

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

3

4 -----

5

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

6

)

GUIDANT CORPORATION) STATUS CONFERENCE

7

IMPLANTABLE DEFIBRILLATOR)

PRODUCTS LIABILITY)

8

LITIGATION,)

9 -----

10

)

This Document Relates)

11

To All Actions) 9:15 o'clock, a.m.

) October 26, 2006

12

) St. Paul, Minnesota

13 -----

14

15

16

THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN

17

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

18

CIVIL STATUS CONFERENCE PROCEEDINGS

19

20

21

* * *

22

23

JEANNE M. ANDERSON

24

Registered Merit Reporter

Suite 646, 316 North Robert Street

25

St. Paul, Minnesota 55101

(651) 848-1221

1 APPEARANCES :

2

3 LEAD PLAINTIFF COUNSEL :

4

5

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

6

7

8

And

9

10

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

11

12

13

14

And

15

16

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

17

18

19

And

20

21

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

22

23

24

25

1 APPEARANCES (Continued):

2

3 PLAINTIFF LIAISON COUNSEL:

4

5

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

6

7

8

9

* * *

10

11 FOR THE PLAINTIFFS:

Ronald Goldser, Esq.
Robert R. Hopper, Esq.
Zimmerman Reed
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402-4123
(612) 341-0400

12

13

14

15

And

16

17

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

18

19

20

21

And

22

23

Gale D. Pearson, Esq.
Pearson, Randall & Schumacher, PA
400 S. 4th Street, Suite 1012
Minneapolis, MN 55415
(612) 332-0351

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES (Continued):

FOR THE PLAINTIFFS:

Daniel E. Becnel, Jr., Esq.
The Law Offices of
Daniel E. Becnel, Jr.
106 W. 7th Street
P.O. Drawer H
Reserve, LA 70084
(985) 536-1186

And

Nicholas J. Drakulich, Esq.
Jennings & Drakulich LLP
2002 Jimmy Durante Boulevard
Suite 400
Del Mar, California 92014
(858) 755-5887

1 APPEARANCES (Continued):

2

3 LEAD DEFENDANT COUNSEL:

4

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

7

8

9

LIAISON DEFENDANT COUNSEL:

10

11

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

12

13

14

15

16

* * *

17

18

FOR THE DEFENDANT:

19

20

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

21

22

23

24

25

1 (In open court.)

2 THE COURT: This is the matter of Guidant
3 Corporation MDL-1708. We have several matters on the
4 Court's calendar this morning for this status conference
5 that is scheduled on October 26th.

6 I wonder whether or not Mr. Pratt and Mr.
7 Zimmerman, perhaps, or others, might want to take the
8 podium for purposes of addressing the Court as to the
9 matters on the joint agenda submitted by the parties.

10 MR. ZIMMERMAN: Thank you, Your Honor. May
11 it please the Court? I am Charles Zimmerman for the
12 Plaintiffs' Steering Committee. We have provided the
13 Court with a joint agenda for today's status conference
14 and we had a pretrial, a pre-hearing conference with
15 Your Honor and Judge Frank this morning that just
16 concluded.

17 What we will do today is we will go through
18 the ten-point agenda. Many of the items we will talk
19 about as being deferred or moved into a meet and confer
20 status of some kind. And any matters that are on the
21 agenda that we haven't reached agreement on or we need
22 to vent or argue before the Court, we will as they come
23 up. But, many of the items are going to be moved into
24 that deferral mode.

25 So, unless you want to change the

1 introduction, the first matter on the agenda is status
2 of cases filed in Federal Court and transferred into the
3 MDL. Contained within that, I think, is also a status
4 of State Court litigation that Mr. Pratt can give us, as
5 well, and then I will comment.

6 MR. PRATT: Good morning, Your Honor, Tim
7 Pratt, Lead Counsel for the Defendants. The number of
8 cases now pending before this Court in the MDL are 685.
9 There have been a total of 18 conditional transfer
10 orders. There are 54 cases pending MDL transfers, so
11 that would get us up into the 750 range when that is
12 accomplished. We have presently 84 State Court cases.
13 The bulk of those are in Minneapolis in the consolidated
14 proceedings pending before Judge Leary in Ramsey County,
15 but there are several of them sort of spread out around
16 the country, as well.

17 THE COURT: Okay, thank you. Number two,
18 discovery status?

19 MR. PRATT: I think, Your Honor, with respect
20 to number 2, it is a matter that we are going to
21 continue to discuss. We have had some discussions with
22 the Plaintiffs' Steering Committee on some electronic
23 discovery issues, with reference as well to the
24 Defendant fact sheets and device testing status. I
25 don't know if there is anything to raise toward Your

1 Honor in that regard.

2 MR. ZIMMERMAN: I think there was an issue on
3 the device testing that had to do with the results. And
4 I think we didn't talk about it in chambers, but I think
5 Ron Goldser was going to discuss one of the issues and
6 then you guys can respond.

7 MR. GOLDSER: Good morning, Your Honor. Ron
8 Goldser for Plaintiffs. We have been working on an
9 exchange of the devices. Pretrial Order 15 requires
10 Plaintiffs to turn in their devices. They come to our
11 office. We then take them over to Faegre & Benson every
12 two weeks. That process seems to have been working
13 reasonably well so far. Today we have a total of 68
14 devices that have come in and been tested.

15 My understanding is that Guidant comes in
16 with their equipment, they do the testing, but we have
17 not been getting the results of that testing yet. And
18 we have not worked out a particular protocol for that,
19 but it doesn't seem to me to be a particularly difficult
20 thing for them to turn over the results of that testing.

21 I know we have gotten some materials in the
22 representative trial cases from that. I'm not clear on
23 whether we have gotten it all. Certainly, in those
24 cases, we need to get reassurance that we have received
25 all of the testing results of the representative trial

1 cases. But, I know hearing from the lawyers in the
2 field, they want to start getting the results from the
3 testing of their devices so they know how to proceed in
4 their cases, whether they have to retain their own
5 experts, do their own testing, the legitimacy of their
6 claims, whether Guidant is making admissions or what
7 have you. Those are the issues.

8 MR. CARPENTER: Your Honor, if I could
9 respond briefly? Andrew Carpenter, here.

10 THE COURT: Sure.

11 MR. CARPENTER: I am not exactly sure what
12 Mr. Goldser's concern about device data testing is.
13 When devices are brought in to Faegre & Benson pursuant
14 to Pretrial Order 15, we test the devices and promptly
15 provide the results of that testing to Plaintiffs'
16 counsel. There has been some discussions about what
17 format they would like it in, what type of results they
18 would like, and we can accommodate that. Those are
19 ongoing. I think actually proposed PTO 15A addresses
20 that in an ongoing basis.

21 We have been turning around test results very
22 quickly, about one to two weeks or so. I haven't heard
23 a lot of complaints about that, so I am at a little bit
24 of a loss somewhat as to what Plaintiffs' specific
25 complaint is. I am always willing to listen to it, and

1 give results in a manner that is most easy to read or
2 useful to Plaintiffs, but I'm not quite sure what the
3 problem is, so --

4 THE COURT: So it sounds as those that is
5 something that should be fleshed out between a meet and
6 confer with the attorneys and I will presume it that is
7 going to happen.

8 MR. GOLDSER: It will.

9 THE COURT: Number 3?

10 MR. ZIMMERMAN: Your Honor, I just want to
11 have Seth Lesser give a report on the status of
12 electronic discovery.

13 THE COURT: Sure, Mr. Lesser?

14 MR. LESSER: Yes, since this has been a
15 significant issue and this is probably the most
16 important discovery issue at the moment in terms of the
17 discovery of the Defendants. What has happened since we
18 last met and last reported, there have been extensive
19 meet and confers, and meet and confers with the
20 technical people on both sides. And we have come up
21 with, in essence, a test manner which has been agreed
22 upon, I believe, in all respects to this point, Silvija?

23 MS. STRIKIS: That is my understanding.

24 MR. LESSER: And we hope by the next status
25 conference we will be able to tell you whether or not we

1 were successful or not. If we are unsuccessful, there
2 will probably be motions to compel and the like coming,
3 but otherwise we did manage to meet and confer and get
4 somewhere.

5 THE COURT: All right, great. Thank you.

6 MR. CARPENTER: Can I just add to what Mr.
7 Lesser said?

8 THE COURT: Sure.

9 MR. CARPENTER: That is accurate our
10 technical people have been in close consultation with
11 each other, and right now we are running searches across
12 our e-mail servers using search terms provided to us by
13 Plaintiffs' counsel. We are going to see what we get,
14 and depending on what happens, that may or may not
15 obviate the back-up tape issue or additional e-mail
16 server issues. And we will see what happens and take it
17 from there.

18 THE COURT: Okay, thank you. That being
19 said, number three, proposed PTO-15A, we have addressed
20 that a little bit already.

21 MR. ZIMMERMAN: We did discuss that, Your
22 Honor. We are going to meet and confer on these
23 processes. The idea here is that we are looking at the
24 idea of streamlining the Plaintiff fact sheet and the
25 failure to adequately provide Plaintiff fact sheet

1 process. We are looking at the possibilities of
2 amending those processes. And we are going to have --
3 we have had some meet and confers. We have not reached
4 agreement, yet. We are going to have some more.
5 Hopefully we are going to have this resolved by the next
6 status conference, and if not, we will have the issues
7 to be submitted and then a decision made by the Court.

8 MR. PRATT: Yes, Your Honor. Item number
9 three deals with the Pretrial Order 15A. It relates
10 specifically to the question of how we are going to
11 handle the Plaintiffs' device testing on an ongoing
12 basis. I think it involves some refinements. I think
13 we can probably reach an agreement and deal with Mr.
14 Goldser's points and deal with -- one of the issues,
15 frankly, is maybe moving the site of the testing. It is
16 a little cumbersome for us to take our equipment to
17 Faegre. We may want to do it at Guidant Headquarters,
18 but I think we can work those out.

19 THE COURT: Okay. Sounds great. Number 4?
20 Anything either of you would like to say to that?

21 MR. LESSER: Number 4, Your Honor, relates,
22 actually, to really 5A and 6. And these are all points
23 which are fundamentally the same point. And it is that
24 the parties are going to try to meet -- and we have had
25 some discussion, we have agreed to push off some of the

1 previously ordered dates on the trial schedule. For
2 example, the Plaintiffs' experts, instead of being due
3 next week, will now be due 30 days thereafter. We are
4 going to roll the reports out. In the meantime,
5 basically the two sides are going to meet and we will
6 report back to you on what we believe will be a full new
7 schedule.

8 THE COURT: Okay, sounds great. Anything you
9 want to add to that, Mr. Pratt?

10 MR. PRATT: Not really on anything there,
11 Your Honor, it sort of, as Mr. Lesser said, kicks into
12 item number 5, which is a representative trial process
13 update. We have discussed that at length this morning.
14 We are setting up a process to do a meet and confer on
15 the several issues that we have mutually raised with
16 respect to the bellwether trial process. So, I'm not
17 sure there is anything with respect to number 5 that
18 becomes a critically important issue, because we have
19 agreed to resolve that or tried to resolve it by a meet
20 and confer process.

21 THE COURT: All right.

22 MR. ZIMMERMAN: All I would like to say on
23 that, Your Honor, is that we are really working on
24 making this process of representative trials meaningful
25 to all of the parties, Plaintiff, Defendant, the Court

1 and the people whose cases are awaiting resolution. So,
2 we are going to really put our heads together and make
3 sure that the process has meaning. And I think it is
4 going to take some time to sit around and discuss it
5 through the efforts and the good offices of the Court.
6 And we appreciate that the Court is going to schedule us
7 some time in the near future to do that so we don't
8 waste any time in bringing this process to a head.

9 THE COURT: Okay. Mr. Pratt, in reference to
10 the Harkonen case, we spoke this morning about receiving
11 some written argument from Plaintiffs concerning their
12 view of that. And you responded, I think, that you
13 would like to supply the Court with something in
14 writing. Can you do so within two weeks?

15 MR. PRATT: Um.

16 THE COURT: I know this is also part of a
17 broader topic, but on that particular issue, that was
18 the bellwether or the representative trial cases that
19 were being reduced to a --

20 MR. PRATT: I think the issue of Harkonen is
21 swept up into several of the other issues. I think the
22 issue is whether we want to submit something in writing
23 dealing with the whole spectrum of issues, or whether we
24 just want to reserve it for the representative trials.
25 I don't know that there is an urgent need to deal with

1 Harkonen in a writing process particularly and separate
2 from the rest of them.

3 THE COURT: All right. Sounds great. Number
4 6?

5 MR. BECNEL: Excuse me. Judge Boylan?

6 THE COURT: Yes?

7 MR. BECNEL: Last week --

8 THE COURT: Dan, why don't you identify
9 yourself?

10 MR. BECNEL: Oh, Daniel Becnel. I understood
11 that the MDL hearing that Judge Frank didn't go to, but
12 I think Judge Rosenbaum did, they had lengthy
13 discussions about how they were going to do or recommend
14 as an expediting manner, rather than one trial at a
15 time, one individual at a time, maybe multiples.

16 And, you know, we don't know what they came
17 up with. Judge Rosenbaum may have a lot of insight into
18 that that might help you and Judge Frank, only because
19 Judge Frank couldn't go, that would help us all in these
20 discussions, because they might have a new method of how
21 we are going to do this in MDL's now. And if so, maybe
22 we can all get a report of what they discussed that may
23 be better than doing one trial at a time. And I only
24 bring that up because none of us really know.

25 THE COURT: Okay. With that being said,

1 number 6?

2 MR. ZIMMERMAN: I believe that is caught up
3 in number 5 and it is going to be part of our meet and
4 confer and discuss and try and work out the entire
5 representative program as it is really going to unfold
6 in real time. And I don't know --

7 THE COURT: I think that is true as to number
8 7, as well.

9 MR. ZIMMERMAN: And I think that is just --

10 MR. PRATT: Six is the schedule.

11 MR. ZIMMERMAN: Except I think Ron had a
12 point that you wanted to raise about a provision for
13 1861 --

14 MR. GOLDSER: We have requested that we
15 receive an exemplar device, and I think Mr. Carpenter
16 has acquiesced in providing that to us so that we'll be
17 getting one of those in short order.

18 MR. ZIMMERMAN: Here is the issue. We just
19 need one of the devices. And that was just a request
20 contained within this whole process. And if there has
21 been agreement on it, I don't think we need to manage it
22 any further.

23 THE COURT: Mr. Pratt, on that issue?

24 MR. PRATT: Well, I think 6 and 7 both are
25 swept up into the meet and confer process. I think the

1 issue of the exemplar device is very much a trial issue.
2 I mean, can they have one to show at trial? I think
3 that and a number of other issues can be resolved, I am
4 sure, by agreement.

5 THE COURT: Number 8?

6 MR. LESSER: This number -- did we skip 7?

7 MR. ZIMMERMAN: Yeah.

8 MR. LESSER: Okay, we will put 7 aside.
9 Number 8 is simply, I think, for informational purposes,
10 on September 29th Plaintiffs sent a letter to Defendants
11 attaching a list of documents which Plaintiffs believe
12 should be no longer covered by the confidentiality
13 order -- the protective order in the case, believing
14 them not to be protected documents, and a motion is
15 coming, we met and conferred and didn't agree, and so a
16 motion will be forthcoming on that.

17 THE COURT: Okay.

18 MR. PRATT: The comment I would make with
19 respect to number 8 is this, Your Honor. It really
20 isn't up for discussion, essentially, they say simply,
21 it is there to tell you that something is coming.

22 They provided us a list of documents. We
23 went through them. It takes time to do that. We
24 designated certain documents as confidential. Since
25 they told you what they are going to do, I will tell you

1 my point, when it comes. And that is, we have an
2 enormous amount of work to do in this litigation. And
3 the battle over confidentiality is one that I would urge
4 the Court to avoid engaging in right now. It takes a
5 tremendous amount of resources.

6 Any of these documents can be used by these
7 lawyers for any purpose on the planet to advance or try
8 to advance their clients' cases. I think we will start
9 getting into a battle over whether this document can be
10 D-designated as confidential or not, I think eats
11 significantly into valuable resources that we can
12 otherwise spend towards getting these cases ready for
13 representative trials. That is just my view, so that is
14 a head note of what I am going to be saying if they file
15 a motion. I think we will continue to talk about
16 whether they really want to tee it up for discussion
17 with the Court or whether there is a way we can kind of
18 solve it through a meet and confer process.

19 THE COURT: Number 9?

20 MR. ZIMMERMAN: That is Defendant's issues
21 about Plaintiffs' fact sheets.

22 MR. CARPENTER: Your Honor, that is an order
23 that we submitted, and also submitted a little bit of a
24 statement in our statement of disputed issues, in which
25 we propose a system that is very similar to that adopted

1 in the PPA Litigation and affirmed by the Ninth Circuit.
2 It gives a little more certainty, a little more
3 structure, a little more notice as to what is required
4 with Plaintiffs' fact sheets when we move to dismiss
5 them when an order to show cause is required.

6 I think this Court has been very clear on the
7 deadlines so far, still there appears to be some level
8 of confusion out there because the results are not
9 coming in. This is our effort to try and get even more
10 structure and certainty. And it would avoid a lot of
11 letter writing, avoid a lot of motion practice. If the
12 Court looks at what has happened in prior cases, Harvey,
13 DeRose, Daydos, there has been a lot of collateral
14 motion practice and litigation that doesn't benefit
15 anybody.

16 Based on our conference in chambers, I
17 understand Plaintiffs are now interested in developing a
18 counter proposal, as it were, to proposed Pretrial Order
19 24. We are going to entertain that.

20 THE COURT: Okay. Anything else you want to
21 add on that, Mr. Zimmerman?

22 MR. ZIMMERMAN: The only thing I wanted to
23 add, Your Honor, just a heads-up. You are going to
24 start hearing now about Defendant fact sheets. I
25 believe they are due very shortly, and it is just a

1 heads-up that that issue is going to be front and
2 center, because I think starting next week or the
3 following week the Defendant fact sheets are due and we
4 are going to have a whole round of discussion with
5 regard to Mr. Defendant's facts sheets, completion, due
6 dates, things like that. And there is nothing I want to
7 argue with that at all, it is just a heads-up the other
8 side of that coin is now going to be turned.

9 THE COURT: Okay, number 10?

10 MR. CARPENTER: Your Honor, number 10 is
11 another proposed Pretrial Order we had submitted, and
12 also mentioned in our statement of disputed issues. It
13 is a proposed pretrial order providing for severance of
14 improperly joined cases. There are several that aren't
15 class actions or consolidated properly. We would just
16 ask the Court to take a look at that and consider what
17 it wants to do with that.

18 THE COURT: Mr. Zimmerman, anything you
19 wanted to add, or Mr. Lesser?

20 MR. LESSER: Sorry. I think on this, also,
21 Plaintiffs will probably wish to be able to take a
22 position and let the Court know on it, because we hadn't
23 seen this well in advance. Certainly we don't agree
24 with this improper joinder at all. In part, for
25 instance buried in it is essentially something that

1 rewrites the short-form complaint and puts new burdens
2 on Plaintiffs when they file cases. So, we are not
3 going to be agreeing on this and we may have a counter
4 proposal, but we certainly wish to be heard more fully.

5 THE COURT: Anything further that either
6 party wants to bring to my attention?

7 MR. ZIMMERMAN: Anybody have anything? No,
8 Your Honor, I think that concludes the matters on the
9 agenda and the matters that are before the Court at this
10 time.

11 We have a few scheduling things to discuss.
12 The next status conference, I believe, has been set for
13 November 29th, with the 8:00 conference, and the 9:15 in
14 the courtroom. And I believe it is going to be set for
15 St. Paul unless you and the Judge decide to move it to
16 another location.

17 And then we have some other meetings that we
18 are going to discuss the representative trial plan that
19 I think we are going to meet with Your Honor this
20 morning after this meeting to nail down some dates to
21 have those in-person meetings.

22 THE COURT: Okay, sounds good.

23 MR. PRATT: Nothing more from the Defense
24 side, Your Honor.

25 MR. LESSER: I think there is actually one

1 other issue, which is related -- the last thing on your
2 issue statement, Tim, which is the -- Seth Lesser, Your
3 Honor.

4 There is a dispute between the two sides on
5 written discovery that has been propounded on the
6 proposed cases for trial. And there are two issues.
7 From the Plaintiffs' perspective, this is entirely
8 utterly duplicative of information that has been
9 obtained through the Plaintiffs' fact sheets and the
10 depositions that have already been taken, and otherwise.
11 In addition, the Defendants not only believe it is
12 proper discovery, but are taking the position that it
13 should be completed on an expedited basis, 20 days
14 instead of the full 30. And maybe we can discuss it
15 further, but it needs to be flagged, because it may be
16 coming back to Your Honor in short order if we don't
17 reach agreement.

18 MR. PRATT: It is not duplicative, because we
19 tried to get new information from them. These cases are
20 coming up for trial. I think we certainly have a right
21 to serve written discovery, just as they have a right to
22 complain they don't want to respond to written
23 discovery. So, they haven't filed a motion that is up
24 for discussion today. If they want to fight it out, we
25 would be glad to fight it out. If they want to try to

1 resolve it by agreement, we will try to do that. I
2 think it is a bit premature right now. We just filed
3 it. It is information we need, we are entitled to, and
4 we would like to get it.

5 THE COURT: Okay, thank you. We are in
6 recess.

7 (Adjournment.)

8

9

10 Certified by: _____

11 Jeanne M. Anderson, RMR-RPR
12 Official Court Reporter

13

14

15

16

17

18

19

20

21

22

23

24

25