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.

ORAL ARGUMENT REQUESTED

GUIDANT SALES CORPORATION;
GUIDANT CORPORATION,

Counter-defendants.

CORRECTED MEMORANDUM IN SUPPORT OF DEFENDANT/COUNTERPLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Lawrence J. Field (#125775)
Douglas R. Boettge (#237292)
LEONARD, STREET & DEINARD
Professional Association
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500
Facsimile: (612) 335-1657

Dan K. Webb (*pro hac vice*)
Timothy J. Rivelli (*pro hac vice*)
Norman K. Beck (*pro hac vice*)
Sheri K. Rudberg (*pro hac vice*)
Josh Goldberg (*pro hac vice*)
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5600
Facsimile: (312) 558-5700

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Defendant/Counterplaintiff Aspen Healthcare Metrics, LLC ("Aspen") submits this memorandum of law in support of its Motion for Summary Judgment.

INTRODUCTION

Guidant and Cardiac Pacemakers (collectively "Guidant") commenced this lawsuit alleging that Aspen, a hospital consulting firm, had induced its hospital clients to divulge Guidant's "trade secrets" – the prices Guidant charges for pacemakers and other cardiac rhythm management ("CRM") devices – and tortiously interfered with Guidant's hospital sales contracts. Two days after filing suit, Guidant sent a form letter to hundreds of hospitals alleging that Aspen was engaged in "unlawful activities."

Discovery revealed, however, that Guidant has engaged in clandestine conduct completely undermining its claim that its pricing is a trade secret. Years before this lawsuit was filed, Guidant hired a market research firm, Millennium Research Group ("MRG"), to survey hundreds of hospitals across the nation to collect the same pricing information at issue in this lawsuit. At Guidant's direction, MRG systematically requested that hospitals divulge the prices they paid for CRM devices made by Guidant and its competitors, St. Jude and Medtronic. The price for this disclosure of Guidant's supposed trade secret? A $150 honorarium paid to the hospital by MRG. These hospitals comfortably disclose Guidant's supposedly secret pricing to firms like MRG because the hospitals do not believe the prices are a trade secret, and the industry thrives on the exchange of prices among hospitals, the physicians that practice at hospitals, group purchasing organizations ("GPOs"), benchmarking firms and consultants.

This lawsuit is an outgrowth of Guidant's hypocrisy. Since 2000, Guidant has been aware of Aspen's involvement in the market, and the success Aspen enjoyed in advising hospitals to engage its physicians and negotiate better terms for high-priced medical devices sold by firms like Guidant. For years before this lawsuit, Guidant met with Aspen, negotiated alongside Aspen, and even provided its supposedly secret pricing directly to Aspen. Indeed, even *after* Guidant filed this Complaint, alleging a wide-ranging theft of its trade secrets, Guidant's representatives continued to meet with and disclose prices to Aspen consultants.

Now, after all of this, after years of inducing price disclosures by hospitals in response to MRG's surveys, after years of working alongside Aspen, Guidant wants this Court to ignore the realities of the market and declare that its pricing is a trade secret. Guidant wants this Court to turn a blind eye to how Guidant has treated its so-called trade secret for years.

In sum, this is not a legal dispute, but a business one. Guidant's real objective is to eradicate consulting firms – which it labels "leeches" – because Guidant sees them as an ally to hospitals in their cost reduction efforts. For the many reasons set forth below, including Guidant's furtive efforts through MRG, which undermine any claimed secrecy of its supposed trade-secret prices, the Court should enter summary judgment for Aspen and against Guidant on each count of Guidant's Complaint.

STATEMENT OF FACTS

I. GUIDANT, ASPEN, AND THEIR MUTUAL HOSPITAL CUSTOMERS

In the healthcare industry, there are certain products that are selected by physicians but paid for by hospitals. These products are known as Physician Preference Items ("PPI"). (Affidavit of Douglas R. Boettge (hereinafter "Aff.") ¶2.) Guidant sells PPI devices including CRM products such as pacemakers, defibrillators, and heart failure devices. (*Id.* ¶3.) Aspen is a healthcare consulting firm that, among other things, helps financially challenged hospitals obtain better prices for the CRM devices they purchase. (*Id.* ¶4.)

A. Guidant's Contracts with Hospital Customers

Guidant contracts with hospitals to sell CRM devices either directly or through a GPO, an organization that pools purchasers to provide contracting leverage. In negotiating contracts directly with hospitals, Guidant generally first submits a pricing proposal. Until 2004, Guidant did not require hospitals to sign a confidentiality agreement *prior to* providing them with a pricing proposal. (Aff. ¶5.) Guidant then began sending a "bilateral" confidentiality agreement with its pricing proposals. (*Id.* ¶6.) About half the time, hospitals "simply refuse[d]" to sign this agreement. (*Id.* ¶7.) Guidant's efforts to obtain written assurances from hospitals not to share their pricing proposals with consultants also have failed. (*Id.* ¶8.) And when Guidant could not secure the hospital's promise not to share with its consultants, Guidant nevertheless provided its pricing proposals to the hospital. (*Id.*) Because Guidant is so unsuccessful

in obtaining a hospital's *consent* to maintain Guidant's price proposals as confidential, Guidant often resorts to what it calls a "unilateral" statement of confidentiality. (*Id.* ¶9.)

Guidant also buries a two-sentence confidentiality clause at the end of its proposals, which upon signature by the hospital becomes the contract. (Aff. ¶10.) This clause, found among other standard terms and conditions, provides:

> "Certain business information, which both GSC and [the hospital] consider confidential (including this agreement) may not be shared.[1] GSC and [the hospital] agree not to disclose this information to any third party without prior written approval." (*Id.* ¶13.)

Guidant never defines the terms "certain business information" or "third party" in its contracts. (*Id.* ¶14.) Moreover, Guidant admits that the clause requires that both Guidant *and* its hospital customers *believe* that the information is confidential before it needs to be treated as such. (*Id.* ¶15.) Guidant recognizes there is a gaping hole in its "confidentiality" clause as evidenced by its attempt to revise it repeatedly since the lawsuit was filed. (*Id.* ¶16.)

While a hospital would not necessarily disclose its Guidant pricing to a competing vendor, not a single hospital deponent believed that Guidant's "confidentiality" clause prohibited the hospital from sharing the prices they paid for Guidant CRM devices with consultants, benchmark firms, GPOs, or physicians. (Aff. ¶17.) This is consistent with Guidant's position that it can share hospital prices with its

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[1] There are various Guidant contracts with hospitals at issue where the confidentiality provision actually indicated that the information "may be shared." (Aff. ¶11.) With whom the information may be shared – each other, other entities like consultants – the contract does not say. (*Id.*) Guidant documents also generally contained a boilerplate legend "Information is confidential between Guidant and [the hospital]" in tiny print. (*Id.* ¶12.)

own consultants. (*Id.* ¶18.) The hospitals deposed in this case testified that the information pertaining to their costs for Guidant products was information owned by the hospital, and that it was confidential only insofar as it was identified with the hospital. (*Id.* ¶19.)

Guidant has done nothing to inform hospitals otherwise, assuring one hospital administrator that the clause was "standard legalese," applying only to disclosures of information to another vendor or another hospital. (Aff. ¶20.)

B. Aspen's Relationships with Hospital Clients

Hospitals hire Aspen to help them improve processes and reduce expenditures. (Aff. ¶21.) A significant portion of Aspen's work includes helping hospitals obtain more competitive pricing for medical devices. (*Id.* ¶22.) Other consultants performing services similar to Aspen's include Capgemini and Navigant. (*Id.* ¶23.)

To start, Aspen and its hospital client execute an agreement that makes Aspen the hospital's "designated agent" for the purposes of "reviewing and discussing [the hospital's] confidential vendor pricing." Aspen also undertakes to maintain the confidentiality of the hospital's proprietary information, and not to "divulge such information to any third parties . . . ." (Aff. ¶24.)

Aspen's clients then give Aspen their historical purchasing data, comprising the prices the hospital paid for all products it purchased. (Aff. ¶25.) Some hospitals also provide Aspen with copies of their vendor contracts. (*Id.* ¶26.) Upon

receipt of the purchasing data, Aspen undertakes an analysis of selected clinical service lines to provide hospitals with an accurate report on their current spending. (*Id.* ¶27.)

Aspen presents the results of its findings to the hospital and to physicians selected by the hospital. (Aff. ¶28.) Aspen's ability to involve a hospital's physicians in the negotiation process is a key part of Aspen's work. (*Id.* ¶29.) Based on an analysis of a variety of factors, including the hospital's current acquisition costs, volume of procedures, mix of products, spending habits, and physician-administrative alignment, Aspen helps the hospital develop a strategy to reduce its supply costs. (*Id.* ¶30.) Oftentimes, this strategy involves the hospital issuing a request for proposal ("RFP") to elicit vendor pricing proposals. (*Id.* ¶31.) When a hospital decides to send RFPs to vendors, Aspen assists the hospital in preparing the RFP and, utilizing the same analysis set forth above, helps identify the appropriate prices at which to begin the negotiation process. (*Id.* ¶32.)

At no time during this process has Aspen ever disclosed one hospital's prices to another hospital. (Aff. ¶33.) Every Aspen client hospital that testified confirmed that Aspen diligently protected the confidentiality of its prior clients. (*Id.* ¶34.) Aspen's clients likewise agreed that Aspen is not prohibited from drawing on their prices as part of Aspen's knowledge and experience when advising other hospital clients. (*Id.* ¶35.)

At the hospital's discretion, Aspen also negotiates directly with the hospital's vendors. (Aff. ¶36.) Aspen often attends several rounds of meetings with the

hospital and its vendors prior to the execution of a final contract. (*Id.* ¶37; *see also* discussion I.C *infra*.)

Throughout the process, Aspen analyzes and makes recommendations based on the merits of these vendor proposals. (Aff. ¶38.) When Guidant's deal is the best one, Aspen recommends the hospital encourage its physicians to use Guidant products. For example, in an April 2004 proposal to Carilion Healthcare, Aspen advised the hospital to reward Guidant because, based on the proposals submitted, Guidant was the "Good Guy." (*Id.* ¶39.) In many instances, Guidant benefits from Aspen's engagement because the hospital makes a wholesale switch to Guidant from another vendor. (*Id.* ¶40.) In at least one instance, Guidant actively encouraged Aspen to meet with a hospital's physicians to persuade them to accept Guidant's proposal. (*Id.* ¶41.)

C. Guidant and Aspen Worked Side by Side for Years

Guidant has been well aware of Aspen's consulting work *for years*. Jay Ethridge, Guidant's Strategic Pricing Director, testified about a meeting with Aspen consultant Tom Lafferty in 2000 in which Lafferty had Guidant's CRM pricing from various hospitals. (Aff. ¶42.) Guidant took no action following that meeting. (*Id.* ¶43.)

Moreover, a January 2002 presentation to senior Guidant management stated: "Aspen consulting has been sharing price points with accounts across the country, very noticeable as RFP and price-to-pay requests come to the business analysts." (Aff. ¶44.) Again, Guidant took no action. (*Id.* ¶45.)

Later in 2002, Guidant raised the specter of filing suit against Aspen, but chose not to do so. A February 2002 presentation by one of Guidant's consultants,

McKinsey & Co., proposed "taking legal action against consulting practices" in response to the "growing trend" of consultant-driven deals. (Aff. ¶46.) In October 2002, Guidant drafted a letter acknowledging Guidant's various interactions with Aspen over the prior eighteen to twenty-four months, and suggesting that it would not do business with Aspen any longer (but saying nothing about confidentiality). (*Id.* ¶47.) Guidant never sent the letter to Aspen.

Notwithstanding any "concerns" that Guidant may have had with Aspen's access to and treatment of Guidant pricing information, from the year 2000 through the present, Guidant met with and continually provided its "confidential" pricing information to hospitals and Aspen without obtaining any written agreement from Aspen to maintain its secrecy. (Aff. ¶48.) On several occasions, Aspen consultants negotiated with Guidant representatives. (*Id.* ¶49.) These meetings between Aspen and Guidant where prices were discussed continued *even after Guidant filed this lawsuit.* (*Id.* ¶50.)[2] Although Guidant policies purport to provide for disciplinary action when confidentiality is breached, Guidant employees have not been disciplined for sharing information with Aspen. (*Id.* ¶53.)

Further, even when Guidant did not meet directly with Aspen, in every case Guidant in due course consented to Aspen's engagement at hospitals and receipt of Guidant pricing. (Aff. ¶54.) At Rush Hospital, Guidant's representative expressly

[2] Guidant also has acquiesced to hospitals disclosing Guidant CRM pricing to other consultants, including Navigant. (Aff. ¶51.) Further, other than Guidant's lawsuit against Byrne & Assoc., Guidant has taken no apparent steps to address the ongoing consulting work of other consultants in the industry. (*Id.* ¶52.)

authorized Rush to share pricing with Aspen, writing, "I will confirm that we understand your need to include Aspen in your meetings … [w]e will live with that until something changes at higher levels way beyond me." (*Id.* ¶55.) As aptly described by that same Guidant representative, Guidant determines confidentiality on a "case-by-case" basis. (*Id.* ¶56.) While Guidant occasionally objected to Aspen's participation in negotiations, Guidant always ultimately "agreed to disagree," provided its pricing despite Aspen's presence, and never "walked away" from a deal. (*Id.* ¶57.)

II. THE STARK REALITIES OF THE INDUSTRY: AVAILABILITY OF PRICING INFORMATION FOR THOSE WHO WANT IT

Guidant's tolerance, if not acceptance, of Aspen's role in this market is consistent with industry practice, under which pricing information is widely available.

A. Guidant's Retention of MRG to Survey Hospitals for Guidant's Supposedly Secret Pricing

All the while Guidant met with and worked with hospitals that had engaged Aspen, it embarked on a secret survey of industry CRM pricing. In 2002, Guidant engaged a Canadian market research firm, Millennium Research Group ("MRG"), to obtain – by way of a monthly survey – market share and per-unit pricing information for CRM devices sold to hundreds of hospitals nationwide by Guidant and its competitors. (Aff. ¶58.) To date, Guidant has invested more than $1 million in MRG's pursuit of market pricing information. (*Id.* ¶59.) MRG is not a party to any contracts between Guidant and hospitals for the sale of CRM devices – contracts that purportedly prohibit disclosure to "third parties." (*Id.* ¶60.)

MRG received survey responses (e-mail, fax and telephone) from hospitals every month, containing prices the hospitals paid for Medtronic, St. Jude, Biotronik *and Guidant* CRM devices. (Aff. ¶61.) In numerous instances, surveyed hospitals obtained the pricing information for their survey responses from their contracts with Guidant and the other vendors. (*Id*. ¶62.)

MRG's efforts at collecting CRM pricing were wildly successful. MRG initially surveyed more than 300 electrophysiology ("EP") labs per quarter – a "cross-section" of the nearly 1,000 such labs in the United States – seeking prices for more than thirty Guidant products. (Aff. ¶63.) In other words, Guidant, through MRG, induced more than 300 hospitals to disclose thousands of individual price points to MRG each month. (*Id*.) Multiply that by the more than three years MRG conducted its surveys, and the number of disclosures of Guidant CRM pricing runs into the tens of thousands. (*Id.*)

MRG then turned over to Guidant all the data it collected from the hospitals. (Aff. ¶64.) Sometimes, MRG even recorded its conversations with these hospitals – without their knowledge – and turned over copies of these recordings to Guidant as well. (*Id.* ¶65.) In exchange for hospitals' participation in the survey, Guidant, anonymously through MRG, made a small ($100 or $150 every quarter) donation to the hospital. (*Id*. ¶66.) MRG also provided the hospital participants a benchmarking report comparing their prices to average sales prices for the CRM devices that were the subject of the survey (*Id*. ¶67.)

In conducting the survey, MRG made no representation to the hospitals as to who would receive their pricing data. (Aff. ¶68.) There were no written contracts; at

best, there were statements by MRG that it would not disclose the hospitals' identities. (*Id.* ¶69.)

Guidant recognized that its wide-scale inducement of price disclosure through MRG was entirely at odds with its "confidentiality" policy, and considered dropping pricing from the MRG survey altogether in 2004. (Aff. ¶70.) Despite admitting that these disclosures were not "in line with our field policy prohibiting accounts from giving out price information," Guidant nonetheless continued having MRG obtain prices from Guidant's hospital customers. (*Id.* ¶71.) MRG's pricing inducements continue unabated to this day, and Guidant *never once* directed hospitals *not* to disclose prices to MRG or any other survey firm. (*Id.* ¶72.)

B. The Freedom of Information Act Provides Another Readily Available Source of Guidant's CRM Pricing

Far from being "confidential," Guidant's CRM pricing is readily available to the public via the Freedom of Information Act ("FOIA"). Both Guidant and Medtronic have utilized FOIA to collect each other's CRM prices at public hospitals. (Aff. ¶73.)

During the course of this litigation, counsel for Aspen – replicating Guidant's and Medtronic's strategy – submitted several FOIA requests to public hospitals seeking Guidant pricing information. (Aff. ¶74.) Of the approximately sixty responses received from public hospitals that had CRM contracts with Guidant, forty-six institutions provided Guidant pricing – either the Guidant contracts themselves or

purchase orders reflecting the prices paid for Guidant CRM devices. (*Id.* ¶75.)[3] The Guidant contract for all State University of New York (SUNY) hospitals was even available on the Internet. (*Id.* ¶76.)

C. ECRI Provides CRM Pricing Information to both Hospitals and Vendors like Medtronic and Guidant's Suitor Johnson & Johnson

ECRI is a non-profit organization seeking to improve the safety, quality, and cost-effectiveness of healthcare. (Aff. ¶77.) For roughly the last ten years, ECRI has offered a service known as "PriceGuide," an online data benchmarking service allowing customers to access the prices paid by other hospitals for various products, including the CRM devices of Guidant and its competitors. (*Id.* ¶78.) There are approximately 400 subscribers to PriceGuide, including roughly 380 hospitals and several vendors, such as Medtronic and Johnson & Johnson (Guidant's suitor). (*Id.* ¶79.)

Hospitals participating in PriceGuide electronically submit to ECRI, on a quarterly basis, the prices paid to vendors for supplies, including the prices they pay for Guidant CRM devices. (Aff. ¶80.) Through PriceGuide, hospitals or vendors can compare their prices, by vendor and catalog number, to the specific prices other hospitals (identified by region and purchasing volume) have been able to obtain from vendors for those same products. (*Id.* ¶81.)

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[3] As set forth above, defense counsel made FOIA requests and received hospital information from various public hospitals. If the hospital raised a potential exemption issue relating to claims of confidentiality or proprietary information under the FOIA request, the request was withdrawn to avoid multiple administrative disputes in different jurisdictions with Guidant on the exemption issues. (Aff. ¶74.)

Guidant is well acquainted with the services offered by ECRI; its PriceGuide service is well known in the industry. (Aff. ¶82.) In the roughly ten years that PriceGuide has been offered, ECRI did not recall any concerns by Guidant, other venders, or hospitals regarding the confidentiality of the information being submitted. (*Id.* ¶83.) However, in May 2004, just three months before this lawsuit was filed, Guidant sent ECRI a letter complaining about an online "sample" PriceGuide report that appeared to reference Guidant's pricing. (*Id.* ¶84.) In response, ECRI removed that sample report from its website, but did not remove any pricing from PriceGuide. (*Id.* ¶85.) While ECRI modified its contract language with new hospital users to provide a representation that the hospital had the right to submit its pricing data (*id.*), ECRI did not change *any aspect* of its actual PriceGuide data tool. To this day, hospitals continue to provide their Guidant CRM pricing information to ECRI for inclusion in PriceGuide, and ECRI continues to offer data benchmarks for Guidant CRM devices. (*Id.*) Guidant has done nothing about it.

D. Industry Publications like HMM also Survey Guidant CRM Pricing

Guidant pricing information also is readily available in industry publications such as *Hospital Materials Management* ("*HMM*"). (Aff. ¶86.) Since at least 1999, *HMM* has published the annual results of its hospital surveys of pacemaker prices. (*Id.*) These articles provide the "average" survey price for pacemakers by vendor and model number, and the ECRI database benchmark averages for these same products. (*Id.*) In its July 2004 survey of 3,000 hospitals, *HMM* reported the average *HMM* and ECRI survey prices for at least fifty individually identified Guidant products. (*Id.*)

E. Group Purchasing Organizations Obtain and Benchmark Guidant CRM Pricing

1. Novation

Novation, a GPO that contracts for Guidant products on behalf of its member hospitals, is under *no obligation* to maintain the secrecy of Guidant's pricing. (Aff. ¶87.) The only confidentiality promise made in Novation's current contract with Guidant requires that *Guidant* maintain the confidentiality of all pricing. (*Id.* ¶88.) Further, several provisions in this contract specifically contemplate that Guidant will provide Novation with sales information pertaining to deals negotiated directly between Guidant and Novation's GPO members. (*Id.* ¶89.) When Guidant claimed in June 2005, apparently for the first time, that the pricing it negotiated directly with Novation's members was "confidential" and could not be shared with Novation, Novation expressed surprise, and refused to adhere to Guidant's newfound position. (*Id.* ¶90.)

Moreover, the contract expressly recognizes that if Novation obtains Guidant pricing "information from any source," Guidant is required to lower Novation's pricing to be "market competitive." (Aff. ¶91.) Novation exercised this clause in October 2004, and provided Guidant with pricing information it had obtained in the market about what Guidant was charging another GPO (Broadlane). (*Id.* ¶92.)

2. Premier

Similar to the Novation contract, Premier's contract with Guidant requires Guidant to provide Premier with market-competitive pricing. (Aff. ¶93.) Premier's representative testified that this allows Premier to obtain Guidant prices from Premier

members' locally negotiated deals in order to evaluate "market relevant pricing." (*Id.* ¶94.) According to Premier, "Guidant is fully aware that we obtain price points from the membership during negotiations and throughout the term of the contract." (*Id.* ¶95.)

Additionally, Premier offers its members a "supply chain benchmarking tool" called CardiacFocus that allows hospitals to compare CRM pricing "across a national database." (Aff. ¶96.) Much like ECRI's PriceGuide, the CardiacFocus database is comprised of hospital-submitted pricing for CRM devices, including Guidant pricing. (*Id.* ¶97.) In exchange for submitting device pricing to CardiacFocus, Premier supplies hospitals with an analysis of the highest price in the database, the lowest price, and the average price for various types of CRM devices. (*Id.* ¶98.)

In order to participate in the CardiacFocus program, hospitals sign an agreement that grants Premier a "license to use *and disclose* for any lawful purpose any data contained in any Survey completed by Hospital." (Aff. ¶99) (emphasis added.) Premier is allowed to disclose this information as long as the data "is blinded and aggregated with other data of other survey participants." (*Id.*)

In June 2004, just two months before Guidant filed this lawsuit, Guidant contacted Premier about CardiacFocus. (Aff. ¶100.) Premier expressed bewilderment regarding Guidant's problem with CardiacFocus. (*Id.* ¶101.) Premier ultimately agreed to add an asterisk to the bottom of its survey forms, notifying hospitals that they must not violate any agreements they have with vendors in submitting their data to Premier. (*Id.* ¶102.) However, Premier *did not* otherwise agree to change a single component of CardiacFocus or its agreements with members. (*Id.* ¶103.)

F. Physicians Readily Obtain Guidant CRM Pricing

Most physicians are not employed by a hospital or subject to any confidentiality agreements with Guidant, but "somehow the physicians seem to always know what those prices are in [hospital] systems, and that information gets translated to and fro." (Aff. ¶104.) There is no dispute that hospitals share pricing information with the physicians practicing at the hospital. (*Id.* ¶105.)

Guidant's "Code of Business Conduct" does not expressly prohibit disclosure of prices to doctors, and a former Guidant sales representative testified that Guidant directly shares prices with physicians about twenty percent of the time. (Aff. ¶106.) Guidant's documents and testimony by its sales representatives further corroborate the fact that Guidant has disclosed prices to physicians. (*Id.* ¶107.) Guidant has known of these disclosures to physicians for years and has done little to stop them. (*Id.*¶108.)

III. GUIDANT'S LAWSUIT AGAINST ASPEN

On August 8, 2004, Guidant filed a four-count Complaint against Aspen. Three days later, Guidant sent a letter to over 400 of its key hospital and physician customers, accusing Aspen of "unlawful activities." (Aff. ¶109.) Guidant sued Aspen, as opposed to other firms that are engaged in similar consulting, because Guidant believed Aspen was a "relatively small player[], with lack of substantial resources to defend litigation." (*Id.* ¶110.)

Count I of the Complaint alleges that Aspen tortiously interfered with Guidant's contracts when Aspen requested the hospitals to provide Aspen with their cost data (including costs for Guidant products). (Compl. ¶¶ 33-36.) Count II alleges that Aspen tortiously interfered with those same contracts when hospitals, consulting with Aspen, issued an RFP to Guidant seeking to renegotiate their contracts. (*Id.* ¶¶ 37-41.) Count III alleges that Aspen, through its alleged misappropriation of Guidant's pricing, tortiously interfered with Guidant's prospective contractual relations at some hospitals. (*Id.* ¶¶ 42-45.) Finally, Count IV alleges that Aspen improperly acquired Guidant's confidential pricing from Aspen's hospital customers, misused such information in consulting with hospitals, and disclosed the information to third parties. (*Id.* ¶¶ 49-50.) Guidant has identified its claimed trade secret as the "pricing information" in every pricing proposal or contract with its hospital customers. (Aff. ¶111.)

ARGUMENT

Summary judgment should be granted on each count of Guidant's Complaint. Guidant fails to satisfy any element of Minnesota's version of the Uniform Trade Secrets Act ("UTSA"), especially the requirement that it took "reasonable efforts" to protect its "trade secret," after it spent years funding MRG's efforts to induce price disclosures at hundreds of hospitals. Guidant's tortious interference claims also fail because they are displaced by the UTSA, because Guidant cannot prove a breach, and for other reasons outlined herein.

I. SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). No genuine issue of material fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the party with the burden of proof at trial is unable to present evidence to establish an essential element of that party's claim, summary judgment on the claim is appropriate because 'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *St. Jude Med., Inc. v. Lifecare Int'l, Inc.*, 250 F.3d 587, 595 (8th Cir. 2001).

II. ASPEN IS ENTITLED TO SUMMARY JUDGMENT ON COUNT IV, GUIDANT'S MISAPPROPRIATION CLAIM.

Minnesota's Trade Secrets Act requires the party seeking protection to show both the existence and the misappropriation of a trade secret. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983). Aspen is entitled to summary judgment because Guidant cannot show either that its prices qualify as trade secrets or that Aspen misappropriated any price information.

A. Aspen Is Entitled to Summary Judgment on Count IV Because Guidant's CRM Prices Are Not a Trade Secret.

To establish the existence of a trade secret, Guidant must prove three elements: (1) the claimed secret "was not generally known or readily ascertainable," (2)

the claimed secret "derived independent economic value from its secrecy," and (3) the claimed owner made "reasonable efforts to maintain the secrecy" of the material. *Electro-Craft*, 332 N.W.2d at 899. Guidant cannot establish any one of these three elements.

1. Guidant's Prices Are *Readily Ascertainable.*

As demonstrated above, Guidant's pricing information in its contracts and proposals to hospitals is generally known and easily obtainable by a whole host of entities in the industry who obtain economic value from its disclosure or use. The ease with which these third parties obtain Guidant pricing leaves no genuine issue of material fact as to whether Guidant pricing deserves trade secret protection.

When determining whether a claimed secret is generally known, courts ask whether the claimed secret is "commonly known" in the claimed owner's "trade," even if it is not known among the public at large. *See Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp., 661, 688 (D. Minn. 1986) *aff'd* 828 F.2d 452 (8th Cir. 1987); *Precision Moulding & Frame, Inc. v. Simpson Door Co.*, 888 P.2d 1239, 1242-43 (Wash. Ct. App. 1995). The issue, therefore, isn't whether Guidant's pricing is readily available to the public. Instead, courts focus on the relevant industry, and whether the claimed trade secret is available to anyone in that industry who may benefit from it.

a. Availability to Aspen

First and foremost, Guidant has demonstrated that it willingly provides its pricing information directly to consultants like Aspen, or will acquiesce to a hospital's desire to do so. (Aff. ¶112.)

b. Availability to a Market Research Firm like MRG

Guidant's engagement of MRG further proves that Guidant's prices are available to any survey firm that can call a hospital – simply under the guise of "market research." (Aff. ¶113.) Through MRG's pursuit of market prices, Guidant has ended up with thousands of its own price points from hundreds of hospitals. (*Id*. ¶63.)

c. Other Available Sources

Moreover, there is a host of other sources for Guidant CRM prices. FOIA provides access to Guidant pricing at public institutions. (Aff. ¶73.) Benchmarking services like ECRI's PriceGuide and Premier's CardiacFocus list individual price points for Guidant CRM devices for hundreds of hospitals. (*Id*. ¶114.)

GPOs regularly receive their members' contract pricing negotiated directly with Guidant; Novation, in particular, has no obligation to maintain the confidentiality of that information. (Aff. ¶115.) Novation's "Most Favored Nations" and Premier's "Market Checks" clauses in their contracts with Guidant implicitly recognize the GPO's ability to obtain the prices their competitors are paying Guidant from the open market. (*Id*. ¶116.) If Guidant agrees that Novation and Premier are entitled to lower pricing upon learning that a competitor is paying less, it necessarily follows that the GPOs first must learn of their competitors' lower pricing in the marketplace.

Physicians also are sometimes privy to Guidant prices. (Aff. ¶¶104-108.) Finally, *HMM*'s published surveys likewise demonstrate availability. (*Id*. ¶86.) *See Surgidev*, 648 F. Supp. at 688 (material is readily ascertainable if it is "available in trade journals, reference books, or published materials . . . or if the putative trade secret can be

ascertained by 'proper means'" including "discovery by independent invention," "observation of the item in public use or on public display," or "obtaining the trade secret from published literature").

2. Guidant's CRM Pricing Has *No Independent Economic Value.*

Aspen also is entitled to summary judgment because the alleged secrecy of Guidant's prices does not produce any independent economic value. This UTSA element "carries forward the common law requirement of competitive advantage." *Electro-Craft*, 332 N.W.2d at 900.

Guidant concedes that the alleged secrecy of its pricing does not produce economic value in the form of higher prices. When Guidant's Director of Strategic Pricing and corporate representative on the topic of pricing and trade secrets was asked whether Guidant can charge customers more for a device if prices are secret, he responded simply: "Absolutely not." (Aff. ¶117.)

Given the widespread availability of benchmarked pricing, Guidant's admission that any claimed secrecy does not result in higher prices is hardly surprising. Not only is benchmarked pricing widely available; it provides a better tool to gauge market pricing because the information is drawn from a larger hospital pool. Secrecy of the alleged trade secret can produce no independent economic value when information similar to the alleged secret information is more useful and is widely available. *See, e.g., Microbix Biosystems, Inc. v. Biowhittaker, Inc.*, 172 F. Supp. 2d 665, 674 (D. Md. 2000) (holding "as a matter of common sense" that when "there is no substantial difference

between the alleged trade secret and what is generally known, there is no protectible trade secret").

3. Guidant Made *No Reasonable Efforts* to Protect Its Supposed Trade Secret.

"Reasonable efforts" require "a continuing course of conduct" that manifests the plaintiff's intention to keep the information confidential. *Northwest Airlines v. American Airlines*, 853 F. Supp. 1110, 1115 (D. Minn. 1994).

In determining whether a plaintiff took adequate steps to protect the secrecy of its information, courts consider industry-specific risks. *Electro-Craft*, 332 N.W.2d at 903. Here, such industry-specific risks include hospitals' understanding that pricing information belongs to the hospital and the standard hospital protocol of sharing pricing with consultants, benchmark firms, GPOs, and physicians.

a. Guidant's Disclosures of Pricing Information.

Guidant's "efforts" cannot be viewed as reasonable in light of the repeated, unprotected disclosures of its own pricing information. A plaintiff's unprotected disclosure of its claimed secret destroys its trade secret claim. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (holding that once a claimed owner discloses a trade secret to "others who are under no obligation to protect the confidentiality of the information . . . his property right is extinguished"); *see also Flotec, Inc. v. Southern Research, Inc.*, 16 F. Supp. 2d 992, 1007 (S.D. Ind. 1998). Further, the signing of a confidentiality agreement only by *some parties* with access to the claimed secret is not sufficient to demonstrate the "continuing course of conduct" required under the

reasonable efforts element. *See Ring Computer Systems, Inc. v. ParaData Computer Networks, Inc.*, No. C4-90-889, 1990 WL 132615, at *2 (Minn. Ct. App. Sept. 18, 1990). Finally, confidentiality policies that are good in theory but disregarded in practice are not "reasonable efforts." *See Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 959 (D. Minn. 1999).

While Guidant may trumpet its formal confidentiality policy, in reality, Guidant takes the issue of confidentiality "on a case-by-case basis." (Aff. ¶118.) This ad hoc approach to confidentiality has resulted in numerous instances of Guidant's *direct* disclosures of allegedly confidential pricing to Aspen. (*Id*. ¶119.) In fact, Guidant sales personnel have e-mailed Guidant pricing proposals directly to Aspen in an effort to close a deal. (*Id*. ¶120.) No one from Guidant has been disciplined for these disclosures; in fact, one of them was promoted shortly thereafter. (*Id*. ¶121.)

In addition, Guidant has made unprotected disclosures to parties other than Aspen. Guidant's current and former employees have admitted sharing pricing information with physicians; one estimate was that such disclosures occur approximately twenty percent of the time. (Aff. at ¶¶107-108.) Other consulting firms likewise have been privy to Guidant's CRM pricing. (*Id*. ¶122.)

Finally, until just months before filing this lawsuit, Guidant failed to require that hospitals sign a confidentiality acknowledgement before sending them allegedly secret pricing proposals. (Aff. ¶123.) Guidant's newly developed pricing proposal policy, which hospitals often refuse to affirm, is no better. (*Id*. ¶¶6-8.)

Guidant cannot make unprotected disclosures of its pricing information on a "case-by-case" basis, when it suits its purposes for doing so, and at the same time assert that this information merits trade secret status. Guidant's unprotected disclosures of its pricing destroy its trade secret claim by demonstrating that Guidant failed to take reasonable efforts to protect the secrecy of this information.

b. Guidant Fails to Enforce Its Confidentiality Language.

Under *Electro-Craft*, the proponent of a trade secret is required not only to alert those in receipt of the information of its secret status, but also to treat the information confidentially itself, including enforcing known violations of its confidentiality policy. 332 N.W.2d at 901; *cf. Wyeth v. Natural Biologics*, No. Civ. 98-2469, 2003 WL 22282371, at *5 (D.Minn. Oct. 2, 2003) (finding plaintiff had taken reasonable efforts to protect its trade secret where, in the sole instance of attempted disclosure, plaintiff sought and obtained a permanent injunction).

- **MRG**

The MRG survey is the most egregious example of Guidant's utter failure to take any action to enforce the secrecy of its pricing. It is simply incredible that Guidant has asked the Court to prevent hospitals from providing pricing information to consultants, while simultaneously taking full advantage of hospitals' willingness to freely provide this information to MRG. Internally, Guidant recognized that the MRG survey was entirely inconsistent with its confidentiality policies. (Aff. ¶¶70-71.) Yet, Guidant chose to continue soliciting Guidant's pricing information and did nothing to inform

hospitals that they should stop participating in the survey. (*Id*. ¶124.) Guidant's undisputed knowledge of hospitals' provision of Guidant CRM pricing information to MRG on a monthly basis, without any confidentiality agreement, and Guidant's failure to take any action to remedy such disclosures, evidences Guidant's absolute failure to take the reasonable steps necessary to protect the secrecy of this information.

- **Benchmarking Firms**

In addition to MRG's "benchmarking" newsletter, there are myriad other benchmarking services available to hospitals in the industry. (Aff. ¶125.) Benchmarking services require that hospitals submit their pricing information, including Guidant pricing, on a regular basis to be compared against other hospital pricing data. (*Id*.) Just before filing this lawsuit, Guidant took a few superficial gestures to address these services. (*Id*. ¶¶84-85, 90, 100-103.) However, to this day hospitals continue to routinely submit their Guidant CRM pricing to these services. (*Id*. ¶126.) Guidant's minimal efforts were too little, too late, and far short of reasonable to protect the secrecy of its information. *See Electro-Craft*, 332 N.W.2d at 903 (finding that plaintiff's institution of exit interviews, a mere ten days before commencing its trade secret litigation, was insufficient to constitute "reasonable efforts" to maintain secrecy).

- **Physicians**

Guidant also is aware that physicians who implant its devices have access to Guidant CRM pricing information. (Aff. ¶104.) Guidant has failed to take even the

basic step of informing hospitals that it considers such disclosures to be a breach of the Guidant contract. (*Id*. ¶108.)

c. Guidant's Boilerplate Clause Failed to Provide Adequate Notice to Hospitals.

Finally, as part of the "continuing course of conduct" required to establish the reasonable efforts element of a trade secret, the proponent of a trade secret has a duty to provide "fair notice" to recipients of the alleged "secret" that the information is confidential. *Electro-Craft*, 332 N.W.2d at 903. Moreover, where the information does not intuitively call for secrecy, the claimed owner has a heightened duty to let those with access to the information "know in no uncertain terms" that the information is secret. *Id.* at 902-03; *Nordale v. Samsco*, 830 F. Supp. 1263, 1274 (D. Minn. 1993). Confidentiality agreements containing "vague" or "boilerplate" language are insufficient to put the recipient on notice of the purported "trade secret" status of the material. *Electro-Craft*, 332 N.W.2d at 903; *Motor City Bagels v. American Bagel Co.*, 50 F. Supp. 2d 460, 480 (D. Md. 1999) (rejecting "boilerplate language" on the cover of a document as insufficient to put the recipient on notice of the purported "trade secret" status of the material).

In this industry, it is not obvious or intuitive that pricing information constitutes a trade secret. Guidant's two-sentence, boilerplate clause is not remotely sufficient to put hospitals on notice that their *routine practice* of sharing pricing information with consultants, GPOs, or market research firms like Guidant's MRG is unlawful. Hospital administrators unequivocally testified that they did not understand

that their contract with Guidant prohibited them from sharing Guidant pricing with such entities. (Aff. ¶17.) Guidant never told them otherwise and indeed felt free to disclose hospital pricing to *its* chosen consultants. (*Id.*¶ 18.)

At best, Guidant's standard confidentiality "legalese" is vague and obtuse. (Aff. ¶¶13-17, 19-20.) The two-sentence clause fails to specify what information is covered. (*Id.* ¶¶13-15.) Guidant even admits that the clause requires that *both parties* to the contract consider information confidential to make it so. (*Id.* ¶15.) Finally, Guidant has attempted to make this clause more robust since filing the lawsuit – an implicit acknowledgement that the clause in its current form just doesn't work. (*Id.* ¶16.)

In sum, Guidant's insufficient confidentiality clause, its deficient confidentiality policy, its repeated disclosures through MRG or otherwise, and its failure to take steps to stop the free flow of its pricing information in the industry cannot constitute efforts that are "reasonable under the circumstances." *Electro-Craft*, 332 N.W.2d at 901.

B. Aspen Did Not Misappropriate Guidant's Prices.

Aspen also is entitled to summary judgment on Count IV because there was no misappropriation. "Misappropriation involves the acquisition, disclosure, or use of a trade secret through improper means." *Id.*

1. Aspen Acquired the Pricing Information by Proper Means.

There is no evidence that Aspen had any reason to believe it received price information by improper means. The Act defines "improper" to include "theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage." Minn. Stat. § 325C.01, subdiv.2.

Pursuant to contracts with hospitals designating Aspen as an agent, Aspen obtained costs for Guidant products directly from hospitals. (Aff. ¶¶24-25.) Guidant's confidentiality agreements did not prohibit hospitals from sharing pricing information with Aspen because Aspen is not a "third party." (*Id*. ¶¶13-14, 17-19.) Nor did these hospitals understand the Guidant contracts to prohibit sharing pricing with hospital "agents." (*Id*. ¶17.) Moreover, because Guidant freely shared information covered under the clause with its own consultant, and – since this lawsuit was filed – requested that at least one hospital specifically agree not to disclose this information to a "consultant" (as opposed to an undefined "third party"), there is no reasonable interpretation of Guidant's boilerplate clause under which Aspen is a "third party." (*Id*. ¶¶16, 18)

Under these facts, Guidant cannot establish that Aspen's acquisition of Guidant pricing information from hospitals was improper. *See Glasstech, Inc. v. TGL Tempering Systems, Inc.*, 50 F. Supp. 2d 722, 729-30 (N.D. Ohio 1999) (holding defendant purchaser, who acquired trade secret pursuant to a valid third-party contract, did not acquire trade secret by improper means).

2. Aspen's "Use" of the Pricing Information Was Authorized.

Guidant likewise cannot identify any evidence that Aspen improperly "used" Guidant pricing information. Guidant argues that Aspen "uses" Guidant prices when Aspen receives cost data from its hospital clients and then draws on the knowledge gained from other consulting relationships to recommend what it believes are achievable price targets. Misappropriation occurs, however, only if a defendant's use of the alleged trade secret is "wrongful," and Guidant cannot make that showing for a variety of reasons.

a. Any "Use" By Aspen of Guidant's Prices Was Not Improper Because it Was Made with Guidant's Consent and Was Made without Knowledge of a Duty.

Misappropriation requires the "disclosure or use of a trade secret of a person without express or implied consent." Minn. Stat. § 325C.01, subdiv. 3. Any attempt by Guidant to show that Aspen lacked an implied consent to use price information when advising its hospital clients is belied by the many instances when Guidant either directly disclosed pricing to Aspen or did not object to hospitals sharing their prices with Aspen. (Aff. ¶48.) Not once has Guidant refused to sell to a hospital that retained Aspen. (*Id*. ¶¶48, 54-57.) Guidant's efforts to inform Aspen that it had an obligation not to use its pricing were wholly insufficient. (*Id*. ¶¶43, 45, 47.)

Courts reject claims of wrongful use when the plaintiff, like Guidant, continued to disclose the supposed secret after learning of an alleged misuse. *See, e.g., Omnitech Int'l, Inc. v. Clorox Co*., 11 F.3d 1316, 1325 (5th Cir.1994) (because the target

company continued to share its trade secrets with the acquiring company after the acquiring company's interest in a competitor became known, the target company "cannot be heard to claim that [the acquiring company] 'misused' its proprietary information").

Wrongful use also requires knowledge of a duty that limits use of the alleged trade secret. Thus, apart from showing that Aspen used price information without consent, Guidant must show that Aspen "knew or had reason to know" that it acquired the information under circumstances giving rise to a duty to "limit its use" or that it derived the information from a person who owed Guidant a duty to "limit its use." Minn. Stat. §325C.01, subd. 3(B)(II), (III).

Here, Aspen had no reason to know of a duty that it owed either hospitals or Guidant that limited use. Aspen's agreements with hospitals did not prohibit use, and hospitals consistently testified that Aspen can draw on their prices when advising other hospital clients, so long as Aspen does not disclose hospital identities with any specific pricing. (Aff. ¶¶13-14, 24, 35.) Given Guidant's history of sharing prices directly with Aspen, and acquiescence when hospitals do the same, Aspen had no reason to believe it owed Guidant a duty that limited use. Second, there is no evidence that Aspen had any reason to believe that the hospitals from whom it obtained price information owed Guidant a duty to limit use of that information. At best, Guidant's agreements with hospitals only prevented hospitals from disclosing prices to a third party. (*Id*. ¶¶13-14.)

b. Any "Use" by Aspen of Guidant's Prices Was Not Improper because Aspen Does Not Compete with Guidant.

Moreover, any use of price information by Aspen to advise its hospital clients is not actionable because neither Aspen nor its clients compete with Guidant, and there is no evidence that Aspen ever disclosed Guidant pricing to one of Guidant's competitors. Courts applying the UTSA have held as a matter of law that only those uses that would result in unfair competition are actionable. *Omnitech,* 11 F.3d at 1325 (holding that the defendant, who evaluated plaintiff's trade secrets in deciding whether to purchase plaintiff or plaintiff's competitor, did not make an actionable "use" because the information was not used to gain "any competitive edge"); *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078, 1083-85 (W.D. Ark. 1997) (holding that the defendant, an attorney who used information obtained from plaintiff under a confidentiality agreement to bring a class action against the plaintiff, did not make an actionable "use" because the information was not used "in an anti-competitive manner") *aff'd* 175 F.3d 1025 (8th Cir. 1999).

The Eighth Circuit has adopted the reasoning of *Omnitech*. In *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827 (8th Cir. 1996), the Court refused to hold an acquiring company liable for "using" a potential target's trade secrets to evaluate whether to purchase the plaintiff or the plaintiff's competitor. Quoting *Omnitech*, the Court held that a contrary ruling would lead to "unacceptable results" because it either would force acquiring companies to make purchase decisions without the benefit of evaluating the target's trade secrets or would entirely preclude them from evaluating other targets. *Id*. at

831. This reasoning applies with equal force to consultants. If accepted, Guidant's theory either would force consultants to recommend cost-saving strategies without the benefit of evaluating their client's costs or would preclude them from assisting other clients.

There can be no dispute that Guidant does not compete against Aspen or its hospital clients. But even if they were competitors, there is no evidence that Aspen has used price information in an anti-competitive manner. *See SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1257 (3d Cir. 1985) (refusing to enjoin the use of pricing knowledge because doing so would "place an artificial restraint on the free market"); *Glaberman Associates, Inc. v. Kinderman & Sons*, No. Civ. A 98-3711, 1999 WL 98588, *3 n.7 (E.D. Pa. Feb. 25, 1999) (recognizing that any "industry custom" which requires that prices be kept secret "would be an unenforceable artificial constraint on trade"). Because Guidant cannot identify any evidence of anti-competitive use, summary judgment should be entered on Guidant's trade secret claim.

3. Aspen did not Disclose the Pricing Information Identified with any Hospital.

Guidant has presented no evidence that Aspen disclosed pricing information identified with one hospital to another hospital. (Aff. ¶¶33-34.) To show that these prices indeed are a trade secret, Guidant must demonstrate that they are relatively unique. *Electro-Craft*, 332 N.W.2d at 899. Because Guidant has failed to show that Aspen told its consulting clients what other specific hospitals have paid, rather

than what the consulting clients *should* pay based on, *inter alia*, their knowledge of the market, Guidant's claim of improper disclosure fails.

Aspen consultants clearly testified that there had been no disclosure of specific pricing from one hospital to another. (Aff. ¶33.) Guidant witnesses could not provide any first-hand knowledge of disclosures by Aspen, and no hospital witness had knowledge of any disclosures. (*Id*. ¶127.) Because Aspen did not improperly acquire, use or disclose Guidant pricing, the Court should enter summary judgment on Count IV.

II. ASPEN IS ENTITLED TO SUMMARY JUDGMENT ON EACH OF GUIDANT'S TORTIOUS INTERFERENCE CLAIMS.

Guidant's tortious interference claims likewise fail for multiple reasons, including that: Aspen is an agent, and thus cannot tortiously interfere with its principal's contract; Guidant's tortious interference claims are displaced by the UTSA; there has been no breach of contract by the hospitals; and Aspen is protected by the honest advice and consultant's privileges.

A. Aspen, an Agent of its Hospital Clients, Could Not Tortiously Interfere with Its Principals' Contracts with Guidant.

It is black letter law in Minnesota and elsewhere that an agent, acting within the scope of its agency, is incapable of tortiously interfering with its principal's contract absent a showing of malice. *See, e.g., Nordling v. Northern States Power Co*., 478 N.W.2d 498, 506-07 (Minn. 1991).

Aspen was an agent. Under the Restatement (Second) of Agency, an agency relationship is formed upon (1) manifestation by the principal; and (2) consent by

the agent. *Id*. § 15. Aspen's typical hospital contract identifies Aspen as a "designated agent in reviewing and discussing the hospital's confidential vendor pricing…" (Aff. ¶24), and Aspen was acting within the scope of its agency. Both the timing of the RFP and review of the hospital's pricing were within the scope of Aspen's agency. (*Id*. ¶¶25-32.) Nor is there any evidence of malice. Aspen's advice was rendered to its hospital clients not to punish Guidant, but to encourage the most favorable contracting terms for its hospitals; if Guidant was the "good guy," then Aspen encouraged its clients to buy from Guidant. (*Id*. ¶39.) Summary judgment is therefore appropriate on Counts I through III.

B. Guidant's Tortious Interference Claims based upon Aspen's Alleged Misappropriation Are Displaced by the Uniform Trade Secrets Act.

The UTSA provides that it "displace[s] conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." Minn. Stat. § 325C.01. Courts interpret this displacement provision to allow plaintiffs to maintain separate causes of action only "to the extent that the causes of action have 'more' to their factual allegations than the mere misuse or misappropriation of trade secrets." *Micro Display Sys., Inc. v. Axtel, Inc*., 699 F. Supp. 202, 205 (D. Minn.1988).

Guidant's tortious interference claims in Counts I and III are displaced because they are little more than artful repleading of Guidant's trade secret claim. Count I alleges that "Aspen intentionally induced" various hospitals "to breach the confidentiality provisions in their contracts by obtaining the contracts' pricing information from them." (Compl. ¶34.) Count III similarly alleges that Aspen's "misuse

of Guidant Sales' confidential pricing information" resulted in hospitals refusing to renew their existing sales contracts with Guidant. (*Id.* ¶44.) Because these claims are based entirely on a misappropriation theory, Aspen is entitled to summary judgment on Counts I and III.

C. Guidant's Tortious Interference Claims Fail because There Was No Breach of Guidant's Hospital Contracts.

1. Guidant's Hospital Clients Did Not Breach the Early Termination Term of Their Agreements.

Guidant's hospital contracts typically contain a provision allowing termination at will upon notice, typically ninety days. (Aff. ¶128.) In certain instances, the hospital's RFP provided for new pricing to begin on a date less than ninety days from the issuance of the RFP. (*Id.* ¶129.) This was not sufficiently unequivocal to constitute an anticipatory repudiation. *See Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 785 n.4 (Minn. 2004). Guidant has admitted that its contracts are frequently renegotiated during their terms, despite the existence of these notice provisions. (*Id.* ¶130.) More tellingly, the hospitals consistently testified they were not told by Guidant that their RFPs constituted a breach; at best, Guidant occasionally objected to hospital efforts to send an RFP prior to invoking the notice provision in the contract. (*Id.* ¶131.)

Even if there was an unequivocal anticipatory repudiation by a hospital, that repudiation was retracted. Retraction of an anticipatory repudiation occurs when the repudiating party, before its "next performance is due," retracts "by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform."

Gibbs, Nathaniel (Canada) Ltd v. Int'l Multifoods Corp., 804 F.2d 450, 452 (8th Cir. 1986).

Hospitals testified that they continued to pay Guidant at the original contract price *after* the new pricing deadline set forth in the RFP and until a new contract with Guidant was executed. (Aff. ¶132.) Since a valid retraction reinstates the repudiating party's rights under the contract, *see Gibbs*, 804 F.2d at 452, there was no breach, and Aspen is entitled to summary judgment on Count II.

2. Guidant's Hospital Clients Did Not Breach Their Confidentiality Agreements because Aspen Is Not a "Third Party."

As set forth above, Guidant's "confidentiality" boilerplate provides that information that *both* the hospital and Guidant consider confidential may not be shared with a "third party" (undefined in the contract) without written authorization from the other party.

Aspen, as a consultant to the hospitals, was not a "third party." First, Guidant has taken the position that *its own consultant* McKinsey & Co. is not a "third party," so a hospital's consultant cannot be treated differently. (Aff. ¶18.) Second, since this lawsuit was filed, Guidant attempted to make this confidentiality language more specific, not simply precluding disclosure to an undefined "third party." (*Id.* ¶133.) Third, hospitals uniformly testified that Guidant's "third party" language covered entities like Medtronic or St. Jude (Guidant's competitors), *not* agents, consultants, attorneys, auditors and the like. (*Id*. ¶17.) Finally, if there is any ambiguity over the meaning of "third party," this language must be construed against Guidant, as drafter of the contract.

See Simeone v. First Bank Nat'l Ass'n, 971 F.2d 103, 107 (8th Cir. 1992). Aspen therefore is entitled to summary judgment on Counts I and III.

D. Guidant's Tortious Interference Claims Fail through Application of the Consultant and Honest Advice Privileges.

Finally, Aspen cannot be liable for tortious interference because its conduct is protected by the "consultant's privilege" or "honest advice defense." Under the Restatement (Second) of Torts: "[o]ne who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relationship with another does not interfere improperly with the other's contractual relationship, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice." *Id*. at § 772.

Minnesota has adopted this defense, *see Glass Serv. Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871-72 (Minn. Ct. App. 1995), and there is abundant case law applying § 772 to protect the honest advice that consultants provide their clients. *See, e.g., J.D. Edwards & Co. v. Podany*, 168 F.3d 1020. 1022-23 (7th Cir. 1999); *Cabanas v. Gloodt Assoc.*, 942 F. Supp. 1295, 1307 (E.D. Cal. 1996) *aff'd* 141 F.3d 1174 (9th Cir. 1998). Aspen provided truthful information and honest advice. Aspen's hospital clients testified overwhelmingly that Aspen's services were valuable and that its consultants were skillful and professional. (Aff. ¶134.) For that reason, summary judgment should be entered for Aspen on all three tortious interference claims.

CONCLUSION

For all the foregoing reasons, this Court should enter summary judgment against Guidant and in favor of Aspen on each count of the Complaint.

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ASPEN HEALTHCARE METRICS, LLC

s/ Douglas R. Boettge
Lawrence J. Field (#125775)
Douglas R. Boettge (#237292)
LEONARD, STREET & DEINARD
Professional Association
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500
Facsimile: (612) 335-1657

Dan K. Webb (*pro hac vice*)
Timothy J. Rivelli (*pro hac vice*)
Norman K. Beck (*pro hac vice*)
Sheri K. Rudberg (*pro hac vice*)
Josh Goldberg (*pro hac vice*)
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5600
Facsimile: (312) 558-5700