

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CARDIAC PACEMAKERS, INC.;
GUIDANT SALES CORPORATION,

Plaintiffs,

vs.

ASPEN HEALTHCARE METRICS, LLC,

Civil No. 04-CV-4048 (DWF/FLN)

Defendant/Counterplaintiff,

vs.

GUIDANT SALES CORPORATION;
GUIDANT CORPORATION,

Counterdefendants.

**DEFENDANT/COUNTERPLAINTIFF'S REPLY MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Guidant's brief abruptly changes the definition of Guidant's supposed trade secret. No longer simply CRM pricing, Guidant now claims it is an amorphous combination of CRM "price points" *and* other information sufficient to make a "meaningful" analysis of the price. Guidant's about-face comes after a year of discovery and on the heels of Aspen's summary judgment motion that details the overwhelming evidence of Guidant price disclosures, typified by Guidant's sponsorship of the MRG survey. Guidant's attempted shell game in no way negates the reasoning in Aspen's opening brief, and, in fact, provides an additional basis to enter summary judgment: the nebulous "trade secret" fails for lack of specificity as a matter of law.

FACTS

Desperate to find a factual dispute to avoid summary judgment, Guidant cites "facts" in opposing Aspen's motion that are irrelevant or worse, plain wrong. (Reply Aff. ¶1.)¹ For instance, Guidant relies heavily on its paid "security" expert, who focused almost exclusively on physical security at Guidant's facilities, did not speak to any Guidant sales reps in the field, and carefully omitted any discussion of the MRG survey from both of his reports. (*Id.* ¶2.) In sum, the undisputed facts in the "record taken as a whole" under the *Matsushita* standard provide ample basis to enter summary judgment.

¹ References to Douglas Boettge's Affidavit in Support of Aspen's Reply are "Reply Aff." References to the Affidavit in Support of Aspen's Opening Brief are "Opening Aff."

ARGUMENT

I. THE MOVING TARGET OF GUIDANT’S “TRADE SECRET”

Guidant brought this lawsuit based on its theory that Aspen had “misused our prices,” and for over a year identified its supposed trade secret simply as the “prices” it charged for CRM products. (Reply Aff. ¶3; Opening Aff. ¶44.) Guidant’s sworn interrogatories identified the trade secret as “CRM pricing information in each contract and proposal.” (Reply Aff. ¶4.) Guidant’s Rule 30(b)(6) deponent identified the trade secret as prices charged at hospitals. (*Id.* ¶5.) Guidant’s President baldly testified: “Price is a trade secret,” and its lawyers argued before the Magistrate that “pricing of our products” was the trade secret. (*Id.* ¶6.)²

Now, after discovery has closed, and faced with the prospect that Guidant’s original “trade secret” won’t hold water, Guidant desperately wants to change course. Guidant’s brief argues for the first time that its “trade secret” is not the “price points” charged by Guidant for its products, but rather is limited to certain types of CRM pricing where “meaningful” analysis can be done on the price, or an undefined pricing “process” that Guidant does not allege Aspen ever had. (Guidant Br. at 7-8.) The Court should reject Guidant’s last-minute machinations.

² Guidant counsel’s response to Judge Noel during a hearing on MRG is telling:

“THE COURT: I want to make sure I am clear on your position. As I understand the litigation, you say when you sell a pacemaker to a hospital you tell them that the price we charge you is secret and can’t be told to anybody?

[ANSWER]: Yes, Your Honor.” (*Id.* ¶7.)

But even if Guidant were permitted to gerrymander its “trade secret” into this amorphous definition, the Court would have an additional ground to enter summary judgment. The law requires that a trade secret be defined with specificity. *FSI International v. Shumway*, 2002 U.S. Dist. LEXIS 3388, at *29 (D. Minn. Feb. 26, 2002). Vague definitions of a trade secret strip the defendant of a fair opportunity to respond to the allegations, and render it “impossible” for a court to fashion appropriate relief. *Id.*; see also *Electro-Craft Corp. v. Controlled Motion*, 332 N.W.2d 890, 898 (Minn. 1983); *E.W. Bliss Co. v. Struthers-Dunn*, 408 F.2d 1108, 1114-1115 (8th Cir. 1969).

There is no rational way to distinguish a “price point” from a “confidential trade secret price” as demonstrated by Guidant’s absurd claim that a hospital’s price is a trade secret, but “the discrete price points paid by a particular hospital” are not. (Guidant Br. at 7-8.) What particular information pushes a “price point” to a “trade secret price”? A “price point” is an actual price. How “meaningful” must the analysis be? How can Guidant obtain injunctive relief that permits hospital disclosures to a third-party survey firm like MRG – which Guidant intends to maintain – yet enjoins consultants from obtaining that same information from a hospital client? Guidant’s unspecified “trade secret” fails as a matter of law.

II. REGARDLESS OF HOW GUIDANT DEFINES IT, THERE IS NO TRADE SECRET.

A. Guidant Pricing Is Readily Ascertainable and Guidant Has Failed to Take Reasonable Efforts to Protect It.

1. MRG

Guidant's claim that MRG is a "red herring" (Guidant Br. at 16) stands in stark contrast to Judge Noel's observation upon learning about MRG: "What else do you need? I mean it seems to me you win." (Reply Aff. ¶8.) Aspen "wins" because Guidant does not dispute that hundreds of hospitals surveyed by MRG willingly divulged significant details³ about their Guidant contracts, not just pricing, with no assurances about who will receive the data. (Aspen Br. at 9-11.) Guidant completely ignores how easy it was for MRG to obtain actual prices in the market.

Guidant also misses the significance of MRG as to whether Guidant took "reasonable measures." Again, the inquiry isn't whether Guidant and MRG maintained confidentiality *after* the survey was completed (Guidant Br. at 14-16), but what measures Guidant took to prevent hospitals from making these disclosures *in the first place*. *Electro-Craft*, 332 N.W.2d at 901. Guidant, as sponsor of the survey, acknowledges that it took *no action* to prevent disclosures to MRG by hospitals. (Opening Aff. ¶72.)

Finally, Guidant's assertions that the MRG survey results were inaccurate, and that "MRG makes no attempt to obtain ... contract prices" (Guidant Br. at 15, 16) are

³ Guidant ignores that the MRG survey accounted for rebate, bulk-buy and other information that Guidant now ties to its amorphous trade secret. (Opening Aff. ¶62.)

preposterous. Surveyed hospitals testified, and records plainly show, that its survey responses were *identical* to the hospital's contract prices. (Aspen Br. at 10.)

2. Guidant's Disclosures to Aspen

Guidant admits that it has disclosed pricing proposals to Aspen directly on certain occasions, and also that it "submitted pricing proposals to hospitals *knowing* that Aspen would receive them." (Guidant Br. at 31) (emphasis added.) Of the ninety-five hospitals where Aspen and Guidant intersected, Guidant identified only *one* where Guidant did not consent to the provision of its pricing proposals to Aspen. (Guidant Br. at 13.) Remarkably, Guidant's disclosures to Aspen occurred long after Guidant became aware of Aspen's business and continued *even after* this lawsuit was filed. (Opening Aff. ¶¶48, 50.) Guidant does not dispute these facts. Nor can Guidant cite any case where *repeated* disclosures of a "trade secret" to an alleged known misappropriator suffice as "reasonable efforts."

Guidant ignores its indirect disclosures to Aspen through hospitals, and argues only that its direct disclosures to Aspen were "reasonable" efforts to "mitigate" its damages. (Guidant Br. at 37-40.) First, Guidant took no significant efforts to protect its trade secret before this supposed "mitigation." As one hospital administrator testified: "If [Guidant] refused [to provide pricing because the hospital had retained Aspen], I can't tell you what would have happened ... But Guidant continued to provide the pricing and information and never put [the hospital] in the position of making that decision." (Reply Aff. ¶9.)

Further, such an argument would allow “mitigation” to swallow the secrecy of any trade secret. Not surprisingly, the cases Guidant cites do not support its “mitigation” theory; they don’t discuss mitigation at all. Rather, they hold that the trade secret holder may make “disclosures of a limited nature” in the context of a “confidential relationship” when such disclosures are “necessary” for the trade secret holder to carry on its business. *See, e.g., Kewanee Oil Co. v. Bicron*, 416 U.S. 470, 475 (1974).

This is not what is happening here. Guidant asserts no facts to support its contention that its direct or indirect disclosures to Aspen were of a “limited nature,” nor can Guidant claim that it shared a “confidential relationship” with Aspen. But most notably, the notion that it was *necessary* for Guidant to make repeated disclosures to Aspen so that it could sustain its business is absurd. In fact, in the *one instance* where Guidant actually refused to provide pricing, Guidant was successful in pushing Aspen from the process, *and* retaining its business at the hospital. (Guidant Br. at 13.)

3. Other Industry Disclosures

Guidant’s assertion that there is not a “shred of evidence that any other [consulting] firm” does what Aspen does, in an effort to explain why it sued only Aspen, (Guidant Br. at 2) is meritless. Guidant provided its pricing information to consulting firms other than Aspen, even when they refused to sign Guidant’s confidentiality agreement. (Reply Aff. ¶10.) Guidant tracked and considered suing other defendants (including Capgemini), but settled on litigation against “small players with lack of substantial resources to defend litigation” like Aspen. (Opening Aff. ¶110.)

Guidant likewise attempts to whitewash the evidence on ECRI by claiming that ECRI obtains only “price points” from participating hospitals. (Guidant Br. at 20.) In fact, participating hospitals – all 380 of them – disclose to ECRI their entire closed receipt file, including volume and other information about the hospital’s purchases. ECRI then posts pricing information, along with demographic information about the hospitals, in its benchmark. (Opening Aff. ¶80.) While ECRI “understands” (Guidant Brief at 21) Guidant’s litigation position, it *would not remove Guidant pricing information from its product*. (Opening Aff. ¶85.)

Guidant’s argument that the *HMM* surveys of pricing from over 3,000 hospitals constitutes hearsay (Guidant Br. at 23-24) fails under Fed.R.Evid. 803(17). But putting aside the issue of hearsay, Guidant does not dispute that it did nothing to stop *HMM*’s publication of this information.

Finally, Guidant completely misrepresents the availability of Guidant pricing through FOIA by ignoring all of the hospitals that provided price data. (Opening Aff. ¶74.) Guidant’s claim that it “is not aware of anyone other than Aspen obtaining contracts in this manner” (Guidant Br. at 32) is belied by its own use of FOIA to check on Medtronic’s CRM prices at public hospitals. (Aspen Br. at 11.)

B. Guidant Cannot Articulate Any Independent Economic Value.

The only conceivable economic value that can result from secrecy here is higher prices for Guidant’s CRM products. This is why Guidant’s response makes a futile attempt to rebut the admission of its corporate representative, Jay Ethridge, that Guidant’s “trade secret” does not allow it to charge higher prices. (Opening Aff. ¶117.)

Guidant, for instance, argues that secrecy allows it to “tailor” prices, but does not, and cannot, explain how “tailored” prices result in economic value. (Guidant Br. at 28.) Guidant’s claim that hospitals benefit when they “cannot compare contract prices” (*Id.* at 8), is irrelevant because again it doesn’t show how Guidant derives economic value from secrecy.

Equally deficient is Guidant’s argument – based solely on paragraph 11 of Ethridge’s latest affidavit – that secrecy “makes it difficult for Guidant’s competitors to undercut Guidant’s prices” and saves Guidant from having “to offer commodity pricing.” (Guidant Br. at 8, 28.) Competition on price, even for a “commodity,” would require Guidant to lower its prices, squarely contradicting Ethridge’s earlier testimony. *St. Hilaire v. Minco Products*, 288 F.Supp.2d 999, 1003 n.5 (D. Minn. 2003) (party cannot generate fact issue with an affidavit “inconsistent with his sworn deposition”).

III. THERE HAS BEEN NO MISAPPROPRIATION.

Aspen also is entitled to summary judgment because it properly acquired the price information and did not misuse or disclose it. (Aspen Br. at 27-33.) Guidant does not argue disclosure, but complains that Aspen “improperly” acquired the information and misused it in advising hospitals. (Guidant Br. at 42.)

A. Proper Acquisition

Guidant’s “improper acquisition” theory is premised on its claim that Aspen induces hospitals to breach the confidentiality provision in its agreements. As set forth in Aspen’s prior briefs (Aspen Br. at 33-34; Aspen SJ Resp. at 18-19), this is

incorrect because, *inter alia*, Aspen is not a “third party,” but a hospital agent. Guidant does not, and cannot, argue that Aspen ever acquired Guidant’s undefined pricing “process.”

B. There Has Been No Misuse.

Aspen’s use of knowledge gained from other consulting relationships to advise existing clients on achievable price points is not wrongful for three reasons: (1) Guidant authorized its use; (2) Aspen did not have knowledge of a duty; and (3) Aspen’s use was not anti-competitive. (Aspen Br. at 29-32.) Guidant’s argument fails because it mistakes *any* use with *wrongful* use, and only *wrongful* uses are actionable.

First, Guidant does not dispute that it repeatedly disclosed prices to Aspen, despite its belief by January 2002 that Aspen “has been sharing price points with accounts across the country.” (Opening Aff. ¶44.) For this reason alone, Aspen’s use is not actionable because it was made with Guidant’s “express or implied consent.” Minn. Stat. §325C.01, subd. 3(ii). Guidant’s attempt to distinguish *Omnitech Int’l, Inc. v. Clorox*, 11 F.3d 1316 (5th Cir.1994), ignores the court’s alternative holding: Because the plaintiff continued to share its trade secrets with the defendant *after* it believed defendant had misused the information, the alleged use was not actionable. *Id.* at 1324-25.

Second, where, as here, the alleged misappropriation involves alleged misuse, the MUTSA requires a showing that Aspen “knew or had reason to know” of a duty to “limit use.” Minn. Stat. §325C.01, subd. 3(ii)(B). Guidant’s assertion that Aspen knew that hospitals owed Guidant a *duty not to disclose* to Aspen is not enough.

(Guidant Br. at 42.) Further, Guidant's assertion is belied by the uniform hospital testimony that Guidant's "third party" language did not apply to consultants like Aspen. (Aspen Br. at 4.)

Third, Guidant does not dispute its burden to prove harm from Aspen's use of its purported trade secret in an "anti-competitive manner," but errantly focuses on whether hospitals that hire Aspen are better suited to compete with other hospitals. (Guidant Br. at 46.) Competitive harm among hospitals' competitors has no bearing on competitive harm to Guidant. Further, Guidant ignores the cases cited in Aspen's Opening Brief, holding that Guidant's efforts to obscure pricing are anti-competitive because they artificially restrain trade. (Aspen Br. at 32.)

IV. GUIDANT'S TORTIOUS INTERFERENCE CLAIMS ALSO FAIL.

A. Aspen Is an Agent.

Because Aspen is an agent of its hospital clients, Guidant's tortious interference claims in Counts I, II and III fail as a matter of law. Contrary to Guidant's arguments (Guidant Br. at 43-45), agency turns not on whether the agent is authorized to enter an agreement on behalf of the principal, but rather on control, and Guidant fails to address the fact that the hospitals had sufficient control of Aspen's work. (Aspen Br. at 33-34; Aspen SJ Resp. at 20-22.)

B. There Has Been No Breach of Contract.

Guidant's brief flatly ignores unequivocal hospital testimony that Aspen was authorized to receive hospital pricing because Aspen was not a "third party" under

the terms of the hospital's contract with Guidant. (Aspen Br. at 4-5.) Nor does Guidant dispute that, in practice, Guidant construes the "third party" contract language identically, providing the same pricing information to its consultant, McKinsey & Co., without seeking hospital authorization. (*Id.*) Aspen is thus entitled to summary judgment on Counts I and III.

Guidant's response as to why there has been no breach of the early termination provision alleged in Count II of Guidant's Complaint likewise fails. There is no dispute that a few hospitals did not provide notice before seeking to renegotiate. (Guidant Br. at 48-49.) Guidant's brief fails to address, and therefore concedes, that (1) the hospital's alleged anticipatory repudiation was not sufficiently equivocal under established precedent, and (2) even if there was an anticipatory repudiation, it was revoked when the hospitals continued to pay Guidant on their original contract terms. (Aspen Br. at 35-36.)

C. MUTSA Displacement

Guidant does not dispute that its tortious interference claims in Counts I and III are any different from its trade secret claim, and instead argues that the MUTSA permits "redundant" claims. (Guidant Resp. at 47-48.) The decision cited by Guidant, however, actually holds that a plaintiff must have "'more' to their factual allegations than the mere misuse or misappropriation of trade secrets" for a claim to survive displacement. *Micro Display Systems v. Axtel*, 699 F. Supp. 202, 205 (D. Minn. 1988). Because Guidant does not dispute that Counts I and III are duplicative of its trade secret claim, they are displaced.

D. Honest-Advice Privilege

Aspen is entitled to rely on this privilege because its advice was honest and not motivated by self-interest. (Aspen Br. at 37; Aspen SJ Resp. at 22-24.) Guidant's argument that Aspen's advice was premature is a red herring. (Guidant Br. at 49-50.) Guidant is not asserting any claim on any contract where that hospital did not retain Aspen. This defense bars each tortious interference claim.

CONCLUSION

For the foregoing reasons and those in Aspen's Opening Brief, this Court should grant Aspen's Motion for Summary Judgment.

Dated: December 5, 2005

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