere with what we are doing, but he has read all of
16 the Orders in our case, he tells us.

17 So, we will just probably ring him up and
18 just indicate that if there is something that will be
19 helpful on either side of the aisle that we are
20 available. So --

21 MR. ZIMMERMAN: Very good.

22 THE HONORABLE JUDGE FRANK: One other thing,
23 and I am going to go off the record. And then if you
24 want this on the record, we will put it on.

25 (Discussion off the record.)

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THE HONORABLE JUDGE FRANK: Okay, thank you.

THE HONORABLE MAGISTRATE JUDGE BOYLAN: Thank
you.

ALL COUNSEL: Thank you.

(Adjournment.)

Certified by: _____

Jeanne M. Anderson, RMR-RPR
Official Court Reporter