

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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To All Actions) 9:45 o'clock, a.m.

) November 29, 2006

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) St. Paul, Minnesota

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THE HONORABLE JUDGE DONOVAN W. FRANK

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UNITED STATES DISTRICT COURT JUDGE

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STATUS CONFERENCE PROCEEDINGS

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1 (In open court.)

2 THE COURT: You may be seated. Thank you
3 very much.

4 We can set a hearing date for sanctions on
5 the Judge setting a hearing for 9:15. And we can set it
6 for the next date because our next meeting will be, to
7 coordinate with Medtronic and some other cases in due
8 regard to the holiday time, will be December 20th. And
9 the 8:00 version of the meeting will be at 2:00 in
10 Minneapolis, not here, 15th floor. And then the
11 courtroom get-together will be at 3:00, that is on the
12 20th of December. Because I think many of the lawyers
13 will be in town for a couple of different reasons.

14 Not that there is really any legitimate
15 reason, but I will just make a short note, before we go
16 down the agenda, my apology for starting late, because
17 it was primarily my doing in filing an order setting all
18 of the trials that the order came out yesterday. And
19 so, much of the discussion was by myself and Judge
20 Boylan.

21 Judge Boylan will not be joining us for the
22 conference with my permission. He has some other things
23 to attend to. But, as the lawyers that were in the
24 conference this morning at 8:00 or since 8:00, he was
25 there. And much of the time was spent on the

1 representative trial process and the fact that we will
2 be starting to try these cases back to back in June or
3 July of this next year.

4 We said July 16th, and it is accurate to say
5 that we might be persuaded to -- we talked about June
6 and out and the order may well be tweaked, for lack of a
7 better word. But, that really is the -- where our focus
8 was, in large part because of the remarks of Judge
9 Boylan and myself.

10 And that order was not as of early this
11 morning on the website. The lawyers got it yesterday
12 afternoon. It should be out, if not right at this
13 moment, before the afternoon or morning is out, setting
14 up by case name, date and day certain dates for the five
15 representative trials. Plaintiff has asked for six to
16 be set.

17 So, I think if the lawyers in the audience
18 want to know some of the particulars about other
19 options, given the time frame of deadlines that have
20 been set forth in that order that was filed yesterday,
21 they can probably impart that knowledge to you on what
22 other options may be available from either the
23 Plaintiffs' side of the aisle or the Defendants'.

24 With that, in addition to introducing,
25 assuming everybody has a general knowledge of who is

1 involved in the case, the person closest to you sitting
2 up at the Bench with me, Amy Gernon, you have met
3 before. She is one my law clerks. And a new law clerk,
4 Danielle Mair, sitting next to her, so you may be seeing
5 her from time to time.

6 And to the extent that many of you have met
7 last year, at the end of last year, Laura Johnson, who
8 job shares one clerkship with Amy Gernon, even though
9 Amy is full-time now, that will go back to the share
10 mode in the third week in January. So, if you see one,
11 two, or three individuals, that is the reason why.

12 With that, I think we can move down the
13 agenda. We can begin with the Plaintiffs and leave time
14 at the end for anyone in the audience who wants to be
15 heard. Mr. Zimmerman?

16 MR. ZIMMERMAN: If it please the Court? Good
17 morning, Your Honor, and Counsel. We have filed an
18 agenda with the Court and it was posted on the website
19 and electronically filed. It is called and titled joint
20 agenda for the status of November 29. We will go
21 through them, 1 through 6, which are the agenda items.
22 But, a number of the items are contained at number 5,
23 which are issues raised in the Court's November 17, 2006
24 letter. And that contains seven or eight -- excuse me,
25 12 questions that the Court asked about the status of

1 matters. And then we each filed written responses with
2 Your Honor with regard to those open questions that the
3 Court asked, those referenced to 5.

4 THE COURT: And maybe in fairness to both of
5 the lawyers that are on the committees and the people in
6 the courtroom, we sent out, my chambers sent out a
7 letter over my signature just to try to inventory every
8 issue, just to make sure that there are -- what motions
9 are pending, what issues are either resolved or not
10 resolved, just as we move in, now, some of the deadlines
11 will be coming up as we move into motions, both
12 dispositive, nondispositive, as discovery will begin to
13 conclude in such a way that we can get to some of these
14 issues. And so that was the purpose of the letter. And
15 what you say is exactly right, both of you have
16 responded. And we have discussed those, in part. But,
17 go right on ahead.

18 MR. ZIMMERMAN: Thank you, Your Honor. And
19 also, just for the record, as you said there is Pretrial
20 Order 25, which I believe was issued yesterday, which
21 addresses all of the representative or bellwether cases
22 in a comprehensive schedule for not just the trial, but
23 all of the pretrial matters including deadlines for fact
24 discovery, expert disclosure, due dates, dispositive
25 motions, including Daubert and the pretrial conferences.

1 I am not going to go over that in detail, but it is
2 available as PTO 25. And it is a comprehensive order
3 that outlines for all of the parties to understand what
4 the Court's thinking is and what the directives are with
5 regard to trial start, length of trial, which is going
6 to be limited, and scheduling.

7 We can go into that a little bit on the
8 record when we get to it on the agenda if the Court
9 chooses, but I am just matter-of-factly that we
10 reference it so people know they can take a look at it
11 and it's out for everyone to reference.

12 So, to begin, Your Honor, which is the
13 historical beginning of our status conference, which is
14 the status of cases filed in Federal Court and
15 transferred to the MDL, and then status of State Court
16 proceedings. And Mr. Pratt has that information and he
17 will provide it to the Court on the record.

18 THE COURT: All right, thank you.

19 MR. PRATT: Good morning, Your Honor. Tim
20 Pratt, lead counsel for Guidant. I am here with Andy
21 Carpenter, my partner, and Joe Price liaison counsel for
22 the Defendants.

23 There are 855 cases in Federal Court. 819
24 have been transferred to your jurisdiction here and are
25 on your docket. 36 of them are still with the Judicial

1 Panel, pending transfer here. So, of those 36, there's
2 some oppositions that have been filed. And whether they
3 are successful or not, historically they have not been
4 very successful in preventing transfers, Your Honor.
5 So, we have 819 here, hopefully 36 on their way. There
6 are a total of 77 State Court cases pending against
7 Guidant involving these products. Some of those are
8 targets, A appropriate targets for removal. And we will
9 take those necessary steps. So, that is about where
10 things stand at the present time.

11 THE COURT: All right.

12 MR. ZIMMERMAN: Next item, Your Honor, is the
13 report on the representative trial process, and parties'
14 letters of the same.

15 If I might just explain? The Court asked us
16 to provide letters to Your Honor, which I think were due
17 Monday of this week, where each side, the PSC and the
18 Defense took positions with regard to how we should
19 stage the representative trial process, what the
20 deadlines should be, how they might be grouped, how we
21 might use summary jury trial procedures, and other
22 procedures to get through the representative trial
23 process.

24 The Court then issued PTO 25 yesterday which
25 I have earlier referenced. It is an important order.

1 It is an order that is very clear on its face as to what
2 the Court expects. And the parties will certainly be
3 complying with it. I think for purposes of open court
4 discussion, I might just make a couple of brief
5 comments, and then maybe the Defense or the Court wants
6 to make others just so people know.

7 THE COURT: All right.

8 MR. ZIMMERMAN: I think the important thing
9 is the trial of the Duron case, which is an explant
10 without complications was selected by the Court to be
11 the first trial. And that will begin on July 16th,
12 2007.

13 There was a discussion as to where it would
14 take place. The Court Order says St. Paul.

15 THE COURT: It will probably be Minneapolis.
16 I was a little territorial in the Order, but I think if
17 there is more than a handful of folks, that and the
18 subsequent trials that will follow each month, that I
19 think you can assume they will all be in Minneapolis.

20 MR. ZIMMERMAN: Yes, and we understand that.
21 And then the Court, based upon the submissions, said
22 that the Court wishes to conduct the trial in no more
23 than eight days.

24 Now, the Court also said they want input from
25 the parties and some discussion to make sure that that

1 is adequate, reasonable and appropriate. We have agreed
2 to meet and confer and discuss that in greater detail.
3 But, those are our working orders at this point is we
4 should limit this trial to an eight-day trial if humanly
5 possible, but give feedback to the Court if really six
6 is more appropriate or 11 might be more appropriate.

7 THE COURT: Well, I will be the first to
8 admit, and it was discussed this morning, that I have
9 given day certain -- these aren't trial ready dates,
10 these are dates we are going to be trying each of these
11 cases. And I will say more about that before we are
12 done here, because it was not to suggest that there was
13 an agreement on which cases go first, or whether we
14 should try a group together, because that is the issue
15 the Plaintiffs have raised.

16 But, I have set five cases and I acknowledge
17 today that I have given "date certainties" for each month
18 to follow, five back to back cases, that obviously, if
19 the trials are eight days or less, we will be trying one
20 case a month for five months, unless we add a sixth case
21 and then we will try six, one a month.

22 And obviously, there's going to be issues
23 raised by both of you. But, I will be the first to
24 acknowledge, if we come to either an agreement or Court
25 decision, that eight days is unrealistic, and that it is

1 going to be closer to three or four weeks for a trial,
2 which I frankly think is highly unlikely, unless we
3 would join a group of Plaintiffs, which I have declined
4 to do, up until now. Then that schedule is reasonable.
5 And I think obviously the expectation is you will all be
6 discussing it. Not to suggest we are all in agreement
7 that if a trial takes eight days or less, it is not an
8 aggressive schedule to try one a month, but that is what
9 we are going to do, absent some compelling circumstance.

10 But, my admission, that if one or more of
11 these trials is significantly more than eight days, it
12 may be unfair to lots of people, even if not to the
13 Court, to expect people to go. Because I have given
14 that -- I haven't said month to month, I have given
15 specific dates. If anybody has read the order, I have
16 given specific dates and specific times for each case,
17 for each month. In other words, these aren't backed up,
18 they are just -- here is the day we start in July,
19 August, September, October, November.

20 So, obviously, as we focus in on what
21 discovery remains on these cases -- but the deadlines we
22 have established with your input -- we will see how
23 realistic I have been. So, I just want to make sure
24 that I am not indifferent to the length of the trial.
25 But, that is where we are going to start and use as a

1 standard until I am convinced otherwise.

2 MR. ZIMMERMAN: And then, Your Honor,
3 contained also within the order was a scheduling order
4 which I referenced earlier for fact discovery closing
5 plaintiff's disclosure of experts, and dispositive
6 motions and the like. I am not going to read the entire
7 order into the record, but the Court said no later than
8 dates for the scheduling of all of these reports and
9 motions.

10 Then the Court also set a date for the final
11 pretrial conference to prepare for the July 17th -- 16th
12 trial for July 9th before Your Honor at 9:00 a.m..

13 Further in the order Your Honor set trial
14 submissions, which are either going to be by e-file or
15 e-mail or both, and gave specific dates for statements
16 of case, exhibit lists, witness lists, list of
17 testimony, deposition testimony, motions in limine,
18 joint statement of case, proposed voir dire questions,
19 proposed jury instructions, and proposed jury forms:
20 Those were also submitted at no later than dates and how
21 they are to be filed with the Court and what they are to
22 include so it is a very comprehensive set of submissions
23 that the Court has requested of counsel.

24 THE COURT: And to the extent it is relevant,
25 much of that, the Pretrial Order on trial submissions,

1 is the order that many of us use, at least in the
2 District and this -- in the Federal Court here for all
3 civil trials. It bears much resemblance to the order
4 most of us use in every major civil case. So --

5 MR. ZIMMERMAN: Thank you. The next
6 important item in the order was the subsequent trials
7 which the Court just hit upon, touched upon, but the
8 Court actually set the order of the next cases, as the
9 Duron case is first, and then the Clasby case, which is
10 an explant with complications to commence on August
11 13th, 2007. The Braund case, another explant without
12 complication case on September 10th, 2007. The Beranek
13 case, which is a non-explant psychological injury on
14 October 9th, 2007. And the Valls, a non-explant
15 psychological injury on November 5, 2007.

16 And understanding the caveat that the Court
17 just provided with regard to the hope of being able to
18 get these in within that eight-day time frame, if that
19 would hold, then this set of trials subsequent down the
20 road through November was also set by the Court.

21 The Court did indicate that there may be some
22 grouping of those cases if in the wisdom of the Court it
23 became appropriate at a later date, but made no ruling
24 and made no promises with regard to the grouping of the
25 cases.

1 THE COURT: And I think it would be accurate
2 to say that Plaintiffs for some time have suggested that
3 maybe we go take a closer look at that. And Guidant has
4 opposed that, at least up until now. And reflected in
5 this order, which I think was consistent with my earlier
6 remarks to counsel in chambers the last few months, I
7 think the phrase I used was: I think it is a long way
8 home to put them all together.

9 But, I should also say in fairness to both
10 parties, you have come up with some creative suggestions
11 in light of my order, and still honor these dates. So,
12 time will tell.

13 MR. ZIMMERMAN: And subsequent to our meeting
14 in chambers, Mr. Pratt and I conferred informally. And
15 we have agreed again to meet and confer and talk about
16 the trial plan, what we really see as being the trial,
17 how long we think it might take and we have agreed to
18 put our heads together and try and come up with an
19 agreement on all this so we can hold steadfast to this
20 or provide our thoughts to the Court in subsequent
21 status conferences. That is really the sum and
22 substance of the Pretrial Order. There is more
23 contained within here and I don't mean to slight any of
24 it, but I am just trying to summarize sort of the major
25 points because originally we thought we would be

1 debating some of this in open court. Because the Court
2 has now issued its ruling based upon the submissions, it
3 is now a part of PTO 25.

4 THE COURT: Well, and I will say in the event
5 Mr. Carpenter and Mr. Pratt, we will see if they have
6 anything they wish to say, but no one should assume -- I
7 certainly don't -- that silence of any lawyer from
8 either side of the aisle on some part of my order means
9 agreement to how I came up with the order, because your
10 submissions you have each made speak for themselves on
11 what you have requested and how you want some of these
12 cases rolled out and in what order. So, those are a
13 matter of record. And so, silence is not acquiescence,
14 understandably so.

15 MR. ZIMMERMAN: Understood, Your Honor. Mr.
16 Pratt, I don't know if you have any comments at this
17 time. Or if you want someone to keep going?

18 MR. PRATT: I would make this observation,
19 Judge. As I explained to you in the informal
20 conference, this is an ambitious schedule. There is no
21 question about trying cases in five months challenges
22 the trial lawyer skills of anybody.

23 It is going to take a high degree of
24 cooperation, I will tell you that. There is a
25 significant amount of discovery that the Plaintiffs'

1 Steering Committee is still pursuing against Guidant.

2 Guidant now has five cases to get ready for
3 trial in what I would represent from my standpoint to be
4 a relatively short period of time. We are going to keep
5 you attuned to problems that we have, if any, to
6 accomplish the discovery that we need to get done before
7 the first case is set for trial.

8 Clearly, the focus now is going to be the
9 July 16 trial in Duron. That is fine. You said all
10 along in this MDL you want to set cases for trial, you
11 want to do bellwethers. We sort of argued with you at
12 beginning about that. But, we are where we are right
13 now, Guidant is as anxious as anyone to get its story
14 out before a group of jurors in these proceedings; that
15 will be fine.

16 But, I do want to emphasize that we have had
17 some problems in the past getting some discovery done in
18 a timely fashion, but we have received a high degree of
19 cooperation from the Plaintiffs' Steering Committee.

20 We have different lawyers involved in these
21 cases. And I think we can get all of them ready, I
22 really do, with a high degree of cooperation from all
23 sides. And I expect it from my colleagues on the other
24 side of the table.

25 I will also say that we just got this order

1 yesterday afternoon. Implicit in it is an obligation on
2 the parties to sit down and meet and confer on a lot of
3 sort of the interstices of the order, things that we
4 have to get done.

5 First and fundamentally is whether we can try
6 these cases in 7 to 8 days. That is something we need
7 to move to the top of the meet and confer list. That,
8 as I told you in the informal conference, depends in
9 substantial part on what the Plaintiffs are going to
10 present. If they are going to do their case in four
11 days, then it makes it easier for me to do my case in a
12 limited number of days.

13 So, we are going to have to talk about
14 proportion and experts and witnesses and just how much
15 is involved, maybe without specifying how many
16 documents, and exactly which witnesses will be called,
17 but we do need to get a sense early on regarding the
18 issue of whether we can try these issues in 7 to 8 days.

19 So, I think that is an issue I think I want
20 to engage my colleagues on the other side on fairly
21 soon, because I think as you pointed out, it affects
22 sort of the succession of trials.

23 So, I think it is an order that has some
24 sharp edges to it from the standpoint of our getting
25 these cases ready for trial; but, we understand what the

1 Court is seeking to accomplish. And you can be assured
2 that those of us on this side of the courtroom will do
3 everything humanly possible to accomplish the letter and
4 spirit of Pretrial Order 25.

5 THE COURT: One thing I say that may be the
6 farthest from anybody's mind on these trials, a question
7 that was raised during the conference -- it is not the
8 first time it has come up, really, apart from the MDL
9 context is, well, with the Federal Courthouse closed,
10 does it matter who the jury pool is, Minneapolis or St.
11 Paul? And the answer before we closed the building was,
12 yes, it would.

13 And the answer today and for the next three
14 years and for all of these cases is, no, it won't. We
15 have merged the Minneapolis and St. Paul pools, and it
16 isn't -- by saying Minneapolis/St. Paul, you could look
17 at our website for the Federal Court and see that really
18 runs from the Iowa border close to the Moose Lake area
19 over beyond St. Cloud. Anyway, both pools have been
20 merged and all trials for criminal and civil are being
21 randomly drawn from that merged pool, whether the case
22 is tried in St. Paul or Minneapolis, because we are
23 trying civil cases here if a courtroom is manageable.
24 In other cases, all criminal cases, custody cases, in
25 Minneapolis. It is the same pool. That is not

1 ordinarily the case, but it is the same jury pool.

2 MR. ZIMMERMAN: The next item, Your Honor, on
3 the agenda, unless there is anymore discussion on PTO
4 25, it is the Plaintiffs' desire to make these trials
5 short and sweet and appropriately time limited. We hope
6 and we believe strongly that we can do it in eight days.
7 And I will take up Mr. Pratt's invitation to meet and
8 confer on it, and hopefully have a meeting of the minds
9 on that very soon so we can set the time limits in
10 stone, because that will help us all craft a trial and
11 prepare the documents.

12 THE COURT: The other thing, and it may not
13 be implied in the order, and it maybe doesn't need to be
14 said, but one of the responsibilities that comes along
15 with an MDL assignment to a judge is to give the case,
16 the work related to the case, including trial dates,
17 calendar priority.

18 And what I have said to the lawyers and I
19 will stand by it is, you will never hear from Judge
20 Boylan or myself that, well, we don't have time to try
21 it in 13 days. We will get these cases in. It will not
22 be our schedule that will interfere. And so, you know,
23 I don't subscribe to rocket dockets.

24 I believe they are, in most senses
25 irresponsible, even though there are some very fine

1 judges across the country have resorted to them for
2 various reasons. But, on the other hand, we will give
3 these cases kind of a priority, and nothing is going to
4 get bumped. In other words, you haven't heard from me
5 and you won't hear from either one of us, well, if it
6 doesn't go this day, we won't reach you for X number of
7 days. That won't be an issue for these cases. So, that
8 is one of the expectations these MDL panels have is to
9 try to move these along in some responsible way, and
10 that is exactly what we will do.

11 MR. ZIMMERMAN: Thank you, Your Honor, the
12 next is the report on outstanding discovery issues which
13 I think is subsumed in five, is it not, or are there
14 other reports or outstanding issues which have to do
15 with the issues raised in the November 17th letter of
16 the Court? They are all contained in the same place,
17 are they?

18 MR. CARPENTER: Pretty much, I believe.

19 MR. ZIMMERMAN: So, we will then move down to
20 number 5, Your Honor, which is the issues raised in the
21 Court's November 17th, 2006 letter, which, just for the
22 record, was a letter addressed to liaison counsel for
23 both sides asking each to give you, the Court, updates
24 on 12 specific items that the Court raised as
25 potentially open items, or items that needed a certain

1 clarification.

2 THE COURT: Can I interrupt for just a
3 minute?

4 (Discussion off the record.)

5 Maybe I can hear from each of you when you
6 complete, whether you have any view. I don't have any
7 desire to put you on the spot. I don't believe I've
8 e-filed the letter or rolled it out on the web, the
9 letter that was sent. So, if either side has a view on
10 whether I should or shouldn't and care to share it with
11 me before you sit down, that would be --

12 MR. ZIMMERMAN: From my point of view, Your
13 Honor, I know I speak for the LCC. We have no problem
14 if this were to be posted for purposes of clarity to
15 people who are watching the filings, that it be filed.
16 It would be an appropriate filing, in my judgment.

17 The PSC, LCC filed its response with the
18 Court via a letter, hand delivered to the Court on
19 November 27th, which was Monday, which outlined the
20 responses to each of them.

21 I don't know, Counsel, and if it makes sense
22 to go over any items, in particular, where we have
23 simply agreed to -- we are in agreement, so I don't know
24 how much detail we should go into on these, but maybe we
25 could just highlight them and make sure that --

1 THE COURT: I don't think we need much
2 detail. Let me just ask, does Guidant have a view on
3 rolling this thing out, putting the letter out, e-filing
4 it or rolling it out on the --

5 MR. PRATT: I have no objection to your
6 letter going out on e-filing, no objection to the
7 Plaintiffs' Steering Committee letter and our responsive
8 letter going out. If that is the case, it is going to
9 be clear to anybody who reads it where there are points
10 of agreement --

11 THE COURT: I would agree.

12 MR. PRATT: So, I'm not sure that we need to
13 go into any detail.

14 THE COURT: Right, unless there is an issue
15 that you feel has been raised by other counsel to you,
16 or something that was, for lack of a better word, a hot
17 button issue during our informal conference. And I
18 don't think there were any.

19 MR. ZIMMERMAN: There are only two issues I
20 would like to highlight, Your Honor.

21 THE COURT: Just let me represent to
22 everybody in the room, then, we will e-file, we'll put
23 on the web my letter that went out and the responses by
24 both parties. Because I think they do illustrate, one,
25 that there is substantial agreement on a number of

1 issues; but, more importantly, it shows the issues that
2 were raised and the response by the parties in terms of
3 the case moves on. So, we will roll those out sometime
4 today. So, maybe as soon as we get off the Bench.

5 MR. ZIMMERMAN: There are two issues, Your
6 Honor, that I have received questions on. And I think
7 if we could just in open court make sure everybody is on
8 the same page with. The first one has to do with the
9 preemption motion that has been brought by the
10 Defendants and their motion to dismiss the Medicare
11 Secondary Payor Act claim and the Third-Party Payor
12 claim.

13 THE COURT: And I assume you bring it up just
14 not coincidentally with Judge Rosenbaum's decision that
15 was filed, apparently in this morning's paper?

16 MR. ZIMMERMAN: That is correct, Your Honor.
17 As we understand the position right now, that has been
18 pulled back for the time being, subject to Defense
19 Counsels' decision, whether they want to bring that up
20 for hearing or not. However, under no circumstances
21 would it interfere with the trial dates set by PTO 25.

22 THE COURT: I think it has been fully
23 briefed. It is sitting -- and as soon as I get a word
24 from somebody, we will put it out without delay for oral
25 argument. But, it is fully briefed, I believe.

1 MR. ZIMMERMAN: Right, that is our
2 understanding.

3 MR. HOPPER: It is.

4 MR. ZIMMERMAN: And I think there were even
5 some supplemental authority --

6 THE COURT: That is true.

7 MR. ZIMMERMAN: -- that have followed --
8 fallen in, because there are decisions that are coming
9 out, including Chief Judge Rosenbaum's that came out
10 yesterday. So, it is really Defendants -- it is
11 Defendants' call as to whether or not they are going to
12 bring it. And if they are going to bring it, when they
13 are going to bring it, in terms of the status of both
14 the preemption motion to dismiss and the other
15 substantive motion to dismiss.

16 MR. PRATT: And if I could just comment on
17 that, Your Honor. We have not pulled out our motion at
18 all. The motion to dismiss based on preemption grounds
19 that we filed is still in play. It has been fully
20 briefed. We pulled down the oral argument, waiting to
21 see what Judge Rosenbaum was going to do. We now see
22 what Judge Rosenbaum has done. We just got it yesterday
23 afternoon.

24 As I told you this morning, I want a chance
25 to read it fully, analyze it, talk to my client, and

1 then give Your Honor and the Plaintiffs' Steering
2 Committee the recommendation on how I suggest we go
3 forth with respect to our motion.

4 Do we file supplemental authorities and set
5 it for oral argument? Is there a different way to
6 proceed with it? We still believe in the merits of our
7 preemption defense. How we want to go forth on handling
8 this MDL, consistent with all that has gone on,
9 consistent with Pretrial Order 25, it's going to require
10 a little bit of analysis by me and discussion with my
11 client.

12 Yesterday afternoon I got Judge Rosenbaum's
13 Medtronic preemption ruling, I got your Pretrial Order
14 No. 25, all after I got to the airport. So, I am just
15 trying to digest it all in the white matter. But, we
16 will let you know --

17 MR. ZIMMERMAN: And if he is looking a little
18 cross-eyed, it is because he was reading it on
19 BlackBerry?

20 THE COURT: Yeah, well that will do it.
21 Well, it bears maybe saying, or repeating if I have
22 already implied it, the trial schedules and deadlines
23 that are in Pretrial Order No. 25 assume that nothing
24 will get settled, nothing, that everything will be fully
25 contested, fully briefed, fully argued, fully decided by

1 me.

2 In other words, if you wanted to streamline
3 this, we could, as Plaintiffs have wanted to do. The
4 trial dates -- Guidant -- I am not said they would
5 agree. They could be moved up. There is nothing that
6 is going to happen to move them back, because what is
7 built in is that everything will be fully litigated.
8 And the preemption -- and what we didn't discuss -- and
9 it probably doesn't need discussion today.

10 There are two ways a judge makes a decision
11 in State and Federal Court. I do it maybe five or ten
12 percent of the time. If we get to a point on
13 preemption, just as an example, I'm not adverse to
14 saying, whether I rule off the Bench or rule within a
15 couple of days saying, here is my decision, so it
16 doesn't interfere with the progress of the case, the
17 memorandum and opinion will follow in a few days. I
18 have done that in maybe 10 or 15 percent of the cases if
19 the lawyers find some value in saying, you know, if we
20 could get your decision off the bench or in a couple of
21 days, it would really save us some time. That would be
22 doable with all of these motions.

23 I will just say, however, that we haven't
24 made any assumptions of settlement or stipulations on
25 anything in putting these dates together. I am

1 assuming, planning, hoping for the best, planning for
2 the worst, so that is kind of how that order was set up.

3 MR. ZIMMERMAN: And I am hopeful that we will
4 be able to reach stipulations and agreements that will
5 make everybody's schedule easier and the Court's
6 schedule even ramped up even further, if possible, but
7 certainly making our lives easier by coming to agreement
8 is in everyone's best interest.

9 The second issue, Your Honor, because I
10 wanted to make sure because it is on the agenda, was the
11 Motion to Amend the Complaint to add a claim for
12 punitive damages. At the present time, we have
13 exchanged stipulations on that, and we expect an answer
14 on that from the Defense soon. But, we have a motion --
15 I don't know if it has been fully briefed or not, I
16 don't know if it is even pending.

17 We are just doing it by stipulation at this
18 point. And hopefully, we will agree on a stipulation.
19 If not, that motion then will be fully briefed and heard
20 on an appropriate schedule. And we are just awaiting a
21 response. And then I expect we will have the final word
22 on that no later than the next status, which is on the
23 20th of December.

24 THE COURT: One other comment, not just about
25 that, but everybody has mentioned a number of times

1 Pretrial Order 25, even though I have just got done
2 explaining that it assumes -- the schedule doesn't
3 assume anything is going to resolve, so there is no
4 implicit streamline built into it.

5 I think as the lawyers on committees know,
6 there are a number of motions pending, preemption is
7 one. I don't reference every single dispositive motion
8 that may be pending in Pretrial Order number 25, but I
9 do stand by what I said a moment ago that we inventoried
10 all of those and built into the schedule the ability to
11 decide those and remain true to all of these dates. You
12 know, that doesn't mean some exigent circumstance may
13 come up, but those were all taken into account, even if
14 they were not referenced in orders.

15 MR. ZIMMERMAN: Understood, Your Honor. I
16 don't know if you have anymore comment on the punitive
17 damages stipulation at this point, or it is just in play
18 and we will hear from you soon on that.

19 MR. PRATT: Only this, Your Honor. Guidant
20 maintains that there is no basis for punitive damages in
21 these cases. There is not enough evidence to make a
22 submissible case on punitive damages. The issue is
23 whether the Master Complaint gets amended to add a claim
24 for punitive damages.

25 For a variety of reasons from our standpoint,

1 we have agreed to work through a stipulation that would
2 allow the claim for punitive damages to be added to the
3 Master Complaint, subject to any challenge in an
4 individual case or down the road. I think it will avoid
5 a lot of motion practice.

6 We drafted a stipulation, sent it to the
7 Plaintiffs' Steering Committee, they responded. We have
8 a response to that. If we are getting close, I am
9 hopeful we will get that resolved without the Court's
10 intervention.

11 THE COURT: All right.

12 MR. ZIMMERMAN: Understood.

13 The only other thing is, I believe the Court
14 ordered us by December 8th to provide a two-page letter
15 to the Court on whether or not the Harkonen
16 representative trial should or should not be included as
17 the sixth possible representative trial.

18 And without arguing it today, the Court did
19 hear discussion on it in chambers. And each side has
20 agreed on December 8th to submit to Your Honor whether
21 that case should or should not be included as an
22 additional representative trial, and then the Court will
23 make the call on that based on the two-letter submission
24 that is due December 8th.

25 THE COURT: And I think it is fair to say

1 that people will see when they see your responses to my
2 letter kind of inventorying the issues, that not only
3 are there different views on the Harkonen case, but I
4 have used the word -- I don't know if Mr. Price or Mr.
5 Carpenter would agree, that Plaintiffs -- some creative
6 alternatives -- and they might have another word other
7 than creative in the recent submission --

8 MR. ZIMMERMAN: Brilliant could be another
9 word --

10 THE COURT: I doubt it. I don't know if that
11 word would come to their mind, but -- what you say is
12 true, but you have also suggested that the courts have
13 considered another way to roll in the Harkonen case,
14 joining it with another one of your cases.

15 MR. ZIMMERMAN: Yes, Your Honor, we did
16 suggest various ways that the Court can get through
17 these representative trials. We suggested grouping, we
18 suggested some summary jury trials after the first
19 trial. We suggested some other ways. As I understand
20 it, all of them are in play. None of them have been
21 necessarily agreed to by any stretch of imagination and
22 none have been at this point absolutely denied.

23 THE COURT: All right.

24 MR. PRATT: I'm just running down a checklist
25 of other adjectives to describe the Plaintiffs' ideas.

1 THE COURT: I'm waiting for it.

2 MR. ZIMMERMAN: You can Google that.

3 MR. PRATT: The only additional thing I would
4 add, Your Honor, is I know we discussed what to do with
5 the Arkonen case. We continue to oppose it being added
6 as a sixth case. It wasn't within the contemplation, I
7 submit, of the parties. We will make our points on
8 that.

9 We also talked a little bit about some death
10 cases, what we are going to do with those. That is
11 something the Steering Committee and I will have to
12 discuss. The original contemplation, and it is in, I
13 think, some of the orders and --

14 THE COURT: It is.

15 MR. PRATT: -- some of the submissions, was
16 that there would be a death case that would be a
17 bellwether representative trial. There is no death case
18 in Pretrial Order number 25. I think we need to discuss
19 what to do with that situation. I think we have batted
20 out a few ideas, but I think we could continue to do
21 some batting in order to resolve that, with or without
22 the Court's involvement.

23 MR. ZIMMERMAN: And we agreed to continue to
24 discuss how that might be accomplished. And we will do
25 it and report appropriately to the Court.

1 Your Honor, there may be questions from other
2 Counsel, but that is the agenda and that is the report
3 of the Lead Counsel from each side.

4 THE COURT: All right. I will get to
5 counsel. Mr. Pratt, do you have anything further?

6 MR. PRATT: No, that is all we have, Your
7 Honor.

8 THE COURT: All right. The fine gentleman
9 from Louisiana, I think, was --

10 MR. BECNEL: Judge, I want the Court to
11 consider something a judge from Dallas, Texas recently
12 did in Louisiana that might be helpful. It is very
13 innovative.

14 The Judge impaneled three juries at one time
15 with three individual cases. She let the -- this is a
16 12-year-old case, a chemical case against Exxon. And
17 what she did is have basically generic type witnesses be
18 listened to by all three juries. But, when you got into
19 specifics of that particular plaintiff's case, those
20 juries were excused for a day or two, and they did that.
21 And then they would come back. And what they did, in
22 limited amounts of time, and then she had them all come
23 in for closing arguments on their individuals, and this
24 jury would go out and start to decide, and there would
25 be closing arguments on the next plaintiff and the next

1 plaintiff. I thought it was unique, it was a creative
2 way to get rid of a 12-year-old case with a bunch of
3 individual trials without the Court and these lawyers
4 having to spend the amounts of money on experts, that
5 now cost sometimes 20 and \$30,000 a day, to be able to
6 testify one time for three trials. It was unique. That
7 judge is a Judge Barbara Lynn from Dallas, Texas.

8 THE COURT: You know, there is another Judge
9 from Texas -- a group of patent lawyers told me recently
10 that the following, and I may have brought this up at
11 the last conference, where I assume it was by agreement
12 of the lawyers, after the opening statements of the
13 lawyers, they sent -- a jury sent a special verdict form
14 with each of the 12 jurors, told them they couldn't
15 discuss it amongst themselves and they come back with
16 their verdict based upon the opening statements of the
17 lawyers, and then they recessed for an hour or two or a
18 day to see if the parties wanted to settle the case. I
19 don't know if it was a reality therapy for one or both
20 parties. I will let somebody else decide that. And
21 then if it settled, fine, which it did, because one of
22 the lawyers in this patent case I had was one of the
23 lawyers there. And if it didn't settle, they would
24 carry on with the jury panel. I mean, I can see some
25 pros and cons to that. I would think it would rather

1 dramatically affect the opening statements, or it could.
2 And you would have to modify the jury instructions to
3 say, not to prejudge the case until you hear the
4 evidence. But they did individual -- they didn't have
5 the group go deliberate, they handed out a -- anyway,
6 there must be a number of things going on down there in
7 Texas, because this was in Texas, as well.

8 MR. BECNEL: Well, this Judge came from --
9 because all three judges in the Middle District of
10 Louisiana had to recuse themselves, so they sent a
11 Federal Judge from Texas to Louisiana. And she said
12 although she loved Louisiana, she didn't want to stay
13 there and retire there, so she came up with this
14 innovative way to do three in a short period of time,
15 with a lot of the same testimony that all three jurors
16 would hear.

17 THE COURT: Okay.

18 MR. BECNEL: And then when it didn't apply to
19 them, she would send them out and you would have two
20 days off and you would do individual -- it was unique.
21 I thought it was unique.

22 A separate one, about two years ago I tried a
23 case for a couple of months on a chemical case. And
24 this was what a State Court allowed us to do was to film
25 in the courtroom basically generic type witnesses with

1 full examination and cross-examination, instead of doing
2 all of this cutting and pasting, where you would have
3 real trial advocacy on both sides; that the film would
4 be taken and the Plaintiffs and the Defendants paid part
5 of the cost of the special videographer doing that. And
6 then that film -- I will start another trial that I
7 tried two years ago on January the 9th, using a lot of
8 the actual testimony of this particular witness and that
9 particular witness -- so that it cuts down on the cost
10 for plaintiffs and defendants, having to bring the same
11 person over and he has the same thing.

12 The last thing I wanted to tell the Court,
13 there was another preemption decision last night that my
14 office just notified me of, on the Novartis case, it is
15 a Phillip Weiss, W-E-I-S-S, versus -- and I can't
16 pronounce this Japanese name, F-U-J-I-S-A-W-A, that came
17 out last night. I think I sent it -- asked them to send
18 it to you because you had a computer. I don't know if
19 you got it yet with the citation --

20 THE COURT: I think you sent it to Mr.
21 Pratt's BlackBerry.

22 MR. BECNEL: So, that is it. Thank you,
23 Judge.

24 THE COURT: Anyone else in the gallery wish
25 to be heard? Anything further on behalf of the

1 Plaintiffs?

2 MR. ARSENAULT: No, Your Honor.

3 THE COURT: Defendants?

4 MR. PRATT: Nothing, Your Honor, thank you.

5 THE COURT: Again, my apologies for the
6 people who were here, I am certain, promptly before
7 9:15. I am responsible for that, even though everybody
8 was here well before 8:00. And it still doesn't excuse
9 that.

10 We will roll-out those items on to the
11 website and e-mail those responses today.

12 A couple of you are going to meet shortly
13 with Judge Boylan, Mr. Price?

14 MR. PRICE: It may not surprise some of the
15 older lawyers and judges in the courtroom that Judge
16 Lord used to run multiple jury panels. I think he did
17 it in the Reserve Mining case back in the 1980's, except
18 he would have jurors put earphones on and pipe music in
19 while they were taking testimony that they weren't
20 supposed to hear.

21 THE COURT: I did it once on the State Bench
22 in a case.

23 MR. HOPPER: Your Honor, in the record Mr.
24 Price has spoken about antiquated trial matters, and we
25 appreciate that.

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THE COURT: Thank you, all. We will see you,
if not before, December 20th.

ALL COUNSEL: Thank you, Your Honor.
(Adjournment.)

Certified by: _____
Jeanne M. Anderson, RMR-RPR
Official Court Reporter.