

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CARDIAC PACEMAKERS, INC.;
GUIDANT SALES CORPORATION,

Plaintiffs,

vs.

ASPEN HEALTHCARE METRICS,
LLC,

Defendant/Counterplaintiff,

vs.

GUIDANT SALES CORPORATION;
GUIDANT CORPORATION,

Counterdefendants.

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

**PLAINTIFFS/COUNTER
DEFENDANTS' MEMORANDUM IN
SUPPORT OF GUIDANT'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

INTRODUCTION

Plaintiffs Guidant Sales Corporation (“GSC”) and Cardiac Pacemakers, Inc. (“CPI”) sued Defendant Aspen Healthcare Metrics, LLC (“Aspen”) under Minnesota law in state court. The claims against Aspen include: 1) tortious interference with confidentiality agreements; 2) tortious interference with sales contracts; 3) tortious interference with prospective economic advantage; and 4) misappropriation of trade secrets. After removing this action to federal court, Aspen brought two counterclaims against Counterdefendants GSC and Guidant Corporation (with CPI, collectively “Guidant”): 1) tortious interference with prospective economic advantage; and 2) defamation.

Pursuant to Fed. R. Civ. P. 56, Guidant moves for summary judgment on Guidant's claim for tortious interference with confidentiality agreements and on Aspen's counterclaims. While factual disputes preclude summary judgment on Guidant's remaining claims, Guidant's claim for tortious interference with confidentiality agreements can be decided as a matter of law. Summary judgment on this claim will likely resolve the litigation.

FACTS

Guidant

Guidant manufactures implantable cardiac rhythm management devices ("CRM devices"), such as pacemakers and defibrillators. These devices are manufactured by CPI and sold by GSC. Affidavit of Mark Bartell, filed herewith at ¶ 2 ("Bartell Aff."). GSC, Guidant's U.S. sales arm, is a wholly-owned subsidiary of CPI. Id.

GSC enters sales contracts with hospitals setting forth supply terms for CRM devices. Those terms include the models available for implantation at the hospital, pricing, duration of the contract, and numerous other terms that vary by customer. See, e.g., Affidavit of Craig Coleman, filed herewith at Exhs. 1-5 ("Coleman Aff."). These sales contracts contain confidentiality clauses protecting the information contained in the contracts from disclosure to all third parties:

Certain business information which both GSC and [customer] consider confidential (including this agreement) may not be shared. GSC and [customer] agree not to disclose this information to any third party without prior written approval.

Coleman Aff., Exh. 1 at 1-12.¹ Confidentiality is further reinforced on every page of sales contracts with an admonition stating that, “Information is confidential between Guidant Corporation and [customer].” See, e.g., id.

Guidant maintains strict confidentiality of its contracts and CRM prices due to the complexity of the pricing process and the wide variability of CRM prices. Affidavit of Jay Ethridge, filed herewith at ¶¶ 2-3 (“Ethridge Aff.”). GSC’s strategic pricing group is responsible for preparing pricing proposals. Coleman Aff., Exh. 6. The pricing group considers numerous factors when evaluating pricing proposals for its customers, including, among others: projected volume and revenue, share of the hospital’s purchases committed to Guidant, mix of products requested by the hospital, mix of services provided to the hospital, demographic characteristics of the hospital, and so forth. Ethridge Aff. at ¶ 2; Coleman Aff., Exhs. 7-8. This strategic pricing analysis includes preparation of financial models forecasting the financial impact of the pricing proposal. Coleman Aff., Exhs. 9-10. Guidant’s strategic pricing process requires tiered review by management depending on the level of pricing, with the most aggressive pricing requiring review by a committee of senior Guidant management. Coleman Aff., Exhs. 11-12.

CRM pricing varies widely across hospitals based on the many variables considered during the pricing process. Coleman Aff., Exh. 6. For instance, a large hospital that purchases a high volume of CRM devices will tend to receive aggressive

¹ Guidant refers to the contract between Scripps Health and GSC as representative. This provision is contained in all Guidant contracts.

prices, particularly if the hospital commits to purchasing a majority of its CRM devices from Guidant. Coleman Aff., Exh. 13. Given the number of variables producing a broad range of CRM prices, pricing comparisons between hospitals are generally misleading and not relevant because they compare apples to oranges. Id.; see also Coleman Aff., Exh. 49.

Aspen

Aspen is a healthcare consulting firm that touts its ability to lower the prices that hospitals pay for CRM and other medical devices. In 2003, Aspen was acquired by MedAssets, a large group purchasing organization (“GPO”). Coleman Aff., Exh. 14. MedAssets and Aspen jointly market their services to hospitals. Id.

Aspen’s consulting practice is based on its improper acquisition and knowledge of confidential CRM prices. Aspen instructs its hospital client to provide confidential CRM pricing information to Aspen in violation of confidentiality agreements between the hospitals and Guidant. Coleman Aff., Exhs. 15-18, 69. Aspen markets its ability to compare one hospital’s CRM prices to the prices paid by other hospitals. For instance, Aspen’s standard marketing presentation to prospective clients states that Aspen has “[e]xtensive, all-payer benchmarking databases” containing “product pricing.” Coleman Aff., Exh. 19 at 19-06. Aspen’s standard consulting contract with its clients promises that, “Aspen benchmarks Scripps’s acquisition costs to our ‘best pricing’ database for identical supplies and devices,” in order to “quantif[y] the cost difference between baseline practice at Scripps and best practice of other hospitals in Aspen’s database for the identical item.” Coleman Aff., Exh. 20 at 20-09. Aspen’s clients uniformly

understand that Aspen does exactly that, and they hire Aspen based on its knowledge of CRM pricing. Coleman Aff., Exhs. 21-22.

In reality, discovery has revealed that Aspen either has no “best pricing” or “benchmarking” database or has withheld evidence. Coleman Aff., Exh. 23. It appears that Aspen is simply lying to its clients. Instead, according to Aspen’s own witnesses, Aspen consultants rely on their knowledge of confidential CRM prices improperly gained from consulting engagements around the country. Coleman Aff., Exh. 24.² Aspen consultants use their knowledge of Guidant’s confidential CRM prices to instruct their clients what they should pay Guidant. Coleman Aff., Exhs. 24, 26.

Aspen’s CRM consulting engagements follow the same steps at virtually all hospitals. The consulting process proceeds in several stages:

1. After engagement by hospitals, Aspen immediately interferes with existing contracts between the hospitals and Guidant. In particular, Aspen instructs its clients to forward Guidant’s past and existing CRM contracts and the hospitals’ entire history of CRM purchases from Guidant. Coleman Aff., Exh. 18.
2. Aspen then compares the hospitals’ CRM prices to Aspen’s knowledge of confidential CRM prices improperly obtained from other hospitals. Coleman Aff., Exhs. 20 at 20-08—20-09, 24, 27 at 27-15—27-17, 27-27, 27-40.
3. Aspen then instructs the hospitals to issue a Request for Proposal (“RFP”) to CRM vendors to initiate a bidding process. Aspen disregards existing contracts and advises the hospitals to issue the RFP whether or not the hospitals have existing contracts with

² While admitting that Aspen does not have the benchmarking database that it describes to its clients, Aspen’s President euphemistically referred to its “knowledge database.” Coleman Aff., Exh. 25.

Guidant.³ Aspen drafts the RFP, which includes Aspen's CRM target prices based on its ill-gotten knowledge of confidential prices paid by other hospitals. The Aspen RFP demands that vendors meet Aspen's prices or risk losing the hospitals' business. Coleman Aff., Exhs. 24, 26, 28-30.

4. **When vendors submit pricing proposals in response to the Aspen RFP, Aspen analyzes the proposals and advises the hospitals regarding negotiations. Coleman Aff., Exhs. 31-39.**
5. **After a new contract is signed, Aspen obtains the new contract and maintains this confidential pricing in its files. Coleman Aff., Exhs. 15, 69.**

Aspen freely admits that it obtains Guidant's confidential CRM contracts and pricing from hospitals. Coleman Aff., Exhs. 4-5, 15-18, 40, 69.⁴ Aspen also admits that neither the hospitals nor Aspen obtain Guidant's authorization prior to transferring the confidential pricing information to Aspen. Coleman Aff., Exh. 41. Aspen admits that it advises its clients by comparing one hospital's contract prices to Aspen's knowledge of other hospitals' contract prices. Coleman Aff., Exhs. 26, 42-47. Thus, Aspen's consulting practice depends on its ill-gotten knowledge of Guidant's confidential CRM contract prices.

In addition to marketing and sharing its knowledge of confidential CRM prices at hospitals around the country, Aspen has plans to sell Guidant's confidential pricing

³ For instance, Guidant's contract with Scripps had a two year term ending on October 25, 2004. The Aspen-driven RFP was issued in April 2004. See Coleman Aff., Exhs. 1 & 28.

⁴ Aspen produced copies of many Guidant contracts in its possession in response to Guidant's document requests. See, e.g., Coleman Aff., Exhs. 4-5.

information through an online subscription service. Coleman Aff., Exh. 48. This program, called PPI Profiles or Cost Facts, would sell access to an Aspen information service providing detailed pricing information on Guidant's CRM products, including analysis of prices paid by hospitals pursuant to confidential Guidant contracts. Id. CostFacts was in the development and testing phase when this lawsuit was filed. Id. While only a few hospitals currently participate on a trial basis, Aspen believes that many hospitals will be willing to pay \$35,000 to \$50,000 or more per year for the opportunity to access Guidant's confidential pricing information through CostFacts. Id. at 48-5. Aspen has projected that it will realize millions of dollars in revenue from this product in 2006. Id.

Aspen acknowledges that pricing in CRM contracts is highly complex, variable, and confidential. In fact, Aspen's contracts with its clients also include confidentiality agreements protecting Aspen's advice, knowledge of CRM prices, and the Aspen RFPs from disclosure:

Further, Scripps acknowledges and agrees that in the cause of the performance of this Agreement, Scripps may have access to a variety of information proprietary to Aspen. This information may include, but not be limited to, comparative pricing data, external benchmarking data, and vendor contract documents. Scripps shall maintain the confidentiality of such Aspen proprietary information and not divulge such information to any third parties without the express permission of Aspen.

Coleman Aff., Exh. 20 at 20-16 (emphases added). Aspen claims that its pricing recommendations to clients are tailored to account for numerous factors like the geographic location, size, and academic status of a particular hospital. Coleman Aff.,

Exh. 49. Aspen states that it requires confidentiality agreements with its clients to avoid disclosure of Aspen's pricing recommendations due to the highly nuanced nature of CRM pricing decisions. Coleman Aff., Exh. 50.

Thus, Aspen's approach to and rationale for pricing confidentiality is quite similar to Guidant's approach. The key difference is that, while benefiting from the confidentiality of pricing information in the CRM industry and its own confidentiality agreements, Aspen intentionally and consistently induces its hospital clients to breach Guidant's confidentiality agreements.

Guidant's Claim: Tortious Interference With Confidentiality Agreements

Guidant sued Aspen for inducing hospitals to breach the confidentiality agreements between Guidant and the hospitals. Complaint at ¶¶ 33-36. Through discovery, Guidant learned the identity of Aspen's hospital clients. Coleman Aff., Exh. 51. Aspen has provided CRM consulting services to 95 hospitals where Guidant does business.

Guidant claims damages for Aspen's tortious conduct at 12 Guidant accounts, which include both individual hospitals and hospital systems. Coleman Aff., Exh. 52. In each case, without Guidant's authorization, Aspen has induced the hospital to forward Guidant's CRM pricing information protected by confidentiality agreements. See, e.g., Coleman Aff., Exhs. 1-5.⁵

⁵ Guidant refers to the contracts of Scripps Health, Christiana Care, St. Patrick's Hospital, and Morris Hospital as illustrative examples. Each of the contracts referenced

(continued on next page)

Aspen's Counterclaims

Guidant filed its lawsuit on August 9, 2004. Two days later, GSC President Mark Bartell sent a letter to many of Guidant's customers about Guidant's rationale for the lawsuit. See Coleman Aff., Exhs. 53-54 ("August 11 Letter"). Guidant's senior management regularly interface with customers to discuss many issues, including pending Guidant litigation. Guidant sent the letter as a proactive measure to avoid any misunderstanding about the lawsuit or Guidant's purposes. Bartell Aff. at ¶ 3. The letter explains why Guidant felt compelled to sue Aspen and states that the lawsuit is directed against third party consultants rather than hospitals. Coleman Aff., Exh. 53. The letter then states Guidant's belief that consultants like Aspen unnecessarily undermine the trust and relationships that Guidant works to maintain with its customers. Id.

Aspen filed a counterclaim alleging that this letter constitutes defamation and tortious interference with Aspen's prospective economic relationships. Even after the conclusion of discovery, the August 11 Letter remains the sum total of the facts underlying Aspen's counterclaims. Discovery did not yield any other instances of communication by Guidant to hospitals regarding Aspen, other than contract negotiations that included Aspen.

(continued from previous page)

predated Aspen's engagement at the hospital and contain confidentiality provisions protecting the contracts from disclosure to all third parties.

ARGUMENT

I. ASPEN TORTIOUSLY INTERFERES WITH CONFIDENTIALITY AGREEMENTS BETWEEN GUIDANT AND ITS HOSPITAL CUSTOMERS

Under Minnesota law, a claim for tortious interference with contract includes five elements:

A cause of action for wrongful interference with a contractual relationship requires: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages.

Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994) (internal quotation marks and citation omitted). Regarding the fourth element, the defendant bears the burden to prove that it was justified in inducing breach of the contract. Id.

As in Kjesbo, here there is no dispute regarding the existence of contracts between Guidant and its hospital customers, Aspen's knowledge of those contracts, or Aspen's intentional procurement of the hospital's breach. In Kjesbo, the Minnesota Supreme Court affirmed summary judgment for the plaintiff because the defendant's claim of justification failed as a matter of law. Similarly, Guidant is entitled to summary judgment because Aspen has no legal justification for inducing hospitals to breach the confidentiality agreements protecting Guidant's contracts from disclosure to third parties like Aspen.

A. Guidant's Contracts With Its Hospital Customers Contain Confidentiality Provisions Protecting The Confidentiality Of Those Contracts And Pricing Information

The confidentiality provisions in the contracts between Guidant and its hospital customers are stringent and unequivocal. Each confidentiality provision explicitly states

that the terms of the contract are confidential and cannot be shared: “Certain business information which both GSC and Scripps Health consider confidential (including this agreement) may not be shared.” Coleman Aff., Exh. 1 at 1-12. The confidentiality provision further provides that GSC and the hospitals must obtain written authorization prior to disclosing contract information “to any third party.” Id. Every page of the contract reinforces this ironclad confidentiality agreement with the admonition that, “Information is confidential between Guidant Corporation and Scripps Health.” Id.

There is no genuine dispute of fact regarding the existence of the binding confidentiality agreements between Guidant and its hospital customers.

B. Aspen Knows That Guidant Has Confidentiality Agreements With Its Customers

Aspen does not dispute that it knows that Guidant’s CRM contracts are confidential. In fact, Aspen has repeatedly corresponded with its hospital clients about Guidant’s confidentiality concerns, including advising its clients to ignore those concerns. Coleman Aff., Exhs. 55-58, 60. Aspen consultants admit that they know full well that Guidant’s confidentiality agreements prohibit disclosure of Guidant’s pricing information to third parties. Coleman Aff., Exh. 59.

Moreover, there cannot be a dispute of fact on this point because Aspen has Guidant’s CRM contracts in its possession. See, e.g., Coleman Aff., Exhs. 4-5. Particularly in light of Aspen’s knowledge of Guidant’s confidentiality concerns, Aspen knew that Guidant and the hospitals agreed to keep the contracts confidential. Again, confidentiality admonitions appear on every page of the contracts. See id. At the very

least, Aspen should have known of the confidentiality provisions, and the Minnesota Supreme Court has squarely held that such constructive knowledge is sufficient for summary judgment:

The court of appeals' opinion incorrectly thought there was an issue of fact on whether [the defendant] had knowledge of Kjesbo's contract with Metropolitan Life. It is enough if the defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to complete disclosure of the contractual relations and rights of the parties.

Kjesbo, 517 N.W.2d at 588 n.3 (internal citation omitted).

C. Aspen Intentionally Induces Hospitals To Breach The Confidentiality Agreements Between Guidant And The Hospitals

Nor does Aspen dispute that it instructs its hospital clients to forward Guidant's CRM contracts to Aspen without Guidant's authorization. Aspen does so as a matter of course. Coleman Aff., Exhs. 18, 20 at 20-09, 40, 69. While knowing that Guidant maintains confidentiality agreements with its customers, Aspen has never advised its clients to seek Guidant's authorization for release of confidential pricing information to Aspen. Coleman Aff., Exhs. 41, 55-60.

In fact, Aspen's consulting practice is built on its practice of intentionally inducing hospitals to breach Guidant's confidentiality agreements. By inducing hospitals to provide Aspen with confidential CRM pricing information, Aspen acquires knowledge of confidential pricing that it markets to other hospitals. When consulting with a particular client, Aspen intentionally induces the hospital to forward Guidant's confidential pricing information in order to compare that hospital's prices with Aspen's knowledge of

Guidant's confidential prices at other hospitals.⁶ Aspen drives RFPs and contract negotiations to achieve Aspen's recommended price points based on its ill-gotten knowledge. Thus, Aspen's business model fundamentally depends on maintaining knowledge of confidential CRM prices by continually inducing hospitals to breach Guidant's confidentiality agreements.

There is no genuine dispute that Aspen intentionally induces hospitals to breach confidentiality agreements with Guidant.

D. Aspen Has No Justification For Its Conduct

While lack of justification is an element of a tortious interference claim, the burden for proving this element lies with the defendant. See Kjesbo, 517 N.W.2d at 588; Span-Deck, Inc. v. Fab-Con, Inc., 677 F.2d 1237 (8th Cir. 1982) (relying on Minnesota law to hold that the defendant bears the burden of proof for justification). The defendant must prove that it possessed a valid legal justification for inducing breach of the contract. See, e.g., Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn. 1991) (defining justification element to require valid "legal justification" for actions).

Where defendants fail to assert a valid legal justification for inducing a breach of contract, Minnesota courts regularly grant summary judgment in favor of the party claiming tortious interference. See, e.g., Kjesbo, 517 N.W.2d at 589 (granting summary judgment for plaintiff where claim of justification was not based on valid legal right);

⁶ Due to the wide variability of CRM prices, these comparisons are generally inappropriate and misleading. See, e.g., Coleman Aff., Exh. 13.

Dyrdal v. Golden Nuggets, Inc., 672 N.W.2d 578, 589 (Minn. Ct. App. 2003) (same). In each of these decisions, the court rejected the defendant's claim that it held a legal interest justifying interference with the contract. Both Kjesbo and Dyrdal decided tortious interference claims as a matter of law because the defendant failed to proffer a valid legal justification. Id. Thus, Aspen cannot create a dispute of material fact merely by claiming to have acted in good faith or asserting an invalid legal justification.

Aspen cannot demonstrate justification as a matter of law because it had knowledge of Guidant's confidentiality agreements and intentionally disregarded them. See Kallok v. Medtronic, Inc., 573 N.W.2d 356, 362 (Minn. 1998) (noting that Minnesota law "impute[s] bad faith when the wrongdoer has knowledge that the contract existed"). Justification does not apply where the defendant has knowledge of "the contractual relations and rights of the parties." Id. at 363 (internal quotation marks and citation omitted). Here, there is no dispute that Aspen actually possesses copies of the confidential contracts between Guidant and the hospitals, including the confidentiality agreements. As a matter of law, Aspen can have no justification for nonetheless inducing hospitals to breach those agreements.

Aspen has no legal justification for its practice of intentionally inducing hospitals to breach their confidentiality agreements with Guidant. Aspen is obviously not authorized to obtain Guidant's pricing information because the contracts forbid sharing information in the contracts with "any third party." Coleman Aff., Exh. 1 at 1-12. Both Aspen and its hospital clients agree that Aspen lacks any ability to bind the hospitals, Coleman Aff., Exh. 61, and Aspen therefore cannot act as an agent of the hospitals, see

Restatement of Agency § 1.01 and cmt. c (2001) (holding that power to bind the principal is primary element of agency). There is no genuine dispute that Aspen is anything other than a third party that is not entitled to obtain Guidant's contracts without written authorization.

Aspen will inevitably assert that its conduct is justified by its status as a consultant supposedly bound by a confidentiality agreement with its hospital clients. That assertion fails to provide any legal justification for inducing hospitals to forward Guidant's contracts without written authorization, in violation of the confidentiality agreements. Guidant's confidentiality agreements do not include any exception for consultants.

Apart from lacking any foundation in the law, a claim by Aspen of some special status as a consultant cannot be squared with the undisputed facts. Aspen obtains Guidant's confidential pricing information not just to advise a particular client in confidence. Instead, Aspen takes the pricing information from one engagement and uses it in other engagements. Indeed, Aspen's knowledge of Guidant's CRM prices throughout the country is the engine that drives its business, and Aspen traffics in its knowledge of Guidant's confidential pricing information obtained by repeated breaches of Guidant's confidentiality agreements. See supra at 4-5. That knowledge has value because it is confidential. Aspen's clear intent to profit by repeatedly inducing hospitals to breach confidentiality agreements eliminates any possible legal justification for its conduct. See, e.g., Stephenson v. Plastics Corp. of Am., 150 N.W.2d 668, 680 (Minn. 1967) (holding that interference with contract is "unjustifiable" when done for the purpose of "benefiting the defendant, at the expense of the plaintiff").

Finally, Aspen actively advises its clients to disregard Guidant's confidentiality concerns. Coleman Aff., Exhs. 55-60. Aspen continued this conduct even after this lawsuit was filed. See, e.g., Coleman Aff., Exh. 55. This knowing, fully intentional interference with Guidant's contracts cannot be justified.

In sum, because Aspen cannot demonstrate a legal justification having any validity, it must fail to meet its burden of proof on this element as a matter of law.

E. Guidant Has Been Damaged By Aspen's Conduct

There cannot be a genuine dispute of fact that Aspen's tortious interference damages Guidant. Aspen's CRM consulting practice is premised on reducing the prices paid to Guidant by its hospital customers. At the conclusion of each consulting engagement, Aspen prepares a cost savings report setting forth the amount saved by the hospital for CRM devices. Coleman Aff., Exh. 63. For instance, Aspen's cost savings report for Scripps Health states that Scripps will pay \$ 1.75 million less for Guidant's CRM products due to Aspen's consulting. Coleman Aff., Exh. 62.⁷ Scripps Health's

⁷ Guidant's damages expert has concluded that Aspen significantly inflates its cost savings numbers to its clients. Coleman Aff., Exh. 64. Aspen falsely takes credit for price reductions caused by market forces that have nothing to do with Aspen. Id. Thus, Aspen's compensation is justified by a pattern of misrepresentations to its clients. Id. Incredibly, Aspen's own damages expert agrees. Attempting to drive down Guidant's damage claim, Aspen's own expert admits that Aspen's methodology for calculating cost savings is deeply flawed, misrepresents the facts, and overstates the savings attributable to Aspen. Coleman Aff., Exh. 65. Nonetheless, whether or not Guidant's damages number exceeds \$10 million, Aspen cannot dispute that it damages Guidant by obtaining existing Guidant contracts, instructing hospitals that they pay too much for Guidant products, and advising hospitals to renegotiate prices. See Coleman Aff., Exh. 52.

Vice President confirmed at his deposition that Aspen's consulting resulted in Guidant losing \$2 million. Coleman Aff., Exh. 66. Payment of Aspen's consulting fee is contingent on achieving these cost savings, so it cannot deny that its consulting damages Guidant. Coleman Aff., Exh. 20 at 20-04, 20-14—20-15.

In two respects, these damages are directly attributable to Aspen's practice of inducing breach of Guidant's confidentiality agreements. First, Aspen relies on obtaining Guidant's contracts to provide advice to its clients regarding the confidential contract prices. Second, Aspen depends on access to confidential pricing information from one hospital to advise other hospitals how much they should pay for Guidant's devices. Aspen's recommended prices are based on its knowledge of confidential Guidant prices at hospitals throughout the country, and Aspen has this knowledge only by inducing hospitals to breach Guidant's confidentiality agreements. Coleman Aff., Exh. 24 & 26.

In light of Aspen's own claims to its clients, there cannot be a genuine dispute that Aspen damages Guidant by inducing hospitals to breach confidentiality agreements.

II. ASPEN'S COUNTERCLAIM FOR DEFAMATION FAILS AS A MATTER OF LAW

Guidant's August 11 Letter to its hospital customers is the only basis for Aspen's defamation claim. See Coleman Aff., Exh. 53. There is no evidence of any other communication by Guidant to anyone about Aspen, other than discussions occurring in the context of Aspen-driven contract negotiations. Thus, Aspen's defamation claim rises and falls with the August 11 Letter.

The August 11 Letter cannot constitute defamation as a matter of law. The letter merely explains Guidant's allegations in the lawsuit to some of its customers. Bartell Aff. at

¶ 3. Guidant wrote the letter to underscore the importance of maintaining confidentiality and to ensure that its customers have an accurate understanding of Guidant's litigation position.

Id.

A. Aspen Cannot Meet Its Burden To Prove The Prima Facie Elements Of A Defamation Claim

To state a claim for defamation under Minnesota law, a party must show that the alleged defamatory statement is false, that it has been communicated to another, and that it damages the complaining party's reputation. See Aviation Charter, Inc. v. Aviation Research Group/US, 416 F.3d 864 (8th Cir. 2005). Aspen bears the burden of proving that statements made by Guidant to its customers were false. See Benson v. Northwest Airlines, 561 N.W.2d 530 (Minn. Ct. App. 1997); Jeffries v. Metro-Mark, Inc., 45 F.3d 258, 261 (8th Cir. 1995). Aspen cannot prove the falsity of statements in the August 11 Letter. Even if it could, Aspen has also failed to create a genuine dispute of fact that it has been damaged by the letter.

1. Aspen cannot prove that the statements made by Guidant are false

Truth is a complete defense to defamation claims. See Graning v. Sherburne County, 172 F.3d 611, 617 (8th Cir. 1999). A statement is substantially true, and therefore does not give rise to an actionable defamation claim, "if any reasonable person could find the statements to be 'supportable interpretations' of their subjects." Hunter v. Hartman, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996).

Guidant's August 11 Letter explained why it had filed a lawsuit against Aspen. Coleman Aff., Exh. 53. The letter reviewed Guidant's allegations in the lawsuit, stated

that Guidant did not intend to name any hospitals as additional defendants, and announced that Guidant would not participate in contract negotiations with Aspen absent certain confidentiality assurances. Id. Aspen's defamation claim is premised on the following statements by Guidant:

- "Guidant has sought legal remedies against these two consulting firms based on its belief that these firms are engaging in unlawful activities that interfere with Guidant's ability to conduct business with its customers."
- "Specifically, Guidant believes that these two consultants have violated confidentiality agreements between Guidant and its hospital customers by improperly using confidential and proprietary information in other consulting engagements and by misrepresenting the nature of the confidential information."
- "Guidant believes that these two consultants have unlawfully induced customers to breach their existing contracts."
- "Guidant feels very strongly that the way in which we can bring the most value to our hospital customers is through the ability to work collaboratively without the unlawful interference of these third party organizations."
- "Guidant believes that by removing what it considers to be the unlawful interference of these consultants, information confidential to our partnerships will be protected and the trust inherent within our existing relationships will be promoted."

See id.

Aspen's defamation claim must be dismissed because all of these statements are true. For the reasons stated above, Aspen indisputably has unlawfully interfered with contracts between Guidant and its customers. See supra at 10-17. Guidant is entitled to summary judgment on its tortious interference claim, so its beliefs about Aspen were correct.

Further, the statements in the August 11 Letter merely state Guidant's beliefs about its allegations against Aspen and therefore cannot be false. At the very least,

Guidant's claims about Aspen's activities were reasonable and supportable interpretations of the facts. See Hunter, 545 N.W.2d at 707. Guidant merely explained the nature of its allegations against Aspen in this lawsuit. Whether or not Guidant ultimately prevails on all claims, it certainly has a good faith basis for prosecuting the litigation and communicating to its customers about it. In Graning, 172 F.3d at 617, a terminated employee brought a defamation claim against her former employer based on a posted notice stating that she had been terminated for violating the employer's confidentiality policy. She claimed that factual questions precluded summary judgment, including whether the information was really confidential and whether the confidentiality policy was legal. The Eighth Circuit nonetheless affirmed summary judgment of the defamation claim because, *inter alia*, the plaintiff could not show that the reason given for the termination were pretextual. Id. at 617 n.6. Likewise, Aspen has no evidence that Guidant's stated reasons for filing its lawsuit were not in good faith or were pretextual.

2. Aspen has no evidence that it has been damaged by Guidant's statements

Discovery has yielded no evidence that Aspen has suffered damage from the August 11 Letter. Aspen's expert report on damages, dated May 19, 2005, asserted that Aspen lost potential engagements with Ascension Health, Vanderbilt University Medical Center, and Erlanger Health System due to the August 11 Letter. See Coleman Aff., Exh. 68 ("Cobb Report"). The Cobb Report fails to reference any evidence for this bald assertion. The report merely states that:

- “[F]ollowing receipt of and as a result of Guidant Corporation’s August 11, 2004 letter, Ascension informed Aspen that Ascension would no longer consider contracting with Aspen on a system-wide basis.” See Cobb Report at 33.
- “[F]ollowing receipt of and as a result of Guidant Corporation’s August 11, 2004 letter, Vanderbilt informed Aspen that Vanderbilt would no longer consider contracting with Aspen.” See Cobb Report at 34.
- “[F]ollowing receipt of and as a result of Guidant Corporation’s August 11, 2004 letter, Erlanger informed Aspen that Erlanger would no longer consider contracting with Aspen.” See Cobb Report at 35.

The report cites nothing to justify these conclusory statements. In particular, there is no evidence that the hospitals would have hired Aspen but for the August 11 Letter or that the letter played any role whatsoever in the hospitals’ decision not to retain Aspen. Aspen’s supplemental expert report on damages, dated September 30, 2005, does not even mention Aspen’s counterclaim, much less provide a shred of evidence to support its damage claims. See Coleman Aff., Exh. 65.

To prosecute its counterclaim, Aspen had to pursue discovery of hospitals that supposedly rejected Aspen due to the August 11 Letter. Among other things, proving that Aspen lost business because of the August 11 Letter demands evidence that: a hospital was prepared to hire Aspen, the relevant decision maker at the hospital knew of the letter, and the hospital decided to reject Aspen based on the statements in the letter. These facts can only be established by the hospitals.⁸ Yet Aspen has never pursued any

⁸ For example, any affidavit or testimony from an Aspen witness regarding supposed representations made by the hospital would be inadmissible, self-serving hearsay. See Walker v. Wayne County, Iowa, 850 F.2d 433, 435 (8th Cir. 1988) (reiterating

(continued on next page)

discovery of the hospitals, and it cannot establish even the basic fact that the hospitals identified in the Cobb Report read the letter.

Aspen cannot dispute that it makes many marketing presentations to hospitals and hopes to win their business, only to be rejected for any number of reasons. For instance, Dr. Nicholas Sears, an Aspen Senior Vice President, testified at his deposition that Valley Baptist Medical Center declined to hire Aspen because of new management. Coleman Aff., Exh. 67. Thus, while the hospital asked about the August 11 Letter at an initial sales meeting, Dr. Sears admitted that he could not claim that Aspen lost the business due to the letter. Id. Dr. Sears also testified that the only other hospital to have raised questions about the letter was St. Anthony's Hospital, which then proceeded to hire Aspen. Id. Dr. Sears admitted that he is not aware of "any clients that Aspen either has not gotten or has lost as a direct result of Guidant's August 11, 2004 letter" and that he does not know of "any negative consequences that has happened as a direct result of Guidant's August 11, 2004 letter." Id.

In light of this testimony, Aspen cannot create a genuine issue of fact merely by claiming that it made a marketing presentation to a hospital prior to the August 11 Letter and then failed to win the business after it issued. As the record stands, not even those bare facts have been substantiated. Summary judgment is warranted because Aspen must

(continued from previous page)

well-established rule that a party "may not rely on hearsay evidence to support or oppose" summary judgment).

show that its reputation has been damaged by the allegedly defamatory statements, see Aviation Charter, 416 F.3d at 868, and Aspen has no evidence supporting this fundamental component of its defamation counterclaim.

B. The Statements In The August 11 Letter Are Constitutionally Protected Statements Of Opinion That Cannot Be Disproved

As a matter of law, statements of opinion that cannot be proven false are protected by the First Amendment against defamation claims. See Aviation Charter, 416 F.3d at 868 (stating that “[i]t is well recognized in Minnesota that the First Amendment absolutely protects opinion that lacks a provably false statement of fact”) (internal quotation marks and citation omitted); McClure v. Am. Family Mut. Ins. Co., 223 F.3d 845, 853 (8th Cir. 2000) (same). In addressing whether a statement can be proven false as a matter of law, Minnesota courts consider: “(1) specificity and precision of the statement; (2) verifiability; (3) literary and social context in which it was made; and (4) public context.” McClure, 223 F.3d at 853 (internal quotation marks and citation omitted). “Whether a statement can be interpreted as stating facts or can be proven false is a question of law.” Geraci v. Eckankar, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

In McClure, the Eighth Circuit held that public statements made by an insurance company about terminated insurance agents were incapable of being proven false because they were “not sufficiently precise or verifiable.” McClure, 223 F.3d at 853. In that case, the alleged defamatory statements accused the insurance agents of engaging in “disloyal and disruptive activity” and “conduct unacceptable by any business standard.” Id. The statements also alleged that plaintiffs “were in direct violation of their

agreements” and that they were “falsely claiming they initiated the legislation because they were fighting sales quotas.” Id. The court concluded that these statements were incapable of being proven false as a matter of law. In doing so, the court noted that a person “who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist.” Id. (quoting Hunter v. Hartman, 545 N.W.2d at 707).

As in McClure, Guidant’s statements to its customers are not precise, verifiable assertions of objective fact. Instead, the August 11 Letter merely explains Guidant’s allegations in a lawsuit to its customers. Without offering specifics or details, the statements assert that Guidant has filed a lawsuit against Aspen for conduct that Guidant deems unlawful. The fact that Aspen may have a different interpretation of its activities does not render defamatory Guidant’s explanation of its litigation position. The August 11 Letter is no different from the statements in McClure, and summary judgment is therefore warranted.

Additionally, the August 11 Letter does not contain a single statement of fact about Aspen. The letter only states Guidant’s litigation position and its beliefs about Aspen’s conduct. This subjective viewpoint cannot constitute defamation as a matter of law:

A statement of fact is not shielded from an action for defamation by being prefaced with the words “in my opinion,” but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, a conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Aviation Charter, 416 F.3d at 871 (quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993) (emphases added). The August 11 Letter plainly expresses Guidant's subjective view about the litigation and its allegations, and it cannot be construed as an objectively verifiable statement of fact.

The context of the August 11 Letter also demonstrates that the statements were opinions entitled to protection. The letter was delivered against a backdrop of the recently filed lawsuit against Aspen, and it merely explains Guidant's position on the allegations. See Aviation Charter, 416 F.3d at 868 (noting that "[i]n analyzing a defamation claim, [a court] must consider the context within which the statement was made"). In this context, Guidant's statements about Aspen were obviously a subjective expression of Guidant's litigation position, and no customer could reasonably interpret Guidant's assertions to be actual, verifiable facts. See French v. Eagle Nursing Home, Inc., 973 F. Supp. 870, 884 (D. Minn. 1997) (recognizing that "statements that cannot reasonably be interpreted as stating actual facts are constitutionally protected"). Aspen has no evidence that any hospital has viewed the August 11 Letter as anything other than Guidant's subjective beliefs about the lawsuit.

The timing and the context of Guidant's communications with its customers make clear that the statements challenged by Aspen were not expressions of objective fact, but represent only Guidant's subjective interpretation of the lawsuit. Accordingly, the statements are constitutionally protected, and Aspen's defamation claim must fail as a matter of law. See Beverly Hills Foodland, Inc. v. United Foods & Commercial Workers

Union, Local 655, 39 F.3d 191 (8th Cir. 1994) (issuing summary judgment because statements could not reasonably be construed as statements of fact)

C. The August 11 Letter Is Constitutionally Protected Because It Was Necessary To Protect Guidant's Rights And The Recipients Had An Interest In The Information Communicated

Even if the August 11 Letter was defamatory, it is nonetheless constitutionally protected by qualified privilege. Communications are privileged when “made upon a proper occasion, from a proper motive, and [] based upon a reasonable or probable cause.” Ferrell v. Cross, 557 N.W.2d 560, 565 (Minn. 1997). In particular, a party accused of defamation is immune from liability if “an otherwise defamatory statement was made in good faith by a speaker who had an interest or duty with respect to the subject matter to a person having a corresponding interest or duty.” Id. Such an interest or duty can be “public or private, either legal, moral, or social.” Smits v. Wal-Mart Stores, Inc., 525 N.W.2d 554, 557 (Minn. Ct. App. 1994) (quoting Friedell v. Blakely Printing Co., 203 N.W. 974, 975 (Minn. 1925)). Courts determine whether qualified privilege applies as a matter of law. Bol v. Cole, 561 N.W.2d 143, 149 (Minn. 1997).

When qualified privilege applies, the speech is constitutionally protected unless the claimant can prove that the speaker was motivated by actual “malice.” See Bol v. Cole, 561 N.W.2d at 150. Proving actual malice requires the claimant to demonstrate that the speaker acted with “actual ill-will or a design causelessly and wantonly to injure plaintiff.” Id. (quoting McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 375 (Minn. 1975)).

The August 11 Letter is protected by qualified privilege because the statements were necessary for Guidant to protect its interests. First, Guidant issued the letter to reinforce the confidentiality agreements in Guidant contracts and to ensure that hospitals understand Guidant's willingness to enforce those agreements. Bartell Aff. at ¶ 3. In particular, by explaining Guidant's allegations against Aspen, the letter emphasizes the significance of the confidentiality agreements and minimizes the likelihood of unauthorized future disclosures. Second, Guidant issued the letters to communicate that Aspen, and not hospitals, is the target of the lawsuit. Id. Because hospitals are obviously implicated by Guidant's claims, Guidant needed to reassure its customers that Guidant did not intend to sue them. Id. Finally, the August 11 Letter explains Guidant's position that trust and relationships are best built without the presence of outside consultants who induce violations of binding contracts. Id. at ¶ 5. Guidant has an obvious interest in maintaining positive business relationships with its customers.

Hospitals have an interest in the August 11 Letter for all of the same reasons. The hospitals are parties to the confidentiality agreements and therefore have an obvious interest in an action to enforce the agreements. The hospitals also have a strong interest in understanding Guidant's intentions in filing the lawsuit and knowing that consultants like Aspen are the designated targets. Id. Finally, the hospitals have an interest in communicating with Guidant about its views of consultants and development of business relationships between Guidant and the hospitals. Id.

Because the August 11 Letter is protected by qualified privilege, Aspen bears the burden to prove that the letter was motivated by malice. Thus, Aspen has to demonstrate that Guidant's sole purpose was to injure Aspen. McBride, 235 N.W.2d at 375. Aspen cannot carry this burden as a matter of law, because Aspen cannot controvert Guidant's legitimate interests in sending the letter. See, e.g., Eurlle-Wehle v. UPS, 181 F.3d 898, 901 (8th Cir. 1999) (applying qualified privilege to UPS' explanation of employee termination to other employees and finding no malice as matter of law). Even if the letter had the consequence of damaging Aspen (and there is no evidence that it did), Aspen cannot prove that inflicting harm on Aspen was Guidant's sole motivation for the letter. There is no evidence that Guidant's communications to its customers was motivated by anything other than a desire to explain its litigation position and the importance of confidentiality to its customers.

III. ASPEN'S COUNTERCLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE FAILS AS A MATTER OF LAW

To prevail on a claim for tortious interference with prospective economic advantage, the plaintiff must prove that the defendant "intentionally committed a wrongful act that improperly interfered with [plaintiff's] prospective business relationships." Guinness Import Co. v. Mark VII Distributions, Inc., 971 F. Supp. 401, 413 (D. Minn. 1997) (reciting test under Minnesota law). This test has several critical components. First, the interference must be intentional, so the plaintiff must prove that the defendant had knowledge of the prospective economic relationship and intentionally disrupted it. Id. at 412-13. Second, the interference must be improper. Third, the

plaintiff must produce evidence that the prospective economic advantage would have materialized but for the defendant's interference. In re Appraiser Found. Litig., 867 F. Supp. 1407, 1419 (D. Minn. 1994). "Without evidence that a defendant's wrongful conduct influenced a prospective customer's decision to enter into a contract, summary judgment is appropriate." Sports & Travel Mktg., Inc. v. Chicago Cutlery Co., 811 F. Supp. 1372, 1382 (D. Minn. 1993). Aspen cannot create a genuine dispute of fact regarding any of these elements.

First, Guidant had no knowledge regarding Aspen's prospective relationships with hospital clients. Bartell Aff. at ¶ 4. In particular, Aspen's expert report names three hospitals that Aspen expected to sign as clients, but Guidant had no knowledge of Aspen's potential relationships with these hospitals. Id. Lacking any knowledge of Aspen's marketing efforts, Guidant could not have intended to disrupt Aspen's prospective economic relationships with those hospitals. See Hunt v. Univ. of Minn., 465 N.W.2d 88, 96 (Minn. Ct. App. 1991) (holding that defendant must know about prospective economic relationship and intentionally interference with that relationship).

Second, Guidant's August 11 Letter was not improper. Minnesota law considers several factors in judging the propriety of the underlying conduct:

- In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
- (a) the nature of the actor's conduct,
 - (b) the actor's motive,
 - (c) the interests of the other with which the actor's conduct interferes,
 - (d) the interests sought to be advanced by the actor,
 - (e) the social interests in protecting the freedom of action of the

actor and the contractual interests of the other,
(f) the proximity or remoteness or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

Surgidev Corp. Eye Tech., Inc., 625 F. Supp. 800, 802-03 (D. Minn. 1986). Because the August 11 Letter was not defamatory, it was not an improper interference with Aspen's business relationships. See Glenn v. Daddy Rocks, Inc., 171 F. Supp. 2d 943, 949 (D. Minn. 2001) ("Based on the court's dismissal of the defamation claim, Anderson's e-mails were not wrongful and therefore they fail to support a claim of tortious interference.").

As explained above, Guidant simply issued a letter to its customers explaining the lawsuit and Guidant's claims against Aspen. There is no evidence of improper motive, and both Guidant and the hospitals had legitimate interests in the communication. The August 11 Letter is similar to the facts in Surgidev. There, the Court rejected the notion that filing a lawsuit can constitute tortious interference, absent evidence of a sham lawsuit. Id. Here, Guidant just took the additional step of instructing its customers why it filed a lawsuit that implicates them. Moreover, as the August 11 Letter explains, **Guidant has a legitimate interest in encouraging its customers not to use consultants like Aspen who wrongly compare a hospital's confidential prices to pricing benchmarks obtained from other hospitals.**

Finally, for the reasons explained above, Aspen cannot prove that it would have commenced an economic relationship with any particular hospital but for Guidant's

actions. See supra at 20-23. There is zero evidence that any hospital considered or even read the August 11 Letter when making the decision not to hire Aspen.

CONCLUSION

For the foregoing reasons, Guidant respectfully requests that the Court grant Guidant's motion for summary judgment by entering an order: 1) ordering judgment for Guidant on its claim against Aspen for tortious interference with confidentiality agreements; and 2) dismissing Aspen's counterclaims.

Guidant respectfully suggests that the Court order briefing and a hearing regarding appropriate equitable relief and other remedies for Aspen's wrongful conduct.

Dated: November 1, 2005

FAEGRE & BENSON LLP



Gerard M. Nolting , # 121319
Craig Coleman , # 325491
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Plaintiffs and
Counterdefendants Cardiac Pacemakers,
Inc.; Guidant Sales Corporation; and
Guidant Corporation