UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CARDIAC PACEMAKERS, INC.;
GUIDANT SALES CORPORATION,

Plaintiffs,

vs.

ASPEN HEALTHCARE METRICS, LLC,

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

Defendant/Counterplaintiff,

vs.

GUIDANT SALES CORPORATION;
GUIDANT CORPORATION,

Counterdefendants.

DEFENDANT/COUNTERPLAINTIFF'S RESPONSE TO PLAINTIFFS'/COUNTERDEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In its Motion, Guidant asserts that it is entitled to summary judgment on one claim in its Complaint and both Counterclaims asserted by Aspen. First, Guidant suggests that Count I, its tortious interference claim, has been established because Aspen's hospital clients provided Guidant cost data to Aspen during the course of Aspen's consulting work. Second, Guidant suggests that Aspen's defamation and tortious interference claims should not see trial because the statements on which they are based – letters sent by Guidant to hundreds of Aspen's current and potential clients accusing Aspen of "unlawful activity" and worse – were not "false," were merely "opinions," were subject to a qualified privileged, and in any event, did not damage Aspen.

Guidant's Motion should be denied in its entirety. As set forth in Aspen's Motion for Summary Judgment and below, summary judgment should be entered for Aspen, not Guidant, on Guidant's tortious interference claim in Count I because Aspen is not a "third party," and thus hospitals did not breach any confidentiality provision in their contracts with Guidant when the hospitals provided Aspen, the hospital's agent, with their cost data.

Guidant's Motion also should be denied with respect to Count I for other independent reasons, including that: (1) Guidant's claim is displaced by the Minnesota Uniform Trade Secrets Act; (2) Aspen is an agent of its hospital clients and therefore could not tortiously interfere in the hospitals' contracts; and (3) Aspen is protected by the

consultant and honest-advice privileges. Finally, putting all of these arguments aside, the Court should not grant Guidant's Motion because doing so would require the Court to accept disputed facts about justification, causation and damages.

Guidant's arguments for summary judgment on Aspen's Counterclaims for defamation and tortious interference similarly fail to pass muster. There certainly are factual issues concerning falsity and Guidant's statements are too definite to constitute "opinions." Guidant has waived any affirmative defense based on a qualified privilege and, even if not waived, there is no Minnesota case law to support a qualified privilege for Guidant's letter. Further, there is sufficient evidence to support malice by Guidant in embarking on its propaganda campaign: Guidant considers consultants that are retained by hospitals to help them confront rising healthcare costs to be "leeches" that need to be "eradicated." Moreover, Guidant chose to sue Aspen, as opposed to larger consulting firms engaged in the same conduct, only because Aspen was small, and Guidant believed Aspen would roll over without a fight. Finally, although there is ample evidence of damages to Aspen resulting from Guidant's malicious letter-writing campaign, because Guidant's statements alleging "unlawful conduct" by Aspen are defamatory per se, Aspen need not prove special damages.

STATEMENT OF FACTS

The "facts" on which Guidant bases its argument for summary judgment in its favor consist of little more than conclusory statements – many of them without any record support.

I. GUIDANT'S HOSPITAL CONTRACTS AND ASPEN'S CONSULTING PRACTICES

A. Guidant's Contract Language Provides No Support for Its Tortious Interference Claims.

Guidant contracts with hospitals contain a two-sentence confidentiality clause stating that "certain business information" that Guidant and the hospital both "consider confidential" may not be disclosed to "any third party without prior written approval." (Affidavit of Douglas R. Boettge in Support of Aspen Response, hereinafter "Boettge Resp. Aff." ¶2; Affidavit of Craig Coleman in Support of Guidant Motion, hereinafter "Coleman Aff." Ex. 1.) Notwithstanding Guidant's conclusory and erroneous claim that the clause is "stringent and unequivocal" (Guidant Br. at 10), the clause does not define the meaning of the terms "certain business information" and "third party." (Boettge Resp. Aff. ¶3.) Moreover, Guidant has attempted to revise this clause repeatedly since the lawsuit was filed. (*Id*. ¶4.)

On its face, the scope of Guidant's confidentiality clause depends on what hospitals "consider confidential." (Boettge Resp. Aff. ¶5.) Hospitals that testified in this case unequivocally stated that the hospitals own the information pertaining to their own costs, and that those costs are confidential only insofar as they are specifically identified with that hospital. (*Id*. ¶6.) In fact, hospitals uniformly testified that they believed Guidant's confidentiality clause did not prohibit them from sharing *their own cost data* with consultants, benchmark firms, GPOs or physicians. (*Id*. ¶7.)

Guidant's argument that this clause precludes hospitals from sharing the hospital's own data with consultants and other entities that are not "third parties" is not

supported by Guidant's own practices. In fact, discovery established that Guidant shares hospital prices with its own consultant, McKinsey & Co., without seeking any written authorization from the hospital to do so. (Boettge Resp. Aff. ¶8.)

Former Guidant executive Dennis Antinori, testifying as a Rule 30(b)(6) representative, admitted that Guidant freely shares the specific prices Guidant hospital customers pay for Guidant products with McKinsey. (Boettge Resp. Aff. ¶9.) McKinsey is not a party to any contracts between Guidant and its hospital customers. When asked how Guidant could justify such disclosures in light of its litigation position that hospitals cannot share with Aspen, Antinori testified that the McKinsey consultants:

> were our agents working with us on a business analysis. And agents may be the wrong word. They were our partners in working on this project … I'm not sure it was [Guidant's hospital customers'] prices as much as it was Guidant's price files. So we weren't obligated to ask the customer [for authorization to share with McKinsey]. (*Id.* ¶10.)

This is exactly the same way that Aspen's hospital clients view their relationship with Aspen. (Boettge Resp. Aff. ¶7.)

B. Guidant Does Not Treat Its Pricing in a Confidential Fashion

Throughout its brief, Guidant states as a fact that it "maintains strict confidentiality of its contracts and CRM prices." (Guidant Br. at 3.) Whether or not Guidant treats its pricing data in a confidential fashion is not necessary to resolve this Motion, but the record shows that exactly the opposite is true. As set forth in Aspen's Motion for Summary Judgment, 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. (Boettge Resp. Aff. ¶11; *see also* Aspen Memorandum in Support of Motion for Summary Judgment, filed November 1, 2005 (hereinafter "Aspen SJ Br.") at 9-11.) Guidant, through MRG, induced more than 300 hospitals to disclose thousands of individual price points to MRG each month. (Boettge Resp. Aff. ¶12.) This all occurred at Guidant's behest, despite the undisputed fact that 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.* ¶13.)[1] Guidant's assertion that it treats its pricing in a confidential manner is plainly false, and undercuts Guidant's argument that the information is within the category of material that it "consider[s] confidential."

C. Aspen and Its Consulting Practices

Aspen is a healthcare consulting firm that specializes in working with hospitals to improve their processes and reduce expenditures. (Boettge Resp. Aff. ¶14.) A significant portion of Aspen's work includes helping hospitals obtain more competitive pricing for medical devices. (*Id.* ¶15.) Prior to doing any consulting work for a hospital, Aspen and the hospital execute an agreement that makes Aspen the hospital's "designated agent" for the purposes of "reviewing and discussing [the hospital's] confidential vendor pricing." (*Id.* ¶16.) Aspen also undertakes to maintain the confidentiality of the

[1] Aspen's Motion for Summary Judgment details the various ways that Guidant fails to protect its supposed "trade secret," including the thousands of MRG disclosures, described above, as well as the disclosures to Aspen, other consultants, physicians, and more. *See generally* Aspen SJ Br. at 9-16.

hospital's proprietary information, and not to "divulge such information to any third parties . . . ." (*Id.*)

1. Aspen's Receipt of Data from Hospitals

Guidant saves its most strongly worded rhetoric for its description of how Aspen conducts its consulting practices. For example, Guidant baldly states that "Aspen instructs its hospital client to provide confidential CRM pricing information to Aspen in violation of confidentiality agreements between the hospitals and Guidant." (Guidant Br. at 4, *citing* Coleman Aff. Exs. 15-18, 69.) First, the record does not support the allegation that Aspen "instructs" hospitals to "violate" Guidant's confidentiality agreements. The testimony cited by Guidant for this allegation simply states that Aspen requests pricing data as part of its engagement at hospitals. (*See e.g.*, Coleman Aff. Ex. 18.) Second, all hospitals that testified believed that such data sharing was permissible under the terms of their contract with Guidant. (Boettge Resp. Aff. ¶7.)

Moreover, Guidant's argument that Aspen instructs its clients to "ignore" Guidant's confidentiality concerns is belied by the very evidence Guidant cites in support. (*See* Coleman Aff. Ex. 56 at 56-01.) For example, in an October 2005 email to MedCath health system, Aspen consultant Tom Lafferty advised MedCath that Guidant previously allowed disclosure to consultants, provided the hospital and its consultant had their own confidentiality agreement in place. (*Id.*)

2. Aspen's Analysis of Pricing Data

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. (Boettge Resp. Aff. ¶17.) That analysis involves Aspen's comparison of the client's data with Aspen's consultants' knowledge and experience in the marketplace, in which Guidant is a participant. (Coleman Aff. ¶24, 26.)

Aspen has never disclosed one hospital's prices to another hospital. (Boettge Resp. Aff. ¶18.) This is supported by the consistent testimony of hospitals that their costs are confidential only insofar as they are specifically identified with the hospital. (*Id*. ¶19.) For example, when asked about any limitations on Aspen's access to a hospital's pricing information relating to Guidant products, Carilion Health System administrator Michele Tarantino testified that:

> None of my line item pricing *with Carilion's name on it* would ever be shared with any other hospital. But rather that the Carilion engagement for Aspen would just become part of their general knowledge of what was going on in the nation with these implant manufacturers and averaged to somehow an achievable price. (Boettge Resp. Aff. ¶20 (emphasis added).)

With regard to Aspen's marketing of its services – "its ability to compare one hospital's CRM prices to the prices paid by other hospitals" – Guidant misrepresents this aspect of Aspen's consulting in a blatant effort to malign Aspen on an issue that bears no relevance to resolution of the Motion. (Guidant Br. at 4.) Guidant claims "that Aspen … has no 'best pricing' or 'benchmarking' database" and "is simply lying to its clients," (Guidant Br. at 5; Coleman Aff. Ex. 23), are belied by the record. The very testimony Guidant selectively cites demonstrates that Aspen never claimed to have an electronic "best pricing" database of Guidant pricing, but that Aspen's marketing to prospective clients served to show Aspen's knowledge and experience in the

marketplace. (Boettge Resp. Aff. ¶21.) Specifically, Guidant's selective quotation of Aspen's testimony failed to include the following testimony:

> Okay, if I understand the question. We don't have an electronic pricing database. We do have *a database of knowledge*, or consulting experience as far as what the CRM market or the orthopedic market or what have you, what the current status of those markets is. (*Id*. ¶22 (emphasis added).) [2]

Next, Guidant misrepresents the facts relating to the process by which hospitals send requests for proposal ("RFPs") based on Aspen's analysis. (Guidant Br. at 5-6.) In reality, hospital administrators and Aspen consultants all testified that Aspen's consulting mirrored that of most other consultants. After analyzing hospitals' historical spending, Aspen *at times recommended* the hospital submit RFPs to vendors as part of *the hospitals'* stated goal of reducing costs. (Boettge Resp. Aff. ¶24.) Hospitals testified that they were free to accept or reject this advice. (*Id*. ¶25.) Moreover, while it is undisputed that in many cases Aspen put pen to paper in crafting the RFPs, the hospitals likewise testified that they were free to accept, modify or flat-out reject Aspen's draft RFP, and did in fact do so. (*Id*. ¶26.) This involved not only Aspen's *recommended* target prices, (*id*. ¶27,) but also the effective date new pricing was requested, the requested date for vendor responses, and other issues. (*Id*. ¶28.) Guidant's characterization of the RFPs as "Aspen RFPs" has no basis in the record; Aspen's hospital clients were in control of the overall RFP process. (*Id*. ¶29.)

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[2] Guidant's suggestion that Aspen may have withheld evidence (Guidant Br. at 5) in the more than one year of discovery in this case is offensive and completely unsupported. In fact, Aspen has produced well over one million pages of records and files to Guidant at significant expense, and permitted Guidant to inspect Aspen's electronic client files from thirteen hospitals and copy whatever files they chose. (Boettge Resp. Aff. ¶23.)

II. GUIDANT'S DEFAMATORY CONDUCT: AN EFFORT TO "ERADICATE" CONSULTANT "LEECHES"

A. Aspen's Interaction with Guidant Prior to the Lawsuit

Since as early as 2000, Guidant and Aspen have worked alongside one another on behalf of their mutual hospital customers. (Boettge Resp. Aff. ¶30.) However, sometime in 2002, Guidant began to see Aspen's assistance to struggling hospitals as a threat to Guidant's bottom line. In February 2002, Guidant considered taking "[l]egal action against consulting practices" due to the "price erosion" that Guidant attributed to at least twelve different consulting firms, including Aspen. (*Id.* ¶31.) No concern about alleged "confidentiality" was cited to justify such action. (*Id.*) Later in 2002, Guidant drafted a letter to Aspen, acknowledging the "number of opportunities" over the preceding "18-24 months where [Guidant had] interacted with [Aspen] consultants," but stating that Guidant would refrain from working with Aspen in the future. (*Id.* ¶32.) The letter was never sent, and, as the record makes clear, Guidant sales reps continued working with Aspen even after this lawsuit was filed. (*Id.* ¶30.) By 2003, Guidant's reaction to Aspen grew venomous; one of Aspen's consultants was labeled a "cancerous and vile individual," and upper management was urged to "create a living hell for Aspen consulting." (*Id.* ¶33.)

At some time last year, Guidant devised a new strategy to "disrupt consultant operations," "eradicate" consultants from the industry, and "signal competitors." (Boettge Resp. Aff. ¶34.) As outlined by Mark Bartell, the President of

Guidant Sales Corporation, Guidant adopted a "[t]wo part strategy" for dealing with consultants, whom Bartell called "leeches." (*Id.* ¶35.)

The first part of the strategy, given the name "Project Eagle," involved sending a "rifle shot" across the industry by suing Aspen and another small consulting company, Byrne Consulting. (Boettge Resp. Aff. ¶36.) Guidant sued Aspen and Byrne, as opposed to larger consulting firms engaged in identical business practices, because Guidant considered them "relatively small players, with a lack of substantial resources to defend litigation." (*Id.* ¶37.)

The second part of the strategy involved strengthening Guidant's weak confidentiality practices and informing Guidant's customers that Guidant believes in "fair pricing, which [Guidant] will be happy to talk about when the conaultants [sic] are gone." (Boettge Resp. Aff. ¶38.) Further, Guidant also began to track consultant activity – by Aspen and nine other firms – at various hospitals through a consultant tracking database. (*Id.* ¶39.)

B. Guidant Flooded the Market with Its Defamatory August 11th Letter.

On August 9, 2004, Guidant filed separate lawsuits against Aspen and Byrne Consulting in Minnesota state court. Two days later, on August 11th, Guidant began its "pro-active" communication campaign against both consulting firms by mailing a letter signed by Guidant's President Mark Bartell to several hundred hospitals and an

undetermined number of physicians.[3] (Boettge Resp. Aff. ¶41.) Included among the hospitals that received the letter were the vast majority of Aspen's clients as reflected by Guidant's consulting tracking database. (*Id*. ¶42.)

The letter, identifying Aspen by name, made the following false statements of fact about Aspen and Byrne:

> • "[T]hese firms are engaging in *unlawful* activities that interfere with Guidant's ability to conduct business with its customers."
>
> • "[T]hese 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." (Boettge Resp. Aff. ¶43 (emphasis added).)

Although Bartell signed the letter, he relied on others in his organization to ensure it was accurate. (Boettge Resp. Aff. ¶44.) But the individuals Bartell relied upon,

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[3] Although some individual Guidant employees kept limited records, Guidant corporate did not keep track of which physicians received the letter. (Boettge Resp. Aff. ¶40.)

including Jay Ethridge and Craig Blanchard, had difficulty articulating any basis for the statements in Guidant's letter, at best relying on "anecdotal" information. (*Id.* ¶45.)

On August 11th, Bartell also circulated an email to Guidant's entire management team directing them to "proactively" communicate with hospitals, physicians and Guidant's competitors regarding Guidant's litigation against Aspen and Byrne. (Boettge Resp. Aff. ¶46.) Bartell also circulated various documents to Guidant's managers to assist them in this effort, including a Q&A sheet that accused Aspen and Byrne of "illegal activity." (*Id.* ¶47.)

Guidant's managers heeded Bartell's call and began discussing Guidant's August 11th allegations against Aspen with hospital and physician customers. (Boettge Resp. Aff. ¶48.) Guidant then circulated the letter to Group Purchasing Organizations ("GPOs"), and scheduled meetings with them to discuss the litigation. (*Id.* ¶49.) Guidant's oral communications of false facts about Aspen similarly lacked any reasonable basis, nor did they set forth sufficient information to allow the listener to draw his or her own conclusions. (*Id.* ¶50.)

Shortly following Guidant's communication campaign against Aspen, several Guidant upper-level employees, including Guidant's Director of Strategic Pricing, Jay Ethridge, discussed a situation at Washoe Medical Center where the hospital "decided to pull Aspen out of their negotiations." (Boettge Resp. Aff. ¶51.) Washoe's reaction to the letter was hailed as "good news," signaling "an early success with our strategy." (*Id.*)

Not content with the "signal" that the lawsuit itself might provide Guidant's competitors St. Jude Medical and Medtronic, (Boettge Resp. Aff. ¶52), Guidant also contacted St. Jude directly to urge them to review Aspen's website. (*Id.* ¶53.) Further, following entry of the protective order in this case, a Guidant employee with access to confidential discovery material placed a second call to counsel for St. Jude and informed him that Aspen had produced information "specific to St. Jude," and that St. Jude "may need to take a look at things." (*Id.*)

C. Hospitals Heeded Guidant's False Accusations about Aspen.

In addition to the general reputational harm suffered by Aspen as a result of Guidant's defamatory letter, several hospitals and hospital systems that received the letter declined to engage Aspen's services or refused to consider engaging Aspen for additional services. Other hospitals delayed their decision to engage Aspen.

1. Scripps Health

John Armstrong, the Vice President of Supply Chain Management for Scripps Health, was an Aspen client in August 2004. (Boettge Resp. Aff. ¶54.) Guidant was aware of the relationship between Aspen and Scripps when Guidant sent the letter to Armstrong. (*Id.* ¶55.)

When Armstrong received the letter, Scripps was planning on using Aspen for tracking services and contemplated additional future Aspen projects. (Boettge Resp. Aff. ¶56.) Armstrong testified that after he received the letter he no longer considered doing so:

Q: What was your reaction to the letter?

> **A:** Well, first reaction was, you know, this initiative – I knew the initiative made an impact and probably, you know, looking at it from a hospital guy's standpoint, you know, kind of supported the impact of this initiative in terms of reducing costs, and – but I felt bad about it because I wanted – wanted to use Aspen in the future, and I realized this makes this – this adds a complexity to that and creates a problem.
>
> * * * * * * * * * * *
>
> **Q:** Mr. Armstrong, you testified earlier this morning that you had retained Aspen not only to consult with you on the RFP process, but they were also going to do some tracking services you?
>
> **A:** That's correct.
>
> **Q:** And did you, in fact, utilize them for those tracking services?
>
> **A:** I have not. (*Id.*)

Scripps' decision, based on Guidant's letter, resulted in a loss of at least $65,625 to Aspen. (Boettge Resp. Aff. ¶57.)

2. Vanderbilt University Medical Center

In the Spring and Summer of 2004, Aspen and its parent company, MedAssets, were courting the business of Vanderbilt University Medical Center. (Boettge Resp. Aff. ¶58) By the summer of 2004, MedAssets and Aspen had given several presentations to Vanderbilt and built a detailed financial model for the engagement. (*Id.* ¶59.) The fee structure contemplated for the Aspen-Vanderbilt engagement included a $270,000 flat fee for Aspen's first year of work at Vanderbilt and $65,000 for the second year. (*Id.* ¶60.)

On September 3, 2004, Vanderbilt administrator David Bearden wrote to MedAssets and Aspen stating that the hospital's decision about a possible engagement

should, hopefully, "come in the near future." (Boettge Resp. Aff.¶61.) MedAssets executive Rand Ballard then was informed that Vanderbilt decided to engage MedAssets and Aspen. (*Id.* ¶62.)

A few days later, Vanderbilt was flooded with copies of Guidant's August 11th letter. (Boettge Resp. Aff. ¶63.) In response, Bearden sent an email to MedAssets and Aspen expressing grave concern: "We have received letters both faxed and mailed as well as e-mails from Guidant regarding the lawsuit. Since many people here at Vanderbilt are receiving these and asking me questions, can you detail exactly what is taking place?" (*Id.* ¶64.)

Aspen spent considerable resources seeking to undo the damage caused by Guidant's defamatory letters, engaging Vanderbilt administrators in additional discussions and submitting additional references to alleviate concerns about the issues raised by the letter. (Boettge Resp. Aff. ¶65.) But over a year later, Vanderbilt has not retained Aspen or MedAssets. (*Id.* ¶66.)

3. Ascension

In 2003, Aspen began providing services to Ascension Health System hospitals, on an individual, hospital-by-hospital basis. (Boettge Resp. Aff. ¶67.) Aspen's work included a pilot program for orthopedic and spine purchases on behalf of several Ascension hospitals. (*Id.*) In the Spring of 2004, Aspen began discussions with Ascension regarding the provision of "system-wide" and "long term" consulting services to negotiate a national spine contract with its vendors. (*Id.* ¶68.) Aspen estimated that an

engagement at Ascension to negotiate a national spine deal would have brought in approximately $500,000 in fees. (*Id*. ¶69.)

Guidant sent its August 11th letter to Ascension, and specifically discussed the letter with various Ascension employees. (Boettge Resp. Aff. ¶70.) Guidant was aware that Aspen was pursuing business with the Ascension system. (*Id*. ¶71.) Following Guidant's defamation campaign, Ascension declined to engage Aspen's services for the national spine work. (*Id*. ¶72.) Rather, Ascension informed Aspen that Aspen was in too much "trouble" for a national contract. (*Id*. ¶73.)

4. Other Hospitals

Several additional hospitals, including the University of Pittsburgh Medical Center, Valley Baptist in Harlingen, Texas, and Legacy Health System in Portland, Oregon questioned Aspen about the allegations in Guidant's August 11th letter, sometimes at length. (Boettge Resp. Aff. ¶74.) In some of these situations, Aspen overcame the effect of Guidant's August 11th letter, but not without significant delays in the hospitals' decision to engage Aspen. (*Id*.)

III. GUIDANT'S LAWSUIT AND ASPEN'S COUNTERCLAIM

On August 8, 2004, Guidant filed a four-count Complaint against Aspen in Hennepin County, Minnesota. Count I of the Complaint alleged that Aspen tortiously interfered with Guidant's contracts when Aspen requested that hospitals provide Aspen with their cost data (including costs for Guidant products). (Compl. ¶¶33-36.) Count II alleged 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 alleged 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 alleged 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.)

After removing Guidant's Complaint to this Court, on September 14, 2004, Aspen filed an Answer and asserted a two-count Counterclaim, the first for tortious interference (Aspen Counterclaim ¶¶36-39), and the second for defamation (*id.* ¶¶40-46) based on Guidant's August 11, 2004 letter.

On November 1, 2005, Aspen and Guidant filed cross-motions for summary judgment. Aspen moved for summary judgment on all four of Guidant's claims. Guidant moved for partial summary judgment on one of its claims, tortious interference with contract for inducement of breach of confidentiality agreements ("Count I"), and on both of Aspen's Counterclaims.

ARGUMENT

I. GUIDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS TORTIOUS INTERFERENCE CLAIMS.

To prove tortious interference for inducement of breach of confidentiality agreements, Guidant must show (1) the existence of a contract; (2) Aspen's knowledge of such; (3) Aspen's intentional procurement of breach; (4) without justification; and (5)

damages resulting from the tortious act. *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998).

As set forth in Aspen's Motion for Summary Judgment and below, the undisputed facts support entry of summary judgment for Aspen, not for Guidant, on Count 1 of Guidant's Complaint. The Court should enter summary judgment for Aspen on Count I of Guidant's Complaint because: (1) there has been no breach of the hospital contracts with Guidant; (2) Guidant's claim is displaced by the Minnesota Uniform Trade Secrets Act ("MUTSA"); (3) Aspen is an agent of its hospital clients and therefore could not tortiously interfere in the hospitals' contracts; and (4) Aspen is protected by the consultant and honest-advice privileges. However, even if the Court does not rule in Aspen's favor on its Motion, the Court should deny summary judgment for Guidant on Count I because it cannot accept Guidant's theory without resolving disputed facts, including whether Guidant incurred any damages as a result of any breach.

A. There Has Been No Breach of Guidant's Hospital Contracts.

As stated in Aspen's Motion for Summary Judgment, Guidant's hospital customers did not breach their confidentiality agreements with Guidant because Aspen is not a "third party." (Aspen SJ Br. at 36-37.) Aspen, as a consultant to the hospitals, was not a "third party," just as, in Guidant's view, its own consultant McKinsey & Co. was not a "third party." (Boettge Resp. Aff. ¶75.) Second, Guidant's attempts to make this confidentiality language more specific, not simply precluding disclosure to an undefined "third party," demonstrates the ambiguity of the term. (*Id.* ¶76.) Any ambiguity over the meaning of "third party" 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). Finally, 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.* ¶7.)

B. Guidant's Tortious Interference Claims Are Displaced.

As demonstrated in Aspen's brief in support of its Motion for Summary Judgment, the MUTSA displaces any common law claim – like Count I of Guidant's Complaint – that is premised on allegations that the defendant improperly obtained alleged trade secrets. *See* Aspen SJ Br. at 34-35. Displacement applies with full force to tortious interference claims. *See SL Montevideo Tech., Inc. v. Eaton Aerospace, LLC,* 292 F. Supp. 2d 1173, 1179-80 (D. Minn. 2003) (dismissing claim for tortious interference with a confidentiality provision in a contract); *Lutheran Assoc. of Missionaries and Pilots, Inc. v. Lutheran Assoc. of Missionaries and Pilots, Inc.*, 2005 WL 629605, at *13 (D. Minn. March 15, 2005) (dismissing claim for tortious interference with prospective business advantage). Guidant's Motion completely ignores the MUTSA's displacement provision.

The decision in *SL Montevideo* is right on point and illustrates Guidant's error. The plaintiff, Montevideo, disclosed its alleged trade secrets to Eaton with whom it was under contract to design a motor. Eaton, in turn, shared those alleged secrets with a second defendant, Astromec. When Montevideo learned of Easton's disclosure to Astromec, it claimed that Astromec not only misappropriated its trade secrets when it acquired those secrets from Eaton, but also that Astromec tortiously interfered with the

confidentiality provision in Montevideo's contract with Eaton. 292 F. Supp. 2d at 1175-77. Because the "soliciting and receiving [of Montevideo's] trade secrets" comprised the alleged interference, Judge Kyle held that Montevideo's tortious interference claim was displaced by the MUTSA. *Id*. at 1179-80.

The same result applies here. Just as Montevideo alleged that "by soliciting and receiving [Montevideo's Motor] trade secrets, [Astromec] procure[d] Eaton's breach of its confidential relationship with [Montevideo] without justification," *id*., Guidant alleges that "Aspen has no legal justification for inducing hospitals to breach the confidentiality agreements protecting Guidant's contracts from disclosure to third parties like Aspen." (Guidant Br. at 10). The "disclosure," according to Guidant, involves Aspen's allegedly improper acquisition of "confidential CRM prices," (Guidant Br. at 4) information that Guidant at the same time claims is a trade secret. (Compl. Count IV) Therefore, because Count I and Count III (interference with prospective business advantage) are premised on Guidant's allegation that Aspen improperly induces hospitals to disclose allegedly secret price information, they are displaced by the MUTSA. On this basis alone, Aspen is entitled to summary judgment on both Counts I and III.

C. As an Agent, Aspen Cannot Effect a Breach of Its Hospital Clients' Contracts with Guidant.

Aspen also is entitled to summary judgment on all of Guidant's tortious interference claims – including Count I at issue in Guidant's Motion – because Aspen is an agent of its hospital clients, and thus could not, as a matter of law, tortiously interfere with Guidant's contracts with the hospitals. Agency is defined as "the fiduciary relation

which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1. *See also* Aspen SJ Br. at 33-34.

Guidant does not dispute that its claim fails if Aspen is an agent, because an agent cannot tortiously interfere with its principal's contract. Instead, Guidant argues that Aspen is not an agent because Aspen cannot bind its hospitals to a contract. But that argument is based entirely on a misreading of a tentative draft of the Restatement of Agency, that itself is inconsistent with Minnesota Supreme Court precedent. *See* Guidant Br. at 14-15, *citing* Restatement (Third) of Agency § 1.01 cmt. c (2001). First, Minnesota law does not require that an agent be able to bind its principal to a contract. *See Johnson v. Ostenso*, 84 N.W.2d 269, 273 (Minn. 1957) (holding that the authority to create binding contracts is not necessary to finding an agency relationship exists). Second, the Third Restatement section and comment cited by Guidant also clearly state that "[a]gents who lack authority to bind their principals to contracts nevertheless often have authority to transmit or receive information on their behalf." *Restatement (Third) of Agency* § 1.01 cmt. c. And third, the Third Restatement of Agency is a tentative draft that has not been adopted by the ALI. *See* § 1.01, fn. (a) ("As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals.").

Rather than being determined by an ability to bind a principal, the question of agency is determined by the consent of both parties that the agent "shall act on [the principal's] behalf and subject to his control." *A. Gay Jenson Farms Co. v. Cargill, Inc.*,

309 N.W.2d 285, 290 (Minn. 1981). Guidant does not dispute that hospitals *did* grant Aspen the authority "to transmit or receive information" on their behalf. (Guidant Br. at 4-6). Such consent clearly is manifested in the agreements between Aspen and the hospitals in which the hospitals "authorize[d] Aspen Healthcare Metrics to act as its designated agent in reviewing and discussing the hospital's confidential vendor pricing and other vendor in formation that is proprietary to the hospital." (Boettge Resp. Aff. ¶77.)

Further, at all times in the Aspen-hospital relationship, the hospital had control over Aspen's work. (Boettge Resp. Aff. ¶29.) Even accepting as true Guidant's claim that Aspen recommended hospitals send RFPs to vendors, that Aspen recommended the target prices contained in those RFPs, and that Aspen reviewed vendor responses to RFPs and made recommendations about how to respond, the fact remains that the hospitals made the ultimate decision on each step in the process, and exercised control over Aspen. (*Id.*) Accordingly, the requisite elements of agency are met, and as an agent of the hospitals, Aspen could not have induced the hospitals to breach their confidentiality agreements with Guidant.

D. Consultant and Honest-Advice Privileges Protect Aspen's Conduct.

Finally, as set forth in Aspen's Motion for Summary Judgment on Counts I through III of Guidant's Complaint, Aspen cannot be liable for tortious interference because its conduct is protected by the "consultant's privilege" or "honest-advice defense." *See* Aspen SJ Br. at 37-38. As a consultant providing advice in good faith to hospitals about how to lower their supply costs, all within the scope of its consulting

engagement, Aspen cannot be held liable for tortious interference with contract. Accordingly, summary judgment is warranted for Aspen. *See e.g., Riblet Tramway Co, Inc. v. Erickson Assoc., Inc.*, 665 F. Supp. 81, 87-88 (D.N.H. 1987) (granting summary judgment to consultant on claim of tortious interference in prospective contract based on honest-advice privilege); *In re Estate of Albergo*, 656 N.E.2d 97, 104 (Ill. App. Ct. 1995) (relying on honest-advice privilege in affirming summary judgment to hospital bill review service because service did not act with malice and its advice was justified, even though it was motivated by financial gain).

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 relation with another does not interfere improperly with the other's contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice." *Id*. at § 772. Comment c of this section explains that the rationale underlying this provision is to protect the freedom of communication and enable "the lawyer, the doctor, the clergyman, the banker, the investment, marriage or other counselor, and the efficiency expert" to perform his or her task. *Id*.

Minnesota has adopted this defense. *See Glass Service Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871-72 (Minn. Ct. App. 1995). In *Glass Service*, the Minnesota Appellate Court, citing § 772, affirmed a lower court's grant of summary judgment to the defendant insurer. 530 N.W.2d at 871. The plaintiff, a glass repair service, claimed the defendant insurer tortiously interfered with the glass repair service's contracts and prospective economic relations when the insurer directed its

insureds to use lower-priced glass repair services. *Id*. at 870. The court held that the insurer could not tortiously interfere with the plaintiff's contracts or prospective business relations because the insurer was justified in giving its insureds truthful advice. *Id*. at 871.

While Minnesota courts have not addressed the privilege in the context of consultants, there is abundant case law across the nation 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); *United Truck Leasing Corp. v. Getlman,* 533 N.E.2d 647, 652 (Mass. App. Ct. 1989), *rev'd on other grounds,* 551 N.E.2d 20 (Mass. 1990).

Guidant has presented no evidence that Aspen's consulting work ever went beyond the scope of its engagements with hospitals, or that Aspen made its cost-cutting recommendations to hospitals in bad faith. Instead, Aspen provided truthful information and honest advice, all within the scope of its engagements. Aspen's hospital clients testified overwhelmingly that Aspen's services were valuable, in that Aspen's work lowered the hospitals' operating costs, and that Aspen's consultants were skillful and professional. (Boettge Resp. Aff. ¶78.)

E. Aspen's Consultant Privilege Precludes Guidant from Showing Lack of Justification.

The analysis pertaining to the consultant and honest-advice privileges above likewise demonstrates that no genuine issue of fact exists as to Guidant's tortious

interference claim because, as a matter of law, Aspen was "justified" in every aspect of its consulting work with hospitals.

In *Riblet v. Erickson*, the New Hampshire District Court held that "[i]t has long been recognized that a person's interest in being free from interference with a contract may be *justifiably* invaded by someone who is privileged." 665 F. Supp. at 87 (emphasis added). In granting summary judgment to the defendant consultant, the *Riblet* court held that the consultant was justified in advising his client, a State public entity, to reject the lowest bid for the installation of ski lifts because the bidder had insufficient experience in installation. *Id*. at 87-88.

Guidant's argument that Aspen lacked justification in advising its hospital clients ignores any facts about whether the advice came within the scope of Aspen's engagement, or whether the advice was honest. Rather, Guidant's argument that Aspen lacked justification is premised on its unfounded belief that Aspen's consultations with hospitals were focused on Guidant. (*See* Guidant Br. at 4.) The record is clear that the sole purpose of Aspen's engagement by hospitals was to assist hospitals in cutting their operating costs. (Boettge Resp. Aff. ¶24.) When Guidant's proposals to the hospitals with which Aspen consulted offered the lowest pricing, Aspen continued its good-faith effort of helping the hospitals cut costs by *recommending* that the hospital buy the products from Guidant. (*Id*. ¶79.) In some instances, Guidant benefited from Aspen's engagement because some hospitals made a wholesale switch to Guidant from another vendor. (*Id*. ¶80.)

F. Genuine Issues of Fact Remain on Guidant's Tortious Interference Claim on Both Causation and Damages.

Guidant acknowledges that it must prove Aspen's conduct caused Guidant's damages (Guidant Br. at 16-17), but misstates the requirements for proving causation. Under Minnesota law, Guidant must show that the its damages were "directly caused" by Aspen's interference with Guidant's contracts. *Thomas & Betts Corp. v. Leger*, 2004 Minn. App. LEXIS 1322, at *22 (Minn. Ct. App. Nov. 24, 2004); *see also Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 500 (Minn. Ct. App. 2002) (damages must be caused by the breach); Restatement (Second) of Torts § 774A(1)(b) (explaining that damages are recoverable only if "the interference is a legal cause"). Guidant has no evidence that its price decreases are caused by or even related to Aspen's knowledge of Guidant's pricing at other hospitals.

In an effort to show causation, Guidant relies on Aspen's guarantee to its clients that they will save money, measured by reductions in the prices hospitals pay vendors like Guidant. (Guidant Br. at 16-17.) But nothing in this guarantee indicates that cost savings will be achieved because of Aspen's knowledge of Guidant's pricing. On the contrary, Aspen's clients understand that Aspen achieves the guarantee through its knowledge of market forces and factors impacting price and its "process management." (Coleman Aff., Ex. 66, *cited in* Guidant's Br. at 17.)

Guidant claims that Aspen is relying solely on its knowledge of Guidant's pricing at former clients to develop target pricing for new clients. The record simply does not support this conclusion. For example, Aspen's President Eileen McGinnity

testified that in developing target pricing, Aspen considers the individual client's situation and the factors that would impact the client's pricing. (Coleman Aff., Ex. 13.) Other Aspen witnesses similarly testified that they develop target pricing based on their knowledge of the market as a whole and the market factors impacting pricing. (Boettge Resp. Aff. ¶81.)

Guidant's damages expert agreed that these other factors, including market forces, impact prices. (Coleman Aff. Ex. 64, at 17; Ex. 52 at 10.) Significantly, Guidant's damages expert failed to offer an opinion or even conduct any analysis to consider these factors and their role in affecting the price of Guidant's products. *Id.*

Further, for all the reasons explained in the report of Cobb & Associates, Aspen also disputes Guidant's damages expert's determination of damages exceeding $10 million dollars. (Coleman Aff., Ex. 65.) Guidant's damages expert's analysis is full of significant errors and faulty assumptions. (*Id.*) Thus, Guidant's attempt to move for summary judgment must fail for the additional reason that it has not and cannot establish the necessary causation and damages on its claim.

II. GUIDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ASPEN'S COUNTERCLAIMS FOR DEFAMATION AND TORTIOUS INTERFERENCE.

A. Guidant's Arguments about Aspen's Defamation Claim Fail on Multiple Levels.

To state a claim for defamation, a party must show that the alleged defamatory statement: (1) is false; (2) was communicated to another; and (3) tends to harm the reputation of the plaintiff in the estimation of the community. *Aviation Charter,*

Inc. v. Aviation Research Group/US, 416 F.3d 864, 868 (8th Cir. 2005). Minnesota law specifically protects corporations from statements that "tend[] to affect the credit, property or business of the corporate plaintiff." *Advanced Training Sys., Inc. v. Taylor*, 352 N.W.2d 1, 10 (Minn. 1984). Where a corporate plaintiff establishes that the defendant's statement "tended to prejudice it in the conduct of its business or to deter third persons from dealing with it," special pecuniary damages need not be proved. *Id.* at 9-10.

Guidant does not dispute that it circulated a letter to over 450 current and potential Aspen customer hospitals and an unidentified number of physicians, accusing Aspen of "unlawful activities," "improperly using confidential and proprietary information," "misrepresentation" of information, "unlawful induce[ment]," and "unlawful interference." (Boettge Resp. Aff. ¶82.) Nor can Guidant dispute that it also embarked on a campaign of "proactive … communications" designed to further propagate these false accusations. (*Id.* ¶83.) Rather, Guidant asks that this Court enter summary judgment against Aspen on its defamation claim because Guidant alleges that: (1) the claims in Guidant's letter were true or, alternatively, were mere opinions not capable of being proven true or false; (2) Aspen cannot establish any damages resulting from Guidant's letter; and (3) Guidant is protected by a qualified privilege and Aspen cannot demonstrate sufficient malice to abrogate that privilege. (Guidant Br. at 17-28.) These arguments are meritless and should be denied for the reasons set forth below.

1. At a Minimum, Disputed Material Issues of Fact Exist as to the Falsity of the Statements in Guidant's Letter.

a. Guidant's Statements Are False.

Guidant presumptuously claims that based on the undisputed facts, the claims in its August 11th letter are true. (Guidant Br. at 19.) In other words, Guidant asserts that the following facts are undeniably true:

- Aspen has engaged in "unlawful activities."
- Aspen has "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."
- Aspen has "unlawfully induced customers to breach their existing contracts."
- Aspen has "unlawful[ly] interfer[ed]" in the relationships between Guidant and its customers. (Boettge Resp. Aff. ¶84.)

However, Aspen vigorously challenged each of Guidant's claims, and, through its own Motion for Summary Judgment, asserted that even taking the evidence in the light most favorable to Guidant, each of Guidant's claims is patently *false*. Because there are disputed issues of material fact as to the truth or falsity of Guidant's August 11th statements, Guidant's citation to *Graning v. Sherburne County*, 172 F.3d 611 (8th Cir. 1999), is entirely misplaced. In *Graning*, the "undisputed facts" established that the plaintiff had in fact breached her employer's confidential policy. 172 F.3d at 617. The plaintiff in *Graning* failed to produce any evidence to the contrary. *Id.* at 617 n.6.

Unlike *Graning*, as set forth above and in Aspen's Motion, there is overwhelming evidence to support the conclusion that Aspen has not induced the breach

of Guidant's confidentiality clause nor misappropriated anything that could be considered a trade secret. First, the undisputed evidence has established that hospitals do not understand Guidant's confidentiality clause to prohibit them from sharing Guidant pricing information with Aspen as their agent or with benchmark or market research firms. (Boettge Resp. Aff. ¶7.) Guidant was undeniably aware of hospitals' interpretation of the Guidant confidentiality clause as demonstrated by Guidant's long-term sponsorship of the MRG survey. (*Id.* ¶¶11-12.) Further, Aspen has developed evidence of: (1) Guidant's repeated disclosures of Guidant pricing information directly to Aspen and (2) Guidant's acquiescence to hospitals' provision of Guidant pricing information to Aspen. (*Id.* ¶30.)

Contrary to the facts in *Graning*, here, there is no reasonable interpretation of the facts to support Guidant's assertion that the claims in its August 11th letter were true. *Cf. Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 989 (D. Minn. 1999) (rejecting defendant's motion for summary judgment on defamation claim where defendant's interpretation of the duty of patient confidentiality owed by plaintiff was not supported by contractual, statutory, or regulatory sources). Guidant's argument that its August 11th statements are "indisputably" true is meritless.

b. Guidant's Statements about Aspen's "Unlawful Activities" Cannot be Classified as Mere Opinions.

Despite Guidant's assertion that this court must find its August 11th statements about Aspen to be "indisputably" true, Guidant next alleges that because the August 11th letter "merely state[s] Guidant's beliefs about its allegations against Aspen,"

it "cannot be false." (Guidant Br. at 19.) Because Guidant's letter, accusing Aspen of "unlawful" conduct, is specific and verifiable, and because Guidant does not set forth the facts on which it bases its false allegations to allow a reader to draw a different conclusion, Guidant's statements cannot be construed as opinions as a matter of law.

Minnesota courts consider four factors to determine whether a statement phrased as an opinion is actionable defamation: (1) specificity and precision; (2) verifiability; (3) literary and social context in which it was made; and (4) public context. *Cavanaugh v. Concentra Managed Care, Inc.*, 1999 Minn. App. LEXIS 725, at *12 (Minn. Ct. App. June 29, 1999). A statement that is capable of being proven true or false is not an opinion statement. *Id.* Further, it is well-established law that "statements clothed as opinion which imply that they are based on undisclosed, defamatory facts are not protected" as opinion statements. *Lauderback v. Am. Broadcasting Co.*, Inc., 741 F.2d 193, 195 (8th Cir. 1984). As the Eighth Circuit explained in *Lauderback*, the "stricture on publication of opinion rests on the assumption that, given all the facts of a situation, the public can independently evaluate the merits of even the most outrageous opinion and discredit those that are unfounded … [whereas] … when an opinion held out for belief is stated so that the average listener would infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion." *Lauderback*, 741 F.2d at 195-96. Only where the declarant "states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character" is such a statement protected as a true opinion. Restatement (Second) of Torts § 566 cmt.

B; *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 998 (D. Minn. 1998) (distinguishing non-actionable statement "[i]n my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," from the actionable statement "[i]n my opinion, Mayor Jones is a liar.").

Applying this four-factor test, Guidant's statements are sufficiently specific and verifiable to be defamatory, and there is nothing about the literary or public context in which these statements were made that would undermine their defamatory effect. *See Kovatovich*, 88 F. Supp. 2d at 990 (holding that "the description of the Plaintiff as having violated patient confidentiality, is sufficiently specific, and provable, as to be actionable as defamatory."); *J.N.R. Enterprises, Inc. v. Frigidaire Co.*, 1999 Minn. App. LEXIS 607, at *6-7 (Minn. Ct. App. June 1, 1999) (holding that statement that plaintiff "was not fulfilling its contractual obligation with Frigidaire" was a statement of fact, not opinion); *Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471. 473 (Minn. Ct. App. 1991) (rejecting argument that an employer's description of an employee as "dishonest" was an opinion because it implied the commission of specific acts of dishonesty and therefore was actionable defamation).

Guidant's citation to *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845 (8th Cir. 2000) (cited at Guidant Br. at 23-24), to argue that its statements are mere opinions is misplaced. In *McClure*, the Eighth Circuit held that an insurance company's statements that its former agents were engaged in "disloyal and disruptive behavior … unacceptable by any business standard" were not "sufficiently precise or verifiable" to be actionable. *Id.* at 853. Contrary to the facts in *McClure*, Guidant's August 11th letter,

which uses the word "unlawful" no less than five times, certainly implies that Aspen was guilty of statutory and common law offenses, if not criminally liable for the theft of trade secrets. *See J.N.R. Enterprises*, 1999 Minn. App. LEXIS 607, at *7; *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712, 715 (Wis. 1977) (rejecting manufacturer's claim that its letter to plaintiff's customers stating that plaintiff misappropriated confidential information and trade secrets was an opinion, particularly because the theft of trade secrets is a crime); *see also* Minn. Stat. § 609.52 (2004) (criminal penalties for theft of trade secrets). Guidant's statements accusing Aspen of "unlawful" conduct are specific and absolutely verifiable and therefore are not mere statements of opinion as a matter of law.

Contrary to Guidant's assertion that its letter "explain[s] Guidant's allegations against Aspen," (Guidant Br. at 27) in reality, the letter sets forth only conclusory allegations. Guidant certainly did not set forth any basis for its statements in the letter that would allow the reader to draw his own conclusions as to the legitimacy of Guidant's stated beliefs. Guidant did not disclose, for example, that Guidant bases its views on an interpretation of its contracts that would prohibit hospitals from sharing the prices they pay for Guidant products with any consultant, GPO, physician, benchmark firm, or market research firm. Such a statement would have come as a surprise to every hospital administrator that gave testimony in this case. (Boettge Resp. Aff. ¶7.) Indeed, Guidant had good reason *not* to explicitly inform hospitals of this interpretation for fear that it would suggest to hospitals that sharing Guidant pricing with Guidant's research firm MRG was improper. If hospitals stopped providing pricing information to MRG,

Guidant stood to lose its $1 million dollar investment in the MRG survey project. (*Id.* ¶85.) Nor did Guidant state that it believes Aspen has "unlawfully interfered" with Guidant's contracts with hospitals by helping hospitals achieve lower and better pricing for Guidant products. Had Guidant done so, hospitals then could have evaluated the legitimacy of Guidant's claims.

Guidant's August 11th letter, baldly alleging that Aspen was engaged in "unlawful" conduct, cannot escape its defamatory meaning. The statements in this letter are factual, specific, and verifiable. Moreover, these statements are either entirely untrue, or there are genuine issues of fact as to their veracity.

2. Aspen's Damages are Presumed Because Guidant's Statements Are Defamatory Per Se.

Guidant next asserts that Aspen's defamation claim fails because Aspen has failed to demonstrate damages. (Guidant Br. at 20-23.) Because Guidant's statements are defamatory per se, Guidant's claim for summary judgment should be denied.

Minnesota law recognizes two types of defamatory per se statements that are applicable here: (1) statements that "tend to prejudice [a corporation] in the conduct of its business or to deter third persons from dealing with it," *Advanced Training Sys.*, 352 N.W.2d at 9-10; and (2) statements that accuse plaintiffs of a crime. *Hammersten v. Reiling*, 115 N.W.2d 259, 264 (Minn. 1962) (holding statements accusing plaintiff of accepting a bribe actionable per se). Where a statement is defamatory per se, a plaintiff need not prove any special pecuniary damages under Minnesota law; rather, damages are

presumed. *Advanced Training Sys.*, 352 N.W.2d at 9-10; *Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 627 (Minn. Ct. App. 1994).

It is beyond dispute that a letter, mailed to a business' current and prospective clients, alleging that the business has engaged in "unlawful" activity is the type of communication that would "tend to prejudice" a company in the "conduct of its business" and would "deter third persons from dealing with it." *Advanced Training Sys.*, 352 N.W.2d at 9-10. *See also Imperial Developers*, 518 N.W.2d at 627 (reversing grant of summary judgment on defamation claim because defendant's statement that plaintiff regularly breaches contracts "clearly disparaged [plaintiff's] business reputation, and such a statement is defamatory per se."); *Thomas & Betts Corp.,* 2004 Minn. App. LEXIS 1322, at *26 (holding defendant's statement that plaintiff did not honor warranties or pay for warranty repairs disparaged plaintiff's reputation for honesty and fair dealing and therefore was defamatory per se). The harm imposed to a consulting firm such as Aspen, whose very business depends on the confidential treatment of information and honest advice to hospitals, is even more striking. *See* Restatement (Second) of Torts § 561 (Reporter's Notes) ("A corporation may be defamed by aspersions upon the honesty of its methods.").

Further, the theft of trade secrets is a crime under Minnesota law. Minn. Stat. § 609.52 (2004). Guidant's letter, stating that Aspen "violated confidentiality agreements … by improperly using confidential and proprietary information," could reasonably be read to accuse Aspen of the crime of stealing trade secrets. This statement is defamatory per se under Minnesota law. *Hammersten*, 115 N.W.2d 259 at 264.

In sum, because the false statements in Guidant's August 11th letter both directly impugn the honesty and integrity of Aspen's work, and accuse Aspen of unlawful activity, they are defamatory per se. Thus, damages cannot be foreclosed as Guidant's motion suggests, but rather are presumed as a matter of law.

3. Aspen Has Established Sufficient Evidence of its Damages as a Result of Guidant's Letter.

Even if this Court finds that Guidant's statements are not defamatory per se, Aspen has established sufficient evidence of its damages resulting from the letter to create a material issue of fact. "Causation is generally a question of fact left to the finder of fact that only becomes a question of law 'where different minds can reasonably arrive at only one result.'" *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn. 2000) (citations omitted). This is not such a case.

As set forth above, John Armstrong of Scripps Health testified that in reaction to Guidant's August 11th letter, Scripps reneged on its agreement to engage Aspen for tracking services and additional services in the future. (Boettge Resp. Aff. ¶86.) This testimony alone is sufficient to demonstrate Aspen's damages as a result of Guidant's August 11th letter.

In addition, Aspen was in active pursuit of several engagements at the time Guidant sent its August 11th letter to hundreds of current and prospective Aspen customers. (Boettge Resp. Aff. ¶87.) Following the receipt of Guidant's letter, and in some cases, Guidant's active campaigning against Aspen, these hospitals declined to

engage Aspen's services. (*Id.* 88.)[4] Aspen also had to turn its energy and resources away from its sales efforts in order to address the false allegations published through Guidant's defamatory letter. (*Id.* ¶89.)

At a minimum, this evidence of Aspen's loss of new and expected business, as well as the time and resources Aspen has been forced to devote to countering Guidant's widespread publication of false accusations, give rise to a disputed issue of material fact as to Aspen's damages resulting from Guidant's August 11th letter.

4. Guidant Either Waived Any Privileges or Cannot Establish Its Burden to Demonstrate A Qualified Privilege.

Guidant further argues that even if its statements were defamatory, such statements should nevertheless be protected under a qualified privilege.[5] (Guidant Br. at 26-28.) "As a threshold matter, privileges are affirmative defenses that must be pleaded." *Korth v. Weiner & Assoc.*, 1996 U.S. Dist. LEXIS 21952, at *10 (D. Minn. Dec. 17,

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[4] Guidant argues that "any affidavit or testimony from an Aspen witness regarding supposed representations made by [a] hospital would be inadmissible, self-serving hearsay." (Guidant Br. at 21 n.8.) However, a customer's statements expressing the motive or reason that the customer chose not to deal with a certain business is admissible under Fed. R. Evid. 803(3) to prove the motive behind the customer's decision. *See, e.g., Schwabe, Inc., v. United Shoe Mach. Corp.*, 297 F.2d 906, 914 (2d Cir. 1962); *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 251-52 (3d Cir. 1999); *Morris Jewelers, Inc., v. Gen. Elec. Credit Corp.*, 714 F.2d 32, 34 (5th Cir. 1983).

[5] Because any effort to do so would be fruitless, Guidant does not assert that an absolute judicial privilege protects the statements in its August 11th letter. *See McGovern v. Cargill*, 463 N.W.2d 556, 557 (Minn. Ct. App. 1990) (holding that the absolute judicial privilege applies only where a communication is "(1) published in the due course of a judicial proceeding and (2) relevant to that proceeding."); *Chafoulias v. Peterson*, 2003 Minn. App. LEXIS 1533, at *8 (Minn. Ct. App. Dec. 30, 2003) (holding that an attorney's statements about a sexual harassment case to a television station "were not made in the course of a judicial proceeding.")

1996) (citing *Reeve v. Oliver*, 41 F.3d 381, 382 (8th Cir. 1994)). Guidant did not plead any affirmative defenses of privilege in its answer to Aspen's Counterclaim. (Boettge Resp. Aff. ¶90.) Therefore, Guidant has waived them.

Even if Guidant had not waived these affirmative defenses, there is no qualified privilege applicable to Guidant's letter. And even if there were, Aspen has raised substantial issues of material fact on the issue of common law malice.

a. Guidant Has No Qualified Privilege.

Guidant asserts that its August 11th letter merits a qualified privilege because the letter "was necessary to protect [Guidant's] interests … [because it] explain[ed] Guidant's allegations against Aspen."[6] (Guidant Br. at 27.) To successfully assert a qualified privilege, Guidant bears the burden of demonstrating that its August 11th letter was: "(1) made upon a proper occasion, (2) made from a proper purpose, and (3) based upon reasonable and probable grounds." *Keenan v. Computer Assocs. Int'l, Inc.*, 13 F.3d 1266, 1269 (8th Cir. 1994). Guidant cannot establish any of these elements.

First, Guidant cannot demonstrate that it mailed its letter to Aspen and non-Aspen hospital customers alike on a "proper occasion." Guidant fails to cite to any Minnesota precedent establishing that a litigant may send a defamatory letter to a plaintiff's current and prospective customers, alleging that the plaintiff violated the law, under a qualified privilege. Guidant's citations to cases where a proper occasion was

[6] Although difficult to decipher from its brief, Guidant appears to be relying on the common interest qualified privilege, that applies only where the "circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." Restatement (Second) of Torts § 596.

shown are entirely inapplicable. *Cf. Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (holding psychologist chose a "proper occasion" to inform mother of child sex abuse victim of the names identified by the victim as his abusers); *McBride v. Sears, Roebuck & Co.*, 235 N.W.2d 371, 374 (Minn. 1975) ("Communications between an employer's agent made in the course of investigating or punishing employee misconduct are made upon a proper occasion."). Moreover, even to the extent Aspen's customers may have had an interest in the lawsuit, certainly Guidant cannot support a "proper occasion" for the hundreds of non-Aspen hospital customers, along with countless physicians and GPOs, to which Guidant mailed its letter.

Second, there is a material issue of fact as to Guidant's purpose in mailing the letter. As described in more detail *infra* 40-42, Guidant's internal documents indicate that that its purpose went much beyond "explaining" its allegations against Aspen to customers. Rather, Guidant's real purpose was to "disrupt consultant operations." (Boettge Resp. Aff. ¶91.)

Third, there is sufficient evidence that Guidant did not have any reasonable or probable grounds for making the defamatory statements about Aspen in its August 11th letter. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 n.4 (Minn. 1990) ("Where evidence of reasonable or probable grounds for believing in the validity of the potentially defamatory statements is such that it permits of more than one conclusion regarding the existence of reasonable or probable cause, the question becomes one of fact for the jury."). The author of the letter, Mark Bartell, acknowledged that he did not have any familiarly with any of the factual underpinnings of the letter he signed. (Boettge

Resp. Aff. ¶44.) Moreover, the individuals Bartell relied upon to ensure the accuracy of the statements in the letter were only slightly better informed, testifying only about ambiguous, ill-defined, anecdotal information. (*Id.* ¶45.) *See Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. Ct. App. 1994) (finding no qualified privilege where statements were made without "reasonable grounds to believe the statements … were valid."). Accordingly, Guidant is not entitled to claim a qualified privilege.

b. There Is Substantial Evidence to Support a Finding of Common Law Malice.

Even if this Court finds a qualified privilege applicable to Guidant, Guidant is still not entitled to summary judgment because there is at least a disputed fact as to whether the statements were made with common law malice, which would abrogate any such privilege. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 660 (Minn. 1987) ("A conditional or qualified privilege is lost if a plaintiff demonstrates actual malice.").[7] Contrary to Guidant's recitation of the law on common law malice, a plaintiff

[7] Guidant's brief does not argue that Aspen is a "public figure," and therefore concedes that Aspen need not prove "actual malice" as that term is used by *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) (public figure must show "actual malice," defined as proof that defendant acted with knowledge that the statement was false or with reckless disregard for the truth or falsity of the statement). Under Minnesota law, small, unregulated entities that do not seek out attention, such as Aspen, are not public figures. *Compare American Iron and Supply Co. v. Dubow Textiles, Inc.*, 1999 Minn. App. LEXIS 566, at *8-9 (Minn. Ct. App. May 25, 1999) (corporation was not a public figure because "public controversy existed prior to publication of [defendant's] letter.") *with Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 487-88 (Minn. 1985) (corporations were public figures because they were "actively seeking the attention of the media and the public in news columns [and] voluntarily subjecting themselves to and assuming the risk of public scrutiny."); *Northwest Airlines, Inc. v. Astraea Aviation Serv., Inc.*, 111 F.3d 1386, 1393 (8th Cir. 1997) (holding corporations were public figures under Minnesota law where both "are heavily regulated by the [FAA]."). But even if Aspen is a

need not prove that defendant's "sole purpose was to injure [the plaintiff]." (Guidant Br. at 28.) Rather, a plaintiff can prove common law malice "by extrinsic evidence of personal ill feeling, or by intrinsic evidence such as … the extent of the publication." *Keenan*, 13 F.3d at 1270.

The record is replete with evidence that Guidant acted with common law malice, or "ill will," in circulating its August 11th letter to hundreds of hospitals and countless physicians. This evidence includes the President of Guidant Sales Corporation labeling consultants as "leeches" and discussing Guidant's strategy for negotiating with hospitals once Guidant succeeds in ridding the industry of consultants. (Boettge Resp. Aff. ¶35.) It also includes Guidant's internal documents that discuss: (1) Guidant's reference to an Aspen consultant as a "vile and cancerous individual," (2) Guidant's recommendation to "create a living hell for Aspen consulting," (3) Guidant's efforts to "eradicate" consultants from the industry, (4) Guidant's strategy to go after Aspen in an effort to "disrupt consultant operations," (5) Guidant's targeting of Aspen as a "relatively small player[], with a lack of substantial resources to defend litigation," and as a way to "signal" its competitors, and (6) Guidant's glee at a hospital's subsequent termination of

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public figure, there is ample evidence to show Guidant published its defamatory statements with actual malice: At the same time Guidant alleged that Aspen's receipt of Guidant pricing information was "unlawful," Guidant was surreptitiously obtaining the same information through its own vendor, MRG. (Boettge Resp. Aff. ¶¶11-13.) There is no rational way to reconcile Guidant's public accusations that Aspen's acts constitute "unlawful" conduct, with Guidant's simultaneous claim that its engagement of MRG was perfectly legitimate market research. Guidant's claim that Aspen's conduct, virtually identical to MRG's, was unlawful demonstrates that Guidant's allegations against Aspen were made "with a high degree of awareness of probable falsity." *Diesen v. Hessburg*, 455 N.W.2d 446, 464 (Minn. 1990).

Aspen, describing it as "good news" that signaled "an early success" with Guidant's strategy to harm Aspen. (*Id.* ¶92.)

Taken together, this evidence creates an issue of material fact as to Aspen's allegation of common law malice. *Thomas & Betts Corp.*, 2004 Minn. App. LEXIS 1322, at *28 (rejecting defendant's claim of conditional privilege where statement was "designed to discourage others from" conducting business with plaintiff); *Converters Equip. Corp.*, 258 N.W.2d at 715-16 (rejecting contention that "a manufacturer is or ought to be conditionally privileged to notify customers of a competitor that the competitor's products are being made with stolen trade secrets" where malice was sufficiently alleged).

Finally, Guidant's excessive publication of the August 11th letter, to over 450 hospitals, provides additional evidence of Guidant's malicious motive. Even if Guidant enjoyed a qualified privilege to make otherwise defamatory statements about Aspen to those thirty-seven hospitals that Guidant knew to be working with Aspen, Guidant's privilege certainly did not extend to several hundred additional hospitals, along with various GPOs, IDNs, and physicians. *See Stokes,* 25 F. Supp. 2d at 1002 (stating "[m]alice can be proven by … the mode and extent of publication."); *Nicklow v. Menard, Inc.*, 1992 Minn. App. LEXIS 732, at *5 (Minn. Ct. App. July 7, 1992) (holding defendant's "extensive publication" of plaintiff's termination to as many as nineteen employees was sufficient evidence of malice). Accordingly, Guidant's Motion for Summary Judgment on Count I of Aspen's Counterclaim should be denied.

B. GUIDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ASPEN'S TORTIOUS INTERFERENCE CLAIMS.

Guidant's Motion for Summary Judgment on Aspen's claim of tortious interference with prospective business relations likewise should be denied because of the existence of genuine issues of material fact. To state a claim for tortious interference with prospective business relations, a plaintiff must show that the defendant "intentionally committed a wrongful act that improperly interfered with [plaintiff's] prospective business relationships." *Guinness Import Co. v. Mark VII Distribs., Inc.*, 971 F. Supp. 401, 413 (D. Minn. 1997). To determine whether a defendant's actions are improper, Minnesota courts consider 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 of the actor's conduct to the interference; and

(g) the relations between the parties.

Northside Mercury Sales & Service, Inc. v. Ford Motor Co., 871 F.2d 758, 761 (8th Cir. 1989) (quoting the Restatement (Second) of Torts § 767). Because there are material issues of fact as to whether Guidant's conduct was: (1) intentional; (2) improper; and (3)

resulted in damages to Aspen's business, Guidant's Motion for Summary Judgment on this claim should be denied.

First, contrary to the conclusory assertions in its brief (Guidant Br. at 29), Guidant not only had knowledge of Aspen's relationships, but was monitoring those relationships through its "consultant tracking database." (Boettge Resp. Aff. ¶93.) Second, Guidant did not limit the circulation of its letter to Aspen's current clientele; rather, it circulated its false and defamatory letter to hundreds of hospitals that were Aspen's *potential* customers. (*Id*. ¶94.) Finally, instructive of Guidant's ill intent, upper-level employees at Guidant heralded a hospital's decision to "pull Aspen out their negotiations" after dissemination of the letter as "good news" and "an early success with our strategy." (*Id*. ¶95.) Based on all of this evidence, there are material issues of fact as to whether Guidant intended to interfere with Aspen's business relationships.

Second, there are material issues of fact as to whether Guidant's conduct was improper. Improper conduct includes actions that "are independently wrongful such as … defamation … or any other wrongful act recognized by statute or the common law." *Glenn v. Daddy Rocks, Inc*., 171 F. Supp. 2d 943, 949 (D. Minn. 2001). The same material issues of fact that permeate Aspen's defamation claim likewise preclude any determination as to whether Guidant improperly interfered with Aspen's prospective business relationships. *See supra* at 27-42. Moreover, even if the Court finds Guidant's letter does not rise to the level of defamation, under the factors considered by Minnesota courts, Guidant's interference with Aspen's relationships are independently improper on these facts. Amongst the factors considered to determine whether a defendant's acts were

improper are (1) the actor's motive; and (2) the interests sought to be advanced by the actor. *Northside Mercury,* 871 F.2d at 761. Here, the interests Guidant sought to advance were to "disrupt consultant operations," "eradicate" consultants from the industry, and "signal competitors." (Boettge Resp. Aff. ¶96.) Guidant's motives were neither proper nor worthy of protection. Therefore, even if Aspen's defamation claim fails, Guidant's conduct nevertheless was improper.

Third, there is sufficient evidence to create material issues of fact as to whether Guidant's August 11th letter resulted in Aspen's loss of prospective business. *See supra* at 36-37. Accordingly, Guidant's Motion for Partial Summary Judgment on Count II of Aspen's Counterclaim should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Guidant's Motion for Partial Summary Judgment on Claim I of its Complaint and on Counts I and II of Aspen's Counterclaim.

Dated: November 28, 2005

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