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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Guidant ERISA Plaintiffs Seek OK For \$7M Settlement

By **Allison Grande**

Law360, New York (March 22, 2010) -- A group of former Guidant Corp. employees has requested the certification of a class for a proposed \$7 million settlement in a consolidated action accusing the defibrillator maker and its officers of breaching their fiduciary duty by mismanaging the company's employee pension plan.

The plaintiffs submitted their unopposed motion for preliminary approval of the settlement in the U.S. District Court for the Southern District of Indiana on Thursday, asking the court to certify a settlement class of participants in or beneficiaries of the Guidant employee savings and stock ownership.

The proposed class consists of participants or beneficiaries whose accounts held or acquired interests in investments in company stock from Jan. 1, 2003, to Nov. 3, 2005.

The parties reached the proposed resolution following an all-day mediation session in New York before retired U.S. District Judge Nicholas H. Politan on Oct. 8, agreeing to the monetary settlement in exchange for a release of all claims and the dismissal of the action without prejudice, according to the plaintiffs' motion.

The plaintiffs allege that the \$7 million settlement — which the parties executed on March 18 and equals more than 25 percent of the total damages estimated by their damages experts — represents a fair, reasonable and adequate resolution because it was agreed to “after an extensive and ongoing factual and legal investigation” that included retaining experts, analyzing relevant materials and entering into discussions regarding liability and potential damages during the course of the nearly five-year case.

Guidant and the 21 officers named in the suit deny any direct or indirect liability in relation to the plaintiffs' allegations in agreeing to the settlement.

Former Guidant employee pension plan holder Erica Harzewski filed the original class action complaint in July 2005, while another former Guidant employee, Michael Fontenot, lodged similar allegations in October 2005. The court consolidated the two actions in December 2005.

The plaintiffs' amended February 2006 complaint accused the company and 15 executives of violating the Employee Retirement Income Security Act by allowing the plan to buy and hold Guidant stock despite knowledge that the company was experiencing significant problems with its implantable heart defibrillators, one of its major products.

The defendants' alleged concealment of the defects in the products caused the artificial inflation of Guidant stock, the plaintiffs claimed.

The company argued that it had no duty to disclose the problems with the heart devices, the price of the common stock was not artificially inflated during the class period and the plaintiffs were not entitled to recover damages for the defendants' alleged breaches of fiduciary duty because after the class period ended, Guidant was purchased by Boston Scientific at a higher per-share price than Guidant stock ever reached.

The district court granted the company's request to dismiss the action with prejudice in September 2006 after concluding that the plaintiffs did not have standing to bring the case because they had cashed out their pension benefits before filing their amended complaint.

But the U.S. Court of Appeals for the Seventh Circuit reversed that decision in June 2006, finding that the district court had erred in its decision on standing and ordering the lower court to examine the plaintiffs' theory of how they were injured "as its first order of business" on remand.

The defendants then filed a renewed motion to dismiss in district court, a request that was partially granted in June 2008 when the plaintiffs' claim under the theory that the company and its executives breached their fiduciary duty by failing to divest the pension plan of Guidant stock was dismissed from the action with prejudice.

Representatives for the parties could not be immediately reached for comment Monday.

The plaintiffs are represented by DeLaney & DeLaney LLC, Morris & Morris LLC, Wolf Haldenstein Adler Freeman & Herz LLP, Gainey & McKenna and the Law Offices of Bruce G. Murphy.

Guidant and its officers are represented by Wilson Sonsini Goodrich & Rosati PC, Baker & Daniels LLP and Morgan Lewis & Bockius LLP.

The case is In re: Guidant Corp. ERISA Litigation, case number 05-cv-01009, in the U.S. District Court for the Southern District of Indiana.

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