

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

GUIDANT LLC F.K.A. GUIDANT)		
CORPORATION, AND SUBSIDIARIES, ET)		
AL.,)		
)		
Petitioner(s),)	SYM	
)		
v.)	Docket No. 5989-11,	5990-11,
)	10985-11,	26876-11,
COMMISSIONER OF INTERNAL REVENUE,)	5501-12,	5502-12.
)		
Respondent)		

ORDER

These cases are calendared for trial at the Special Session of the Court scheduled to commence on July 25, 2016, in Chicago, Illinois.

These consolidated cases involve proposed adjustments under section 482 for the taxable years 2001 through 2007, alternative adjustments under sections 367(a) and 367(d), adjustments pertaining to the sale of certain business units to Abbott Laboratories, an accuracy-related penalty for substantial understatement of tax under section 6662(b)(2), and other adjustments.

On April 7, 2016, petitioners filed a Motion to Compel Production of Documents (First). By Order of the Court dated April 11, 2016, respondent filed a Response to Motion to Compel Production of Documents (First Request). By Order of the Court dated April 27, 2016, petitioners filed a Reply to Response to Motion to Compel Production of Documents (First Request). By Order dated May 5, 2016, respondent filed a Response to First Supplemental Reply to Response to Motion to Compel Production of Documents (First Request).

On May 10, 2016, the parties held a telephonic conference call with the Court to discuss, among other items, petitioner's pending Motion to Compel Production of Documents (First).

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In petitioner's first Motion to Compel Production of Documents, petitioners informed the Court that at issue are at least 4,249 documents that respondent has withheld on claims of deliberative process privilege. To justify the privilege respondent provided privilege logs. Petitioners claim that the logs are inadequate and fail to provide the necessary information to support the privilege or at the minimum are deficient in a number of formatting and practical issues or have missing essential information. For example, petitioners argue that hundreds of entries on respondent's logs fail to identify the deliberative process involved and fail to identify the decision to which they relate.

Respondent argues that the logs are complete and that they have all of the elements necessary to claim the privilege.

In the telephonic conference call with the parties held on May 10, 2016, the Court explored with the parties various options to determine whether the documents claimed to be privileged actually satisfy the elements of the privilege. In previous filings both parties argued in detail their respective positions.

The petitioners suggested that the Court issue a Protective Order for the benefit of respondent if respondent would release the documents to petitioners during discovery. Respondent felt that the Protective Order would not adequately protect respondent. Respondent suggested that a sampling of the thousands of documents claimed to be subject to the privilege be examined in camera by the Court. Petitioners objected stating that such sampling would be inherently biased because respondent would know what the documents contained because they had possession of them but petitioners would not know.

The Court expressed that the privilege issue could be resolved by using a "quick peek" procedure. It is described in the Advisory Committee Notes accompanying Federal Rule of Civil Procedure 26(b)(2). The procedure is designed and intended to minimize the costs and delays associated with reviewing large volumes of documents that are, or might be subject to disputed claims of privilege. Such procedure is given effect in Federal Rules of Evidence 502(d) which provides:

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Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

(d) Controlling Effect of a Court Order. A federal Court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

After discussion with the Court, the parties agreed to proceed with the “quick peek” procedure in order to: (1) reduce the number of documents in dispute by eliminating documents considered to have insignificant relevance; and (2) resolve the issue of whether the thousands of documents claimed to be privileged actually meet the requirements of such privilege.

QUICK PEEK PROCEDURE

Accordingly, the Court directs counsel for the parties to meet on or before **12:00 p.m. (cst) on Tuesday, May 17, 2016**, at the offices of respondent in Cincinnati, Ohio, or at such other place and time as the parties may agree upon to review the 4,249 documents at issue. The quick peek procedure shall proceed as follows:

1. Respondent does not waive any privilege it has asserted with respect to deliberative due process or any other privilege it has previously asserted in this case. The privilege is not waived in this litigation and any disclosure is also not a waiver in any other Federal or State proceeding.
2. Counsel for respondent shall disclose each document for which he claims privilege and counsel for petitioners shall review such document but is not permitted to retain or copy such document unless both counsel agree otherwise or except as provided.
3. All documents which both counsel agree are properly claimed as privileged shall remain so and respondent shall not be required to produce that document further. All documents which both counsel believe are not properly claimed as privileged shall be immediately

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produced and given to petitioners.

4. The parties shall file a status report after they have concluded their quick peek procedure.

If counsel desire to modify the above procedure, in any respect, they shall immediately notify the Court.

The Court expects the parties will cooperatively and diligently resolve all of the issues of claim of privilege.

Given due consideration to the foregoing, it is hereby

ORDERED that the parties shall engage in the quick peek procedure described herein.

(Signed) David Laro
Judge

Dated: Washington, D.C.
May 12, 2016