UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CARDIAC PACEMAKERS, INC.;
GUIDANT SALES CORPORATION,

Plaintiffs,

vs.

ASPEN HEALTHCARE METRICS, LLC,

Defendant/Counterplaintiff,

vs.

GUIDANT SALES CORPORATION;
GUIDANT CORPORATION,

Counterdefendants.

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

PLAINTIFFS/COUNTER DEFENDANTS' MEMORANDUM IN OPPOSITION TO ASPEN'S MOTION FOR SUMMARY JUDGMENT

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

INTRODUCTION

Defendant Aspen Healthcare Metrics, LLC's ("Aspen") has moved for summary judgment on Guidant's claims, including its trade secrets claim. Aspen's motion should be denied in its entirety because Aspen consistently misrepresents the facts and misses the mark on what trade secrets Guidant is seeking to protect in this lawsuit.

Plaintiffs Guidant Sales Corporation ("GSC") and Cardiac Pacemakers, Inc. ("CPI") (collectively "Guidant") regard their cardiac rhythm management ("CRM") contracts with hospital customers as trade secrets due to the complexity and variability of the contracts. Guidant's complex, secret, and proprietary pricing approval process is built on analyzing and tailoring contracts according to the specific needs of each customer. In

addition to the actual contracts, Guidant's trade secrets include information that would allow for meaningful CRM price comparisons across hospitals. Such comparisons require knowledge of the hospital's pricing menu, demographic characteristics, and contract terms.

The bluster of Aspen's brief fails to mask a fundamental fact fatal to its motion. Aspen is the only firm that takes Guidant's CRM contracts without authorization, markets its knowledge of Guidant's pricing obtained from hospitals around the country, analyzes hospitals' contract terms and circumstances, and, based on this analysis, recommends to its clients how much to pay for Guidant's CRM products. The record does not contain a shred of evidence that <u>any</u> other firm does <u>any</u> of these activities.

Aspen has left no stone unturned in discovery. At least ten different Aspen attorneys have deposed 38 witnesses, issued subpoenas to 61 third parties, and obtained millions of pages of documents from Guidant and third parties. With the dust settled, Aspen cannot identify one other entity that acquires the trade secret pricing information that Guidant has sued to protect. Aspen's abject failure of proof on this point requires denial of its motion.

Attempting to justify its wrongful acquisition of Guidant's pricing information, Aspen discusses alleged leakages of random price points for Guidant's CRM products. Discrete price points, like invoice prices or average prices paid across hospitals, stand in stark contrast to Guidant's complex contracts. Thus, disclosure of isolated price points is irrelevant to Guidant's trade secrets claim, even if it occurred.

Further, Aspen misrepresents and overstates the record by asserting that information about Guidant's prices is publicly available. The evidence overwhelmingly demonstrates that it is not.

Finally, even assuming that Aspen's misrepresentations were accurate, Aspen can demonstrate disclosures of CRM prices for only a small fraction of Guidant's 3500 customers. Even if true, such limited disclosures would not, as a matter of law, eliminate the trade secret status of all Guidant contracts.

Aspen's brief treats Guidant's claims for tortious interference as an afterthought. Because Aspen cannot be deemed an agent of its hospital clients as a matter of law, its motion for summary judgment should be rejected.

FACTS

I. THE PARTIES

In its Memorandum in Support of Guidant's Motion for Partial Summary Judgment, Guidant provided an overview of the parties' businesses. Significantly, Aspen does not dispute that it induces hospitals to disclose Guidant's CRM contracts to Aspen, that it seeks competitive advantage from its knowledge of Guidant's pricing by marketing its ability to compare Guidant's CRM contracts between hospitals, or that it instructs hospitals how much they should pay for Guidant's CRM products based on its ill-gotten knowledge of Guidant's prices. See Aspen Memo. at 5-7.[1] These facts are sufficient to

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[1] Aspen's relationship with its parent company, MedAssets, makes its conduct even more egregious. Aspen provides Guidant's confidential pricing information to MedAssets, one of the largest group purchasing organizations in the country.

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grant Guidant's motion for summary judgment and to deny Aspen's. Here, Guidant reviews only those facts relevant to its claim for misappropriation of trade secrets.

A. Guidant

1. Guidant's strategic pricing process

Guidant's 3500 hospital customers vary dramatically by geography, size, purchase volumes, sophistication of electrophysiology practices,[2] research and academic commitments, contractual relationships with doctors who implant CRM devices,[3] and many other characteristics. Affidavit of Jay Ethridge, filed herewith at ¶ 2 ("Ethridge Aff."). Guidant offers dozens of CRM devices that vary by therapy type, features, clinical application, and technological innovation. Id. at ¶ 3. Hospital contracts include menus of CRM models and pricing based on hospital preferences and needs. See, e.g., id. at ¶ 4; Affidavit of Craig Coleman, filed in support of Guidant's Motion for Partial Summary Judgment at Exhs. 1-5 ("Coleman Aff.").

Due to the wide diversity of hospitals and the broad range of CRM products, the thousands of contracts between Guidant and its customers are extraordinarily variable.

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MedAssets then uses Guidant's trade secret pricing for its own commercial purposes. Coleman Aff., Exh. 14.

[2] Guidant's CRM devices regulate the heart's electrophysiology ("EP"). Many implanting hospitals have EP centers specifically devoted to CRM implants. Other implanting hospitals have only general cardiology centers, while some have neither. Ethridge Aff. at ¶ 2.

[3] Some hospitals employ electrophysiologists who direct the EP lab and perform all implants, while other hospitals compete with one another to host implants

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Ethridge Aff. at ¶ 5. Some key contract terms that affect prices and vary among contracts include:

- Contract terms varying from one to seven years.
- Volume rebates.
- Volume commitments.
- Hospital commitments to purchase a certain percentage of its CRM needs exclusively from Guidant. These "market share commitments" range from 50 to 100 percent of a hospital's CRM purchases.
- Pricing for CRM systems (e.g., the pacemaker/defibrillator + leads) versus "a la carte" pricing without leads.
- Availability of new CRM technology to the hospital.
- Price caps for new technology.
- Volume purchasing for hospital inventory versus as-needed purchasing.

Id. at ¶ 4. Guidant's CRM contracts and prices account for any or all of these variables, among others. Id. at ¶¶ 4-6.

Given the different needs of Guidant's 3500 hospital customers, products purchased, and contract terms, no two contracts are identical. Id. Product prices vary widely among hospitals. Id. at ¶ 6. Because of dramatic price variation, Guidant has

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performed by EP doctors in private practice. There are many variations in the relationships between hospitals and implanting doctors. Ethridge Aff. at ¶ 2.

always included confidentiality clauses in its contracts to ensure that its customers do not unwittingly compare apples to oranges. Id.

In 2001, Guidant hired McKinsey & Company to review Guidant's approach to pricing and to recommend pricing strategies.[4] See Affidavit of Gerard Nolting, filed herewith at Exh. 1. Guidant subsequently overhauled its pricing process, made fundamental organizational commitments to strategic pricing, and redoubled its emphasis on pricing confidentiality. See id.; Ethridge Aff. at ¶ 7.

First, Guidant established a strategic pricing department with a separate Atlanta office. Ethridge Aff. at ¶ 7. Headed by a vice president, the strategic pricing department drafts contracts, evaluates pricing, and makes pricing proposals. Id. Rather than relying on sales staff to make pricing decisions, Guidant hires individuals with MBAs and finance experience to run the strategic pricing department and to analyze pricing proposals. Id.

Second, Guidant developed sophisticated analytics and financial models for making pricing decisions. Pricing analysis is done on a hospital-by-hospital basis, and Guidant analyzes numerous variables in assessing pricing for each customer. See id.; Coleman Aff., Exh. 8. All contracts are analyzed by multiple individuals within the strategic pricing department, and models are prepared to assess the financial impact of pricing proposals. Ethridge Aff. at ¶ 8. While prices vary according to hospital

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[4] McKinsey is a management consulting firm that provides strategic business advice to many Fortune 500 companies. See http://www.mckinsey.com.

characteristics, product mix, market share commitments, and numerous other factors, Guidant's pricing process requires a business rationale, backed by documented analysis, for every pricing decision. Id. at ¶¶ 6-7.

Third, Guidant implemented tiered decision-making for all pricing proposals, which requires review by strategic pricing staff and management. Id. at ¶ 8; Coleman Aff., Exhs. 11, 12. Proposed prices below internally established thresholds must be reviewed by the Price Council, which is comprised of senior management. Ethridge Aff. at ¶ 8. Senior management regularly review pricing strategies. Id. This involved process ensures that Guidant makes reasoned, deliberate, and disciplined pricing decisions. Id.

2. The trade secret: Guidant's contracts

Guidant asserts trade secret protection for three aspects of its pricing: 1) Guidant's strategic pricing process, 2) Guidant's contracts, and 3) each hospital's price and contract terms. Id. at ¶ 9; Nolting Aff., Exh. 2 at 2-9. Guidant's strategic pricing analysis tailors pricing proposals to the needs, circumstances, and variables of each customer. Ethridge Aff. at ¶ 9. Guidant's pricing analysis and the variability of pricing are what make Guidant's CRM prices unique and valuable. Id. at ¶¶ 9, 11. Accordingly, the trade secret information is the intersection of a hospital's CRM pricing menu, the hospital's characteristics, and contract terms. Id. That information is contained in the contract and can otherwise be obtained only through detailed analysis of the hospital's CRM prices, contract terms, and demographic characteristics. Id.

While still covered by confidentiality provisions, two types of limited pricing information are not included in the trade secrets claim at issue here: 1) discrete price

points paid by a particular hospital for CRM devices; and 2) average sales prices of Guidant's CRM devices across multiple hospitals. Id. at ¶ 10. Such limited pricing information generally does not identify hospitals, reveal contract terms, explain the context for the prices, highlight the wide variability of prices, or communicate any meaningful information about Guidant's strategic pricing analysis. Id.[5]

3. Pricing confidentiality provides economic value

Guidant realizes significant economic value from the secrecy of its trade secret pricing. Id. at ¶ 11. The wide variability of Guidant's CRM prices requires secrecy. Id. Public, transparent contract pricing would amount to commodity pricing, like pricing for band aids, and could compel Guidant to offer commodity pricing for sophisticated technological products that plainly are not commodities. Id. Instead, because hospitals cannot compare contract prices, Guidant can properly tailor pricing to each hospital's circumstances and needs, benefiting both Guidant and its customers. Id.

4. Guidant's measures to protect its trade secrets

Aspen ignores George Murphy, the corporate security expert who assessed Guidant's efforts to protect its trade secret pricing information. Mr. Murphy conducted an extensive investigation, including numerous interviews at Guidant's Atlanta, Indianapolis, and St. Paul facilities. Nolting Aff., Exhs. 2, 3. He concluded that Guidant's confidentiality policies and information protection program are among the best

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[5] Moreover, average sales prices derived from individual price points inaccurately measure actual prices paid unless the calculation accounts for rebates, credits, off-contract purchases, and the like. Ethridge Aff. at ¶ 10.

that he has seen in his long career.[6] Id., Exh. 3 at 3-2. This opinion was premised on several undisputed facts.

First, Mr. Murphy concluded that Guidant has a sound confidentiality policy in place, coupled with extensive training. Id., Exh. 2 at 2-5 to 2-10. Guidant's Code of Business Conduct unequivocally states that all employees must strictly protect pricing confidentiality. Id., Exh. 4 at 4-15. All employees sign agreements prohibiting them from disclosing prices. Id., Exhs. 5, 6. Employees with access to pricing take annual tests regarding Guidant's confidentiality policies. Nolting Aff., Exhs. 2 at 2-8, 7.

Second, Mr. Murphy concluded that Guidant has a strong corporate culture of confidentiality. Id., Exh. 2 at 2-8 to 2-10. Every employee whom Mr. Murphy interviewed had a clear understanding that CRM prices are confidential. Id. Responsibility for protecting confidentiality of prices ranged from the highest to lowest levels of Guidant' organization. Id. Not surprisingly, Aspen does not identify a single Guidant employee professing any doubt about the strict confidentiality of Guidant's pricing.

Third, Guidant limits and segments access to pricing. Id., Exhs. 2 at 2-12; 8. Only the strategic pricing and customer service groups have access to all customer prices. Id.; Ethridge Aff. at ¶ 12. Sales staff have access only to prices for their accounts. Id.

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[6] Mr. Murphy is the former worldwide corporate security manager for Mobil Corporation and IBM. As a consultant, he has provided corporate security consulting to many Fortune 100 companies. Nolting Aff., Exh. 2 at 2-2—2-3.

Guidant's tightly controlled access to pricing reinforces confidentiality. Nolting Aff., Exh. 2 at 2-8 to 2-9.

Fourth, Guidant's strategic pricing department is protected by strong physical security. Id., Exh. 2 at 2-11—2-14. The office is locked, access is controlled, identification is required to enter, visitors must sign in, and access to pricing databases is password restricted. Id.

Finally, Guidant has taken every reasonable measure to ensure that hospitals respect confidentiality. Id., Exh. 3 at 3-5. Every contract contains a confidentiality clause, along with a confidentiality admonition on every page of the contract. See Coleman Aff., Exhs. 1-5.[7] Aspen cannot identify a single hospital lacking knowledge of Guidant's confidentiality requirements. No hospital—including Aspen's own clients—disputes the confidentiality of Guidant's pricing.[8] Nolting Aff., Exh. 9.

Aspen's assertion that Guidant "has done nothing to inform hospitals" about pricing confidentiality is a blatant misrepresentation. See Aspen Memo. at 5. Indeed, Aspen counsels hospitals to ignore Guidant's confidentiality requirements. Coleman Aff., Exhs. 55-59. Guidant has objected to Aspen's participation at virtually every negotiation where Guidant learned of Aspen's involvement. See *infra* at 12-14. Guidant

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[7] As explained below, the only customer without a confidentiality agreement is the Veterans Administration.

[8] Obviously, Aspen's clients devised various rationalizations for disclosing contracts to Aspen. None, however, professed ignorance of Guidant's confidentiality concerns, claimed that they were otherwise free to disclose Guidant's trade secrets, or asserted that Guidant's confidentiality provision need not be honored.

has insisted that Aspen leave meetings between Guidant and its hospital customers due to confidentiality concerns. Coleman Aff., Exh. 59. Moreover, Premier and Novation witnesses testified about meetings with Guidant to address Guidant's concerns about pricing confidentiality. Nolting Aff., Exh. 10. Aspen destroys its own credibility by ignoring the voluminous evidence of Guidant's efforts to enforce pricing confidentiality.

Guidant has adopted additional measures to protect confidentiality. For instance, Guidant ensures that all pricing proposals exchanged prior to signing a contract are governed by confidentiality agreements. Id., Exh. 11; Ethridge Aff. at ¶ 13. Prior to Guidant's experience with Aspen, this measure was not necessary. Id. Other than Aspen's clients, only a few hospitals have ever questioned Guidant's insistence on confidentiality agreements, and Guidant has always reached an agreement with those hospitals prohibiting unauthorized disclosure of pricing proposals to any third party. Id. at ¶¶ 13-14. Mr. Murphy concluded that Guidant's efforts to adapt its confidentiality policies to address Aspen's misconduct bolster Guidant's claim that it takes extraordinary measures to protect its trade secrets. Nolting Aff., Exhs. 2 at 2-13—2-16, 3 at 3-7—3-8.

B. Aspen

Aspen's assertion that it has "worked side-by-side with Guidant" is another misrepresentation, and Aspen omits several critical, undisputed facts. First, Aspen starts its consulting engagements by obtaining Guidant's contracts from hospitals without Guidant's knowledge or authorization. Coleman Aff., Exhs. 15-18, 41; Ethridge Aff. at ¶ 16. Second, Guidant's repeatedly objects to Aspen's involvement in contract negotiations, but Aspen instructs its clients to ignore Guidant's confidentiality concerns.

See, e.g., Coleman Aff., Exhs. 55-59. Finally, Aspen's clients consistently present Guidant with the choice of consenting to Aspen's involvement or losing the hospital's business altogether, and Guidant has provided pricing proposals only to avoid losing the entire account. See, e.g., id., Exh. 30; Ethridge Aff. at ¶ 16; Nolting Aff., Exh. 12.

Aspen's assertion that Guidant has disclosed pricing to Aspen is vastly overblown. Aspen has provided CRM consulting services to 95 hospitals, a tiny fraction of Guidant's 3500 hospital customers. See Coleman Aff., Exh. 51. From that limited number, even under Aspen's distortion of the record, Guidant has forwarded prices knowing of Aspen's involvement in only a handful of instances.[9]

Aspen faults Guidant for not immediately rushing to court. The history of dealings between the entities highlights Guidant's good faith effort to pursue business solutions for Aspen's misappropriation. Guidant has done everything possible to protect its pricing information from Aspen's misappropriation. Ethridge Aff. at ¶ 16. The following facts are illustrative:

- St. Joseph Health System: Guidant had little knowledge of Aspen until Guidant representatives attended a meeting at St. Joseph with Aspen consultants in the room. Nolting Aff., Exh. 14; Ethridge Aff. at ¶ 15. Guidant left without submitting pricing due to Aspen's attendance. Id. Guidant informed St. Joseph that it would not submit a pricing proposal if Aspen was involved. Id.; Nolting Aff., Exhs. 15, 16. St. Joseph then threatened to lock Guidant out of the

[9] The Affidavit of Tom Lafferty cites more than a dozen meetings with Guidant, but mentions only two instances wherein he received or discussed a Guidant pricing proposal. Boettge Aff., Exh. 103. What he fails to mention is that Guidant objected to Aspen's involvement at virtually all of these meetings, and Aspen was often asked to leave the room. Nolting Aff., Exhs. ¶¶ 13, 17.

account unless Aspen was involved, but advised Guidant that any pricing submitted "would go no further than Aspen" due to a confidentiality agreement between St. Joseph and Aspen. Id. Guidant reluctantly submitted a pricing proposal based on this assurance and the necessity of mitigating its damages. Id.

- Rush System for Health: Guidant learned of Aspen's involvement only when it attended a meeting with Aspen consultants present. Id., Exh. 17. Guidant objected to Aspen's presence, and Rush instructed Aspen to leave the room. Id. Guidant refused to submit a pricing proposal to Rush without a signed confidentiality agreement. Id., Exh. 18. Rush made it clear that Guidant would lose the business unless it consented to Aspen's involvement. Id., Exh. 19. Rush assured Guidant that Aspen would not use any Rush prices for any other consulting engagement. Id. Based on this assurance and the threat of losing all business, Guidant consented. Id.

- Washoe Hospital: Guidant instructed Washoe that it would not participate in price negotiations with Aspen involved. Id., Exhs. 20, 21. Washoe then precluded Aspen from access to Guidant's pricing proposals. Id.

- St. Patrick Hospital: Guidant objected to Aspen having any access to pricing proposals submitted to St. Partrick. Coleman Aff., Exh. 55. Aspen told St. Patrick to disregard Guidant's confidentiality concerns, and Aspen drafted a letter for St. Patrick to send to Guidant on the issue. Id. St. Patrick then informed Guidant that it would lose the business if Guidant insisted on excluding Aspen. Nolting Aff., Exh. 22. Guidant responded by preparing two pricing proposals, one with lower prices if Aspen did not participate. Id., Exh. 23. Guidant informed St. Patrick that it could not submit its best prices due to Aspen's involvement. Id.

- Medcath: Guidant insisted on a confidentiality agreement preventing Medcath from sharing any pricing proposals with Aspen. Id., Exhs. 24, 25. Aspen advised Medcath to ignore Guidant's confidentiality requirements. Coleman Aff., Exh. 56. Medcath repeatedly assured Guidant that Aspen could not use any of Medcath's pricing during other consulting engagements. Id. Based on this assurance and faced with losing Medcath's business, Guidant submitted a pricing proposal. Id.

Thus, knowing of Guidant's concerns about its unlawful activities, Aspen continually induces its clients to force Guidant to forward contract proposals or lose the business. Faced with this pattern of misconduct and the realization that Aspen was, in fact, using Guidant's pricing at one account in other consulting engagements, Guidant sued. Ethridge Aff. at ¶ 16; Nolting Aff., Exh. 3 at 3-5—3-8.

II. MILLENNIUM RESEARCH GROUP

With nothing else to argue, Aspen seizes on the confidential market research that Millennium Research Group ("MRG") performs for Guidant as "proof" of the disclosure of Guidant's pricing. In reality, MRG conducts a market survey for Guidant's sole use, Guidant owns the data, and the information goes to no one other than Guidant. See Affidavit of Rachel Haisting, filed herewith ("Haisting Aff."). It is hardly shocking that Guidant has authorized MRG to obtain its pricing to conduct market research for Guidant. Aspen's continued knowing distortion of the MRG market research is outrageous.[10]

CPI is responsible for market intelligence, which includes tracking Guidant's share of the CRM market share. Haisting Aff. at ¶¶ 3-5. Because there is no competitive market share information from publicly available sources, CPI hired MRG to conduct a

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[10] Ms. Haisting's affidavit was submitted in response to Aspen's motion to remove all MRG materials from protection under the Court's Protective Order. The Magistrate rejected this transparent attempt to broadcast Guidant's confidential market research to the world.

market survey for Guidant's internal use. Id. The survey compares Guidant's market share to its competitors. Id.

Established protocols in market research dictate survey design. Id. at ¶¶ 9-10. Industry standards provide that customer surveys be blind, meaning that neither the sponsoring company nor the participating customer knows the identity of the other. Id. Blind surveys eliminate response bias and thereby maximize the statistical reliability of the results. Id. Valuing reliability, Guidant instructed MRG to adopt a blind protocol. Id. MRG therefore conducts a blind survey, and no one at Guidant has ever attempted to ascertain the identity of any of the participants. Id. at ¶¶ 11, 12, 16; Nolting Aff., Exh. 26.

Hospital participants tell MRG what products they have purchased during the last month. Haisting Aff. at ¶ 13. Survey responses include prices paid, but do not disclose other important information like volume discounts, off-contract purchases, system pricing, or other information necessary to knowing actual contract prices. Nolting Aff., Exhs. 27, 30. MRG forwards the survey responses to Guidant without hospital identities included. Id. Guidant then prepares high-level reports for senior management tracking market share trends in broad product categories. Haisting Aff. at ¶¶ 14-15; Nolting Aff., Exh. 28.

Guidant has found that the MRG survey results contain inaccurate pricing data that does not comport with Guidant's own knowledge of its pricing. Nolting Aff., Exh. 29. Consequently, Guidant uses the MRG surveys only to track general market share trends. Id., Exhs. 29, 30; Haisting Aff. at ¶ 21.

MRG acknowledges that its survey is not designed to measure prices accurately. Nolting Aff., Exhs. 27, 30. MRG makes no attempt to obtain or ascertain contracts, contract terms, or contract prices. Id. The survey obtains only invoice prices, but not rebates, volume discounts, and other variables affecting actual prices paid.

Guidant's contract with MRG provides that Guidant owns all survey data. Haisting Aff. at ¶¶ 7-8, 11; Nolting Aff., Exhs. 31, 32. The contract prohibits MRG from disclosing the data to anyone other than Guidant. Id. Hospitals participate in the survey on the condition that their identities remain anonymous, and MRG does not disclose their identities. Id.

Because MRG works exclusively for Guidant, Aspen cannot rely on the MRG survey to demonstrate leakage of Guidant's pricing. MRG is a red herring.

III. ASPEN'S OTHER ALLEGED SOURCES OF PRICING INFORMATION

Aspen relies heavily on the "everybody's-doing-it" defense, but Aspen's own business model is the strongest contrary evidence. Hospitals pay Aspen hundreds of thousands of dollars for information about Guidant's prices that is not otherwise available. Coleman Aff., Exhs. 21. As such, Aspen is using the secrecy of Guidant's contracts for its own competitive advantage.[11]

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[11] Aspen further proves that it possesses unique knowledge of Guidant's prices by requiring its own clients to sign confidentiality agreements protecting that knowledge from disclosure. Coleman Aff., Exh. 20 at 20-16. Aspen's confidentiality clauses are designed to protect Aspen's unique knowledge of Guidant's prices. Id., Exh. 50. Aspen admits that it does not look to any publicly available sources of information about Guidant's prices when consulting. Nolting Aff., Exh. 33.

Aspen does not attempt to claim that anyone else obtains Guidant's contracts or contract terms from hospitals. Aspen points to various alleged sources of information about price points for Guidant's products, but it grossly distorts the record in every instance.

A. Byrne, Navigant, Or Cap Gemini

Guidant sued Byrne Consulting on the same day that it sued Aspen. The claims were identical. Unlike Aspen, Byrne denied obtaining Guidant's prices from hospitals. In any event, Guidant's lawsuit against Byrne settled. Ethridge Aff. at ¶ 17. Byrne no longer provides CRM cost savings consulting. Id.

Aspen baldly asserts that Navigant and CapGemini provide consulting "services similar to Aspen." Aspen's Memo. at 5. The only "evidence" for this assertion is deposition testimony from a Guidant pricing analyst who had no experience with or knowledge of either firm. Id. His complete testimony about Navigant and Cap Gemini was a statement they are "consulting firms." Boettge Aff., Exh. 28. That is it.

Aspen stands alone. Aspen is the only firm that: 1) induces hospitals to disclose Guidant's confidential contracts; 2) analyzes the terms and history of the CRM prices that hospitals pay Guidant; and 3) advises hospitals how much to pay for Guidant's products based on knowledge of Guidant's pricing from other accounts.

B. Premier

Premier is a group purchasing organization ("GPO") that negotiates a contract between Guidant and Premier for CRM devices. Nolting Aff., Exh. 34; Ethridge Aff. at ¶ 18. Hospitals elect to participate in the GPO and gain access to Premier's negotiated

prices by signing a "letter of participation" with Guidant. Id. These letters bind hospitals to the terms of the contract between Premier and Guidant, including the confidentiality provision. Nolting Aff., Exh. 34 at 34-15. In practice, most GPO members negotiate their own CRM deals with Guidant ("local contracts"), rather than relying on Premier's prices. Id., Exh. 35; Ethridge Aff. at ¶ 18. All local contracts contain Guidant's standard confidentiality clauses prohibiting price disclosures to third parties, including Premier. Id.

Premier conducts a pricing survey called Cardiac Focus, but only a tiny fraction of Premier's members—approximately 50 hospitals out of 1500—participate. Nolting Aff., Exh. 36. These few participants receive only average prices paid for various categories of CRM devices, but they do not receive information about prices for specific models or manufacturers. Id., Exhs. 36, 38.

Guidant addressed its confidentiality concerns regarding Cardiac Focus with Premier and ensured that its trade secret pricing is not disclosed to or by Premier. Id., Exh. 37. Premier firmly understands Guidant's concerns and promised Guidant that it has no intention of obtaining Guidant's confidential pricing through Cardiac Focus. Id. To that end, Cardiac Focus instructs participants in bold type on the front page of every survey not to breach confidentiality agreements between the hospitals and CRM vendors like Guidant. Id., Exh. 39.

As a result, Guidant's trade secret pricing is not disclosed through Cardiac Focus. In fact, Premier is not aware of any hospital that provides confidential Guidant pricing.

Id., Exh. 37. At Premier's deposition, Aspen could not establish that a single hospital submits Guidant's pricing to Premier. Id.

Premier acknowledges that Cardiac Focus does not obtain or disclose any information about hospital contracts or contract terms. Id., Exhs. 39, 40. Additionally, Premier recognizes that Guidant's CRM prices vary dramatically based on contract terms and hospital circumstances, but Cardiac Focus is not designed to capture these variables. Id. No information about the identity of the hospitals, pricing context, or the range of prices is provided. Id.

C. Novation

Novation is another GPO. Many of Novation's member hospitals negotiate local contracts with Guidant, and Novation understands that Guidant regards these contracts as confidential. Nolting Aff., Exhs. 41, 43. Guidant has repeatedly admonished Novation that it is a third party prohibited from obtaining Guidant's confidential CRM contracts from member hospitals. Id., Exhs. 41, 42.

Novation does not obtain Guidant's CRM contracts from hospitals, and it recognizes that accessing Guidant's contracts with hospitals would be inappropriate. Id., Exh. 43. Aspen's deposition excerpts state that Novation has not accessed Guidant's CRM prices from a hospital. Boettge Aff., Exh. 75 at p. 12. In fact, Novation met with

Guidant to discuss its inability to access prices in Guidant's local contracts. Nolting Aff., Exhs. 41, 42.[12]

Aspen's reference to a "most favored nations" clause in Novation's contract with Guidant is irrelevant. That provision does not contain any mechanism for Novation to access prices paid by any other Guidant customer. Boettge Aff., Exh. 76.

In short, Novation: 1) respects confidentiality agreements between Guidant and hospitals; 2) does not obtain Guidant's prices from member hospitals; 3) has not disclosed Guidant's prices to anyone; and 4) does not instruct hospitals how much to pay for Guidant's CRM devices. Novation offers no support for Aspen's claim that Guidant's prices are publicly available.

D. ECRI

ECRI is a non-profit group that provides a number of healthcare information services. ECRI focuses on technological comparisons of competing healthcare products, and ECRI's PriceGuide is a small component of its business. Nolting Aff., Exh. 44. PriceGuide obtains prices points paid by survey participants for CRM devices, and subscribers receive reports listing average prices. Id.

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[12] Aspen misleadingly claims that the contract between Novation and Premier "contemplates that Guidant will provide Novation with sales information pertaining to deals negotiated directly between Guidant and Novation's GPO members." Aspen's Memo. at 14. The referenced contract provisions simply set forth the terms of Novation's compensation. See Boettge Aff. at Exh. 76. In no way do the cited contract provisions indicate that Guidant provides Novation with any CRM pricing, and Aspen misleads the Court by insinuating to the contrary.

There is no evidence supporting Aspen's contention that ECRI is a source of leakage for Guidant's confidential pricing. No evidence indicates how many hospitals submit pricing to ECRI. Although several hundred entities subscribe to PriceGuide, there is no evidence whatsoever about how many subscribers submit information. Id. ECRI noted that many of the subscribers are insurance companies, vendors, or other entities that do not even purchase CRM products. Id.

More to the point, there is no evidence that any hospital provides Guidant's CRM prices to ECRI. ECRI understands that Guidant regards its pricing information as confidential. Id., Exh. 45. Due to Guidant's stated concerns, PriceGuide's participation agreement admonishes participants not to breach confidentiality agreements, and ECRI wants "to ensure that there are no confidentiality agreements being broken" by PriceGuide participants. Boettge Aff., Exh. 71 at 147-48. Like Premier, ECRI is not aware of a single hospital that has submitted Guidant's pricing in violation of a confidentiality clause. Nolting Aff., Exh. 45. Thus, there is no evidence that any hospitals provide Guidant's pricing to ECRI.

Additionally, ECRI admits that PriceGuide does not obtain critical information affecting Guidant's CRM prices, such as rebates, system pricing, volume purchase discounts, contractual market share commitments, and other critical information necessary for interpreting prices. Id. ECRI does not obtain Guidant's vendor contracts or the terms of the contracts. Thus, PriceGuide only provides members with a "general sense" of whether their prices "are in the ballpark," but these prices do not accurately reflect average prices paid. Id.

Guidant had no knowledge of PriceGuide prior to the lawsuit.[13] Having learned of publicly available pricing information on ECRI's website, Guidant sent a cease and desist letter to ECRI. ECRI complied both by removing the information and instructing ECRI participants not to breach confidentiality agreements when participating in PriceGuide. Id.

Like Premier, Novation, Cap Gemini, and Navigant, ECRI is not a source of information about Guidant's trade secret pricing.

E. Public Records Requests

Aspen's own evidence undercuts its claim that state open records laws are a source of information for Guidant's contracts. Guidant's contract with the Veterans Administration has long been *sui generis*: the VA is the one customer whose contract does not contain a confidentiality agreement. Ethridge Aff. at ¶ 14. While Guidant and Medtronic have exchanged requests under the Freedom of Information Act for VA contracts, Guidant is not aware of any other similar requests under state or federal laws (aside from Winston & Strawn's requests). Ethridge Aff. at ¶¶ 14, 19.

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[13] Aspen states that, "Guidant is well acquainted with the services offered by ECRI; its Price Guide Service is well known in the industry." Aspen Memo. at 13. This type of blatant misrepresentation has been the hallmark of Aspen's briefs to the Court throughout this litigation. Aspen's deposition excerpts cited in support state only that Guidant has known that ECRI compares the technological features of CRM devices. Immediately following this excerpt, Aspen places the deponent's description of PriceGuide in mid-answer. The deponent never claimed that Guidant knew of PriceGuide. Aspen resorts to these distortions because the record does not support the assertions in its brief.

Aspen's requests to state hospitals for Guidant's contracts have been a dismal failure. Aspen submits an affidavit from its attorney averring that she submitted 54 open records requests to state hospitals. See Boettge Aff., Exh. 68. More than half of the hospitals never even responded. Id. An additional five hospitals refused to provide any information due to confidentiality concerns. Id. Other hospitals redacted Guidant's pricing information. Id. In total, Aspen's nationwide campaign yielded a grand total of three Guidant contracts with state hospitals. Boettge Aff., Exh. 69.

F. "Industry Publications like HMM"

Under its heading entitled "industry publications like HMM," Aspen cites exactly one example: HMM. Aspen's Brief at 13-14. For evidence, Aspen cites nothing but a handful of articles from some publication called HMM. See Boettge Aff., Exh. 74. Aspen provides no foundation for these articles, no explanation of HMM's supposed survey, and no other evidentiary support. In particular, no evidence explains HMM's methodology, how it obtained pricing, how many hospitals provided Guidant's pricing if any, or any number of additional questions central to the admissibility and probity of the HMM articles.

The record provides no explanation of HMM, the articles, or the purported survey. The HMM articles lack foundation and constitute hearsay.[14] Putting aside obvious

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[14] The HMM articles are inadmissible and should be disregarded on summary judgment. See Lutheran Mut. Life Ins. Co. v. United States, 816 F.2d 376 (8th Cir. 1987) (disregarding unexplained and unreliable survey data); Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978); Spraying Sys. Co. v. Delavan, Inc.,

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evidentiary problems, the HMM articles should be taken with a grain of salt. Aspen aggressively pursued every avenue in discovery to identify publicly available information about CRM prices, yet Aspen never obtained any discovery from HMM.

Moreover, the HMM articles have no relation to Guidant's claimed trade secrets. The article contains only average sales prices for certain Guidant products without any further information. None of the context or circumstances for the prices are included.

IV. DOCTORS DO NOT POSSESS GUIDANT'S PRICING INFORMATION

Aspen's claim that Guidant discloses CRM prices to physicians not employed by hospitals is perhaps the worst of Aspen's many misrepresentations. Guidant prohibits sales representatives from disclosing CRM prices to doctors not employed by a hospital customer.[15] Id., Exh. 46. Guidant's sales representatives market Guidant's products to customers, including doctors, based on the clinical applications of Guidant's products and not prices. Id.

In response to Aspen's interrogatories, Guidant asked more than 700 sales representatives whether they have ever discussed Guidant's CRM prices with a non-employee doctor. Id., Exhs. 47, 48 at 48-10 to 48-11. Not a single sales representative identified such a pricing disclosure. Id. More than a dozen Guidant witnesses then

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975 F.2d 387, 394 (7th Cir. 1992); Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112, 118 (2d Cir. 1984).

[15] Again, CRM contracts are between Guidant and hospitals. Many doctors implant CRM products at a hospital, while maintaining private practices. Even if these doctors

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repudiated Aspen's suggestion that Guidant discloses prices to non-employee doctors. Id., Exhs. 46, 49.[16] Aspen relentlessly pursued this issue throughout discovery and filed three discovery motions to no avail. See, e.g., Nolting Aff., Exh. 50. Aspen has never obtained any testimony from a doctor or hospital claiming that non-employee doctors know Guidant's prices.

Aspen fails to mention that virtually all of the testimony on this point involves instances in which Aspen involved doctors at its client hospitals. See, e.g., Boettge Aff., Exh. 4 at 62-64, 133. Aspen is the entity that discloses prices to doctors, and Aspen is unsure whether doctors have any knowledge of prices prior to its arrival. See Nolting Aff., Exh. 51. Even many of Aspen's hospital clients do not share Guidant's prices with doctors. Id., Exh. 52.

Other than Aspen's conduct, the record reveals only one documented instance of any non-employee doctor receiving prices for Guidant's CRM prices. See Boettge Aff., Exhs. 53. In that instance, a Guidant sales representative discussed prices during negotiations with a hospital administrator, and the doctor was present because he was assisting the hospital with choosing CRM technology. Id. The representative explained that he did not feel comfortable precluding the doctor from contract negotiations in this

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knew Guidant's prices, it would hardly render the information "readily ascertainable."

[16] Guidant includes the entire deposition transcript of Dennis Antinori since it is illustrative of Aspen' discovery on this point. Mr. Antinori spent virtually his

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instance, but he never discussed prices directly with the doctor. Id. That is the entire record evidence of non-employee doctors receiving Guidant CRM prices.

IV. SUMMARY

The record establishes two fundamental facts. First, Aspen is the only entity that obtains Guidant's contracts and contract terms from hospitals, and Aspen is therefore the only entity that misappropriates Guidant's trade secrets. Second, there is no evidence, much less admissible evidence, that any of Guidant's CRM prices are publicly available. MRG is not a publicly available source. While Aspen points to ECRI, Premier, and HMM, there is no evidence that hospitals give these entities information about Guidant's prices.

ARGUMENT

Summary judgment is not appropriate unless there remains no genuine dispute of material facts. Fed. R. Civ. P. 56. A dispute of fact requires trial if a reasonable jury could return a verdict for either party. Smith v. Rockwell Collins, Inc., No. Civ. 04-1592 JRT/FLN, 2005 WL 2491591, *2 (D. Minn. Oct. 7, 2005). "A court considering a motion for summary judgment must view all facts in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences that can be drawn from the facts." Id. Here, Guidant disputes every material factual assertion made

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entire deposition explaining why Aspen is incorrect in assuming that Guidant has ever disclosed prices to doctors. Nolting Aff., Exh. 49.

by Aspen. Particularly given all reasonable inferences in Guidant's favor, summary judgment is not appropriate.

I. DISPUTES OF FACT PRECLUDE SUMMARY JUDGMENT ON GUIDANT'S CLAIM OF MISAPPROPRIATION OF TRADE SECRETS

Guidant sued Aspen for misappropriating Guidant's trade secrets in violation the Minnesota Uniform Trade Secrets Act, Minn. Stat. § 325C.01-08 ("MUTSA"). MUTSA defines trade secrets as any information that: a) derives economic value from not being "generally known" or "readily ascertainable," and b) "is subject to efforts that are reasonable under the circumstances to maintain its secrecy." Minn. Stat. § 325C.01. Misappropriation includes:

> disclosure or use of a trade secret of another without express or implied consent by a person who: (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use, knew or had reason to know that the discloser's or user's knowledge of the trade secret was ... acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or ... derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

Id.

A. The Secrecy Of Guidant's Contracts Create Economic Value

Aspen does not dispute the well-established law holding that pricing can constitute trade secrets. See, e.g., Burlington N. R.R. Co. v. Omaha Public Power Dist., 888 F.2d 1228, 1232-33 (8th Cir. 1989) (affirming judgment that "the contract and its pricing formula was a trade secret"); Surgidev Corp. v. Eye Tech., Inc., 648 F. Supp. 661, 680 n.5 (D. Minn. 1986) (holding that "[p]ricing information may also be protectible" as trade secrets); PepsiCo, Inc. v. Redmond, No. 94 C 6838, 1996 WL 3965, *10-12, 16-17 (N.D.

Ill. Jan.2, 1996) (finding that pricing strategies and contract pricing constituted trade secrets); Penetone Corp. v. Palchem, Inc., 627 F.Supp. 997 (N.D.Ohio 1985) (finding that pricing information constituted trade secret even without confidentiality clauses in contracts); Water & Energy Sys. Tech., Inc. v. Keil, 48 P.3d 888 (Utah 2002) (holding that pricing information constituted trade secret where customers were informed that the pricing information was confidential).

There is no genuine dispute that Guidant obtains economic value from maintaining the secrecy of its pricing information. Guidant's strategic pricing strategies, which vary prices according to customer circumstances, depends on pricing confidentiality. Ethridge Aff. at ¶ 11. Guidant gains a competitive advantage by being able to tailor prices to meets customer needs, a practice that would be impossible given public CRM prices. See Burlington, 888 F.2d at 1232 (finding that secret contract pricing conferred competitive advantage). Transparent, commodity pricing, in contrast to Guidant's confidential strategic pricing, would force Guidant to eliminate favorable contract terms and conditions that confidential pricing enables it to offer. Ethridge Aff. at ¶ 11.

Additionally, confidential prices make it difficult for Guidant's competitors to undercut Guidant's prices with any precision. Id. at ¶ 11. Guidant positions itself as a technology and service leader, rather than a price leader, and confidential pricing enables Guidant to compete more effectively in this niche. Id.

Aspen attempts to dispute the economic value Guidant realizes from pricing secrecy by selectively citing deposition testimony from Guidant's Director of Strategic Pricing, Jay Ethridge, stating that Guidant cannot charge hospital's higher prices due to

pricing secrecy. Not surprisingly, Aspen fails to mention that Mr. Ethridge also testified that Guidant has "built our sales organization" around tailoring prices to suit customer needs and circumstances, and that pricing secrecy allows Guidant to pursue that strategy. See Boettge Aff., Exh. 2 at 125-30.

Aspen cannot, in good faith, deny the economic value of the secrecy of Guidant's pricing because Aspen attempts to keep the same pricing information secret. Aspen markets its knowledge of Guidant's pricing and is paid large sums of money for that knowledge. See Coleman Aff., Exh. 21. Aspen requires its hospital clients to protect the confidentiality of Aspen's target prices for Guidant's products because it views that information as economically valuable. Id., Exhs. 50. Incredibly, Aspen even asserts ownership over pricing proposals submitted to the hospital by Guidant. Id., Exh. 20 at 20-16.

Far from justifying summary judgment, Aspen fails even to create a genuine dispute of fact regarding the economic value of pricing confidentiality.

B. Guidant's Trade Secret Pricing Information Is Not Readily Ascertainable

Aspen relies on Surgidev to define the level of disclosure necessary to eliminate trade secrets. Surgidev rejected the notion that absolute secrecy is necessary:

> Courts agree that trade secrets lie somewhere on a continuum from what is generally known in a field to what has some degree of uniqueness, although there need not be the degree of novelty or originality required for patent or copyright protection.

Surgidev, 648 F. Supp. at 688. Citing Minnesota law, Surgidev noted that information is not readily ascertainable so long as it "is not quickly available through proper means."

Id. See also Wyeth v. Natural Biologics, Inc., 395 F.3d 897, 900 (8th Cir. 2005) (quoting Minnesota cases for proposition that "absolute secrecy is not required to maintain trade secret's confidential nature").

Whether information is sufficiently secret to constitute a trade secret is a question of fact. Id.; 1-1 Milgrim on Trade Secrets § 1.03 (2005) ("Secrecy is essentially a question of fact." (emphasis added)). Here, Guidant disputes that any disclosure of its pricing information has occurred, making summary judgment inappropriate.

1. Aspen's business practices confirm the secrecy of Guidant's pricing

Several aspects of Aspen's business model confirm that Guidant's pricing information is not generally available. First, while Aspen touts its history of access to Guidant's prices, Aspen gains that access only by inducing its clients to breach Guidant's confidentiality agreements. Aspen admits that it relies solely on its hospital clients for information about Guidant's prices. See Nolting Aff., Exh. 33; Coleman Aff., Exhs. 24, 25.

Second, hospitals hire Aspen due to its knowledge of confidential prices. Coleman Aff., Exh. 21; Nolting Aff., Exh. 54. Hospitals do not know what other hospitals pay for Guidant's CRM devices; if they did, they would not need Aspen. Id. Neither Aspen nor any of its clients claim that Guidant's contracts and pricing are readily available through any source other than Aspen. Id.

Finally, Aspen itself uses confidentiality clauses in its engagement contracts to protect the secrecy of CRM prices. Aspen justifies this practice based on the need to keep CRM prices confidential. Coleman Aff., Exh. 50.

2. Guidant has never authorized Aspen to obtain Guidant's contracts

Guidant has never authorized Aspen to obtain its contracts or prices from hospitals. Coleman Aff., Exh. 41; Ethridge Aff. at ¶ 16. Prior to the few occasions where Guidant submitted pricing proposals to hospitals knowing that Aspen would receive them, Aspen had already induced the ho[illegible]nt's confidentiality agreements. The damage had alrea[illegible] b[illegible], and Guidant did what [illegible] could to mitigate that damage by attempting to keep the hospitals' business. See *supra* at 12-14.

In any case, Aspen cannot argue that Guidant's pricing is readily ascertainable based on its wrongful pattern of misappropriation. See Syntex Ophthalmics, Inc. v. Novicky, 214 U.S.P.Q. (BNA) 272, 279 (N.D. Ill. May 6, 1982) (holding that defendant cannot rely on its misappropriation to negate trade secret). Aspen has obtained Guidant's trade secrets through improper means.

3. Guidant's trade secret contracts have been disclosed only to Aspen

It is undisputed that Aspen is the only firm that obtains Guidant's trade secret contracts. Only Aspen obtains hospitals' pricing menus and contract terms, and only Aspen purports to make pricing recommendations based on a hospital's contract terms and circumstances.

The three state hospital contracts procured by Aspen's lawyers pursuant to state open records laws are the only evidence that Guidant's contracts have ever been disclosed to anyone. Winston & Strawn conducted a nationwide campaign to obtain Guidant's contracts and obtained a grand total of three. Guidant is not aware of anyone other than Aspen obtaining its contracts in this manner. See Ethridge Aff. at ¶ 19. Release of three Guidant contracts to Aspen's counsel, out of 3500 Guidant customers, does nothing to demonstrate that Guidant's pricing information is "quickly" and "generally" available. See Surgidev, 648 F. Supp. at 688. See also Cherne Indus. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 90 (Minn. 1979) (holding that availability of information from government did not render information "generally ascertainable" and did not negate trade secret where information had not previously been obtained in that manner); Amvac Chem. Corp. v. Termilind, Ltd., No. Civ. 96-1580, 1999 WL 1279664, *5 (D. Or. August 3, 1999) (holding that potential availability of information from government did not negate trade secret where such disclosure did not actually occur in the industry). In fact, the failure of Aspen's counsel to obtain Guidant's contracts proves that this information is not readily ascertainable.

Furthermore, Aspen's procurement of three Guidant contracts could, at most, negate the trade secret status of those specific contracts but not Guidant's other trade secrets. Again, Guidant tailors contracts to hospital circumstances, so each contract is different and constitutes an independent trade secret. See Burlington, 888 F.2d at 1232-33 (holding that individual contract constitutes trade secret).

4. Aspen has not demonstrated the availability of any Guidant pricing information from other sources

Apart from Guidant's trade secret contracts, Aspen has failed to demonstrate that any information about Guidant's pricing is generally available. In every case, the evidence fails to support summary judgment:

- MRG—MRG collects only price points and not contracts or contract terms. Guidant owns all data collected by MRG, so that information is not available to anyone. Haisting Aff. at ¶¶ 7-8. Guidant does not disclose this information to any third party. Id.

- Premier— Premier does not obtain Guidant's contracts from its members and is not aware of any hospital that submits Guidant's pricing to its Cardiac Focus service. Nolting Aff., Exh. 33.

- Novation—Novation does not obtain Guidant's contracts from hospitals, and it knows that doing so would inappropriate. Id., Exh. 43. Novation is not aware of any instance in which it has obtained Guidant's prices from a hospital. Boettge Aff., Exh. 75 at 11-12. There is no evidence that Novation has ever disclosed Guidant's prices to anyone.

- ECRI—ECRI instructs PriceGuide participants not to breach confidentiality agreements with Guidant, and it is not aware of any hospitals that submit Guidant's pricing to ECRI in violation of those agreements. There is no evidence that any hospitals submit Guidant's pricing information to ECRI. Nolting Aff., Exh. 45.

- Doctors—Guidant prohibits its sales staff from disclosing prices to doctors not employed by hospitals. Doctors not employed by hospitals do not gain access to Guidant's prices, and Aspen's exhaustive discovery has uncovered only one exception. Id., Exhs. 46, 47, 48, 49, 50.

As the Eighth Circuit recognizes, absolute secrecy for a trade secret is not necessary under Minnesota law. Wyeth, 395 F.3d at 900. Here, it is disputed whether any disclosure of Guidant's pricing occurred. Even if it did, it has been limited, isolated,

unsubstantiated by the record, and unrelated to the actual trade secrets at issue. Aspen's "evidence" fails even to create a triable dispute of fact regarding the alleged lack of secrecy of Guidant's pricing, much less justify summary judgment.

C. Guidant Takes Reasonable Measures To Protect Its Trade Secrets

The owner of a trade secret must take reasonable measures to protect its secrecy. According to Aspen's cited decision on the subject:

> Absolute secrecy is not required, but the confidentiality measures must be "reasonable under the circumstances." Minn.Stat. § 325C.01 subd 5(ii). Confidentiality measures are sufficient "if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained." Id.

Northwest Airlines v. Am. Airlines, 853 F. Supp. 1110, 1115 (D. Minn. 1994). Emphasizing the fact-intensive nature of this inquiry, as well as the Court's obligation to draw all reasonable inferences in favor of the plaintiff, Northwest Airlines rejected summary judgment even where the plaintiff failed to mark trade secret documents as confidential. Id. at 1115. See also Gronholz v. Sears, Roebuck & Co., 869 F.2d 390, 393 (8th Cir. 1989) ("The issue of whether a plaintiff took reasonable steps under the circumstances to maintain the secrecy of information is an issue of fact." (emphasis added)).

Northwest Airlines emphasized that the plaintiff took sufficient measures to notify individuals with access to the information that it was confidential. Here, after 61 Aspen subpoenas to third parties, the record does not contain a single person professing ignorance about Guidant's position on confidentiality.

1. Aspen ignores the evidence proving that Guidant takes reasonable measures to protect pricing secrecy

To decide Aspen's motion, the Court must look at the totality of Guidant's efforts to protect secrecy and analyzes those efforts in light of the circumstances. See, e.g., Wyeth, 395 F.3d at 900 (assessing "totality of the circumstances" and relying on physical security of building, controlled access to information, employee training on confidentiality, and employee awareness); Northwest Airlines, 853 F. Supp. at 1116 (relying on restricted employee access to information, employee non-disclosure agreements, and regular confidentiality reminders).

Addressing contract pricing, the Eighth Circuit upheld its trade secret status based on the following reasonable steps taken to protect pricing secrecy:

> The court also found persuasive the fact that Burlington had gone to considerable lengths to prevent disclosure of the information, had not disclosed it to persons not directly involved in its use, had negotiated the contract to include a strict confidentiality requirement, and had vigorously prosecuted this action to prevent disclosure.

Burlington, 888 F.2d at 1232.

Measures taken by Guidant to protect the secrecy of its pricing are indistinguishable from those relied upon by the Eighth Circuit in Burlington. Guidant has invested heavily in its strategic pricing program. Ethridge Aff. at ¶ 9. The pricing department is housed in a separate, secure facility with closed access. Id. at ¶ 7. Guidant carefully controls access to pricing information within Guidant, and even sales staff receive only the prices for their accounts. Id. at ¶ 12. All Guidant contracts with customers contain confidentiality clauses and confidentiality admonitions on every page.

Id. at ¶ 14. Guidant sued Byrne and has "vigorously prosecuted this action" to prevent Aspen's continued misappropriation. See also Penetone Corp., 627 F. Supp. at 1001, 1006 (holding that pricing is a trade secret based on limited disclosure, even without evidence of confidentiality clauses); Water & Energy Sys. Tech., Inc., 48 P.3d at 890 n.1 (holding that pricing is a trade secret where sales representatives received access on a need-to-know basis and customers were notified that pricing was confidential). Aspen disregards all of these measures taken by Guidant to protect pricing secrecy.

Nor does Aspen dispute the conclusions of Guidant's corporate security expert that Guidant:

- Maintains a written Code of Conduct explicitly stating that pricing information is confidential;
- Tests its employees every year on the Code of Conduct;
- Requires all employees to sign non-disclosure agreements prohibiting disclosure of all confidential information including pricing;
- Delegates responsibility for ensuring confidentiality throughout all levels of the company;
- Instills a culture of confidentiality and widespread awareness that pricing is confidential.

Nolting Aff., Exhs. 2, 3. Aspen fails to identify a single Guidant employee claiming any ambiguity about the confidentiality of Guidant's pricing.

As to third parties, Guidant has ensured that Premier, Novation, and ECRI all understand and respect the confidentiality of Guidant's pricing. Id., Exhs. 37, 41, 43, 45.

None is aware of any instance in which it has obtained Guidant pricing in violation of that confidentiality. Id., Exhs. 37, 43, 45.

These measures are far more than the steps taken by the plaintiffs in Northwest Airlines, Wyeth, Burlington, and Surgidev, and therefore, at a minimum, establish a genuine issue of fact precluding summary judgment.

2. Guidant's approach to Aspen has been reasonable

In the few instances where it occurred, Guidant acted reasonably in disclosing prices to Aspen. Aspen misrepresents Minnesota law by claiming that disclosure of confidential information to a third party necessarily eliminates its trade secret status:

> The district court found that Gronholz' voluntary disclosure to Singer indicated a failure to maintain a trade secret. Unresolved, however, is the underlying factual issue of whether this disclosure was of a limited nature, and if so, whether that limitation was "reasonable" under Minn.Stat. § 325C.01.

Gronholz, 869 F.2d at 393 (reversing summary judgment). See also Dunnell Minn. Digest Trade Secrets § 1.02 (4th ed.) (reviewing Minnesota cases holding that "secrecy with respect to a trade secret is not lost if the holder of the trade secret reveals it to another in confidence and under an implied obligation not to use or disclose it").

In Metallurgical Industries Inc. v. Fourtek, Inc., 790 F.2d 1195 (5th Cir. 1986), the plaintiff shared trade secret design information with potential business partners and failed to obtain confidentiality agreements protecting the information. The Fifth Circuit nonetheless upheld the trade secret because the disclosure was done on a limited basis, was made to a limited number of recipients, and was necessary to further plaintiff's business interests. Id. 1199-1200. Accord Kewanee Oil Co. v. Bicron Corp., 416 U.S.

470, 475 (1974) (holding that limited disclosure to third party does not negate trade secret); Surgidev Corp. v. Eye Tech., Inc., 828 F.2d 452, 455 (8th Cir. 1987) ("Only reasonable efforts, not all conceivable efforts, are required."); Televation Telecomm. Sys., Inc. v. Saindon, et al., 169 Ill.App.3d 8, 17 (Ill. Ct. App. 1988) ("[P]artial disclosure of the information to third parties, where disclosure is necessary, does not preclude a finding that the information constitutes a trade secret."); Space Aero Prods. Co. v. R. E. Darling Co., Inc., 238 Md. 93, 105 (Md. 1965) ("[D]ifferent degrees of imperfect secrecy are sufficient in different circumstances to make subject-matter capable of protection." (quoting Turner, The Law of Trade Secrets)).

Specifically addressing "negotiated pricing structures," Penetone Corp. held that the pricing constituted a trade secret because it was not "public information" and was "known outside the business to a very limited extent." Penetone Corp., 627 F. Supp. at 1006. In particular, pricing was shared only on an as-needed basis, and the plaintiff's competitors did not have access to the pricing. Id. Similarly, PepsiCo, Inc., found that Pepsi's pricing information constituted a trade secret even though the company distributed the information to bottling companies without confidentiality clauses. PepsiCo, Inc., 1996 WL 3965 at *17.

Here, Guidant's decision to forward pricing proposals to Aspen during a few contract negotiations was reasonable. Aspen had already misappropriated Guidant's pricing information by obtaining the hospitals' contracts without Guidant's knowledge or authorization. Coleman Aff., Exh. 41. Moreover, the hospitals threatened to terminate their business with Guidant unless Aspen was included. Nolting Aff., Exhs., 12, 16, 19,

22, 55. Given these facts, Guidant's refusal to forward pricing proposals would have accomplished nothing, other than further damaging Guidant's business. Guidant's limited disclosure accomplished the sensible business purpose of retaining the hospital's business, the ultimate goal of Guidant's trade secret pricing strategy. See Metallurgical Indust. Inc., 790 F.2d at 1199-1200.

Furthermore, Guidant has consistently attempted to ensure that Aspen understands its duty to treat Guidant's pricing information as confidential. Not only did Guidant repeatedly stress the confidentiality of its information to Aspen and the hospitals, Aspen actually had copies of Guidant contracts containing confidentiality clauses. Aspen knows that Guidant's pricing information is confidential. Guidant also demanded assurances from the hospitals that Aspen could not use the information at any other hospitals. See, e.g., Nolting Aff., Exh. 16, 20, 25. Aspen's client contracts represent that all pricing information shared during the engagement will be confidential between Aspen and the hospital. Coleman Aff., Exh. 20 at 20-16. Finally, when Guidant discovered that Aspen does not honor these confidentiality assurances, it sued.

Guidant's corporate security expert concluded that refusing to cooperate and walking away from the business would have been patently unreasonable under these circumstances. Nolting Aff., Exh. 3 at 3-5 to 3-8. Aspen's own security expert agreed and conceded that that it was reasonable for Guidant to share pricing information with Aspen under the circumstances. Nolting Aff., Exh. 56. Since Aspen's own expert ratified the reasonableness of Guidant's approach to Aspen, Aspen cannot obtain summary judgment.

Finally, Guidant's pricing disclosures to Aspen did not render the information "public" or "generally ascertainable." See, e.g., Penetone Corp., 627 F. Supp. at 1006. Aspen had a contractual duty to its clients to protect the confidentiality of the information. Aspen's use or dissemination of the information is simply proof of its misappropriation.

3. Guidant ensures that third parties cannot access its pricing information

Aspen grossly overstates the evidence regarding access to Guidant's pricing by third parties. In every instance when Guidant learned of possible disclosure of its pricing information to third parties, it proactively and successfully addressed the situation. Guidant has ensured that Premier and ECRI instruct hospitals not to violate Guidant's confidentiality agreements. Nolting Aff., Exhs. 10, 37, 45. Neither entity is aware of any violations of that admonition, and there is no evidence that hospitals provide Guidant's pricing information to these entities. Id. Similarly, Guidant has repeatedly discussed its confidentiality concerns with Novation, and Novation understands that it would be inappropriate to obatin Guidant's pricing from hospitals. Id., Exhs. 10, 41, 43.

Guidant has a strict confidentiality agreement with MRG that prohibits any disclosure of pricing information by MRG to anyone other than Guidant. Nolting Aff., Exh. 32.

There is no evidence substantiating the existence of any other "benchmarking" or "cost savings consultants." Aspen cannot accuse Guidant for unreasonably failing to address entities that do not exist.

Guidant prohibits its sales staff from sharing CRM prices with non-employee doctors. Nearly 20 Guidant deponents confirmed their adherence to this policy, and over 700 sales representatives were contacted to identify any instances of disclosures. Id., Exhs. 46, 47, 48, 49, 50. Aspen identified one isolated instance of prices being shared with non-employee doctors, a disclosure that occurred during contract negotiations with the hospital and did not result in the prices becoming publicly available. Id., Exh. 53.

4. Guidant's confidentiality provisions and policies are reasonable

Guidant's confidentiality clauses in customer contracts unambiguously state that "confidential information (including this agreement)" "may not be shared with any third party without written authorization." See Coleman Aff., Exh. 1. Thus, the confidentiality clauses explicitly identify the contract as confidential. Every single page of Guidant's contracts—including every page with pricing—warns that the information is confidential between Guidant and the hospital. Id.

Aspen does not dispute that all Guidant employees respect the importance of pricing confidentiality. Unsurprisingly, Aspen's clients rationalized their decision to share pricing information with Aspen, but even Aspen's clients acknowledge that Guidant's pricing is confidential. Nolting Aff., Exh. 9. Not a single hospital claimed that it lacked knowledge regarding Guidant's confidentiality clause, and Aspen's expert on corporate security could not identify any hospital claiming that it did not understand Guidant's confidentiality agreements. Id., Exh. 57. No hospital claimed that Guidant's CRM prices are readily available from a source other than Aspen.

Other than Aspen's clients, there is virtually no evidence that any hospital has released a Guidant contract to anyone. The only exception are the three state hospitals that provided contracts to Aspen's attorneys pursuant to state open records laws. This record plainly demonstrates that Guidant has been overwhelming successful in defending the confidentiality of its contracts with 3500 customers.

D. Aspen Misappropriates Guidant's Trade Secret Pricing Information

Aspen's brief completely ignores the statutory definition of misappropriation. Misappropriation includes using "improper means" to obtain Guidant's contracts, such as "inducement of a breach of a duty to maintain secrecy." Minn. Stat. 325C.01, subds. 1-2. Alternatively, Aspen misappropriates Guidant's contracts simply by using the trade secret, while knowing that it was "derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use." Id. Under either definition, Aspen has misappropriated Guidant's trade secrets.

Aspen's brief asserts no defense to the second statutory definition of misappropriation. Even if Aspen properly obtained Guidant's pricing information by acting as an agent or through Guidant's consent (which Guidant vehemently denies), Aspen cannot deny that it uses Guidant's confidential information in other engagements. Aspen relies on its knowledge of Guidant's prices to market to other hospitals and to instruct hospitals how much to pay for Guidant's devices. Coleman Aff., Exhs. 24, 43, 44, 45, 46, 47; Nolting Aff., Exhs. 65, 67, 68, 69. Indeed, Aspen tells its clients that it maintains a database containing Guidant's pricing information used to make pricing comparisons. Coleman Aff., Exhs. 19, 20, 21. In addition to telling hospitals what their

counterparts are paying for Guidant's products, Aspen has shown prospective clients actual Guidant contracts from other hospitals—removing only the other hospitals' name. Nolting Aff., Exh. 58, 59.

Additionally, Aspen shares Guidant's pricing information with MedAssets, its parent company. MedAssets relies on Aspen and its knowledge of Guidant's CRM prices to market its own business nationwide. Nolting Aff., Exh. 60.

1. Aspen is not an agent of its consulting clients

To be an agent, Aspen must act on its behalf of its hospital clients. See Restatement 3d § 1.01 (explaining that agency arises when the agent "act[s] of the principal's behalf"); Asa-Brandt v. ADM Investor Servs., 344 F3d 738, 749 (8th Cir. 2003) (holding that agent must have "full authority" to act on principal's behalf). Agency entails a grant of authority from a principal to the agent to deal with a third party. Id. At most, Aspen provides consulting advice to its clients but does not conduct negotiations on behalf of its hospital clients. Coleman Aff., Exh. 20. On a few occasions, Aspen has attended meetings with Guidant, but only as sidekicks to hospital administrators. There is no evidence that Aspen ever has authority to act on behalf of its clients.

Second, agents must possess the power to bind principals:

> As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person.

Restatement 3d of Agency § 1.01 cmt. c (emphasis added). See also Lee v. Peoples Coop. Sales Agency, 276 N.W. 214, 269 (1937) ("Agency arises where the principal authorizes the agent to make engagements in the name of the principal."). An agent possesses authority only to the extent that the agent can "affect the legal relations of the principal." Restatement 2d of Agency § 7. See also Hoffmeyer v. Pooler, 268 Minn. 551, 565-66 (1964); Restatement 2d of Agency § 12 ("An agent or apparent agent holds a power to alter the legal relations between the principal and third person. . . ."). It is undisputed that Aspen has no such power. Coleman Aff., Exh. 61. Aspen merely provides advice to its clients, but those clients cede no de[illegible] Aspen. Aspen therefore cannot be an agent.

While Aspen calls itself an agent in its engagement agreements, that characterization is irrelevant. "[T]he relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so." PMH Properties v. Nichols, 263 N.W.2d 799, 803 (Minn. 1978) (quoting Restatement (Second) of Agency § 1, cmt. b). See also Restatement 3d of Agency § 1.02 ("An agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties . . . is not controlling."). Aspen might call itself an agent, but it does not fulfill the necessary requirements of agency, including acting on the hospitals' behalf and possessing power to bind its clients.

Finally, even if Aspen is an agent of its clients, it is still not authorized to obtain Guidant's contracts. The contractual provision names two specific parties that may

possess the contracts and prohibits unauthorized disclosures to everyone else. See, e.g., Coleman Aff., Exh. 1. Whether or not Aspen is an agent, it is not one of the parties named in the contract and is therefore necessarily a third party. In fact, Aspen admits that agents are third parties in this context. Nolting Aff., Exh. 61.

2. Guidant has not consented to Aspen's misappropriation

As explained above, Guidant has never consented to Aspen's misappropriation. First, Guidant has never authorized a hospital to provide its existing contracts or purchase prices to Aspen. Coleman Aff., Exh. 41; Ethridge Aff. at ¶ 16. Second, Guidant has strenuously objected to providing pricing information to Aspen and has done so only under the threat of losing a hospital's entire business during Aspen-induced negotiations. Ethridge Aff. at ¶¶ 15-16. Third, even when Guidant has allowed Aspen to view pricing proposals, it has never consented to Aspen's use of that knowledge at other consulting engagements. Id. Yet discovery has demonstrated that Aspen uses its knowledge of Guidant's pricing to market its business as a matter of course. Fourth, Guidant has disclosed pricing proposals to Aspen for a miniscule fraction of its 3500 customers and only a fraction of Aspen's clients. Id.

Aspen's conduct is a far cry from Omnitech Int'l, Inc. v. Clorox Co., 11 F.3d 1316, 1325 (5th Cir. 1994), on which it relies. In Clorox, a potential acquisition target forwarded trade secrets to Clorox during due diligence, while knowing that Clorox was also evaluating the target's competitor. The Court determined that misappropriation did not occur because there was no evidence that Clorox ever used the information for anything other than the designated purpose. Id. The Clorox court noted that the result

would be different given evidence that trade secrets were used to obtain a "competitive edge in the marketplace," and the court cited law so holding. Id. Here, Aspen's business is built on using its knowledge of one customer's pricing "for competitive edge" at other consulting engagements. Indeed, Aspen uses Guidant's prices from other hospitals against Guidant during negotiations. See, e.g., Nolting Aff., Exh. 71.

3. Aspen capitalizes on its ill-gotten knowledge of Guidant's prices

Aspen's brief does not contest that Aspen relies on its knowledge of Guidant's prices to instruct other hospitals what they should pay Guidant. See, e.g., Aspen's Memo. at 32-33. Incredibly, Aspen asserts that this is not an "anti-competitive use" of Guidant's trade secret pricing information. Yet Guidant maintains pricing secrecy specifically to avoid the sharing of pricing information about its products between hospitals. Ethridge Aff. at ¶ 11. Hospitals hire Aspen to gain an unfair advantage in price negotiations that other hospitals do not possess when playing by the rules. And Aspen reaps the benefit of its improperly acquired knowledge of Guidant's contracts, knowledge that no other entity possesses.

Aspen simply ignores the statutory definition of misappropriation. Misappropriation includes any use of information obtained from someone possessing a duty not to disclose it. Minn. Stat. § 325C.01. Aspen sells its knowledge of Guidant's trade secrets for its own financial gain. Furthermore, any acquisition of trade secret information through improper means constitutes misappropriation. See Rehabilitation Specialists, Inc. v. Koering, 404 N.W.2d 301, 306 (Minn. Ct. App. 1987)

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

As set forth in its motion for partial summary judgment, Guidant is entitled to summary judgment on its claim against Aspen for tortious interference with confidentiality agreements. For the same reasons, Aspen cannot obtain summary judgment on any of Guidant's tortious interference claims.

A. Aspen Is Not An Agent Of The Hospitals

As explained above, Aspen cannot be an agent of its clients. When citing the Restatement's definition of agency, Aspen omits the basic requirement that an agent must have authority to act on behalf of the principal. Compare Aspen's Memo. at 33-34 with Restatement 2d of Agency § 1. Aspen cannot provide a shred of evidence that it has authority to bind its clients.

B. Guidant's Tortious Interference and Trade Secrets Claims Are Distinct

Minn. Stat. § 325C.07 states that MUTSA "displace[s] conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." Citing Micro Display Sys., Inc. v. Axtel, Inc., 699 F. Supp. 202, 205 (D. Minn. 1988), Aspen claims that Guidant's tortious interference claims are "displaced" by its claim under MUTSA. Yet Aspen neglects to state that Micro Display narrowly interpreted Section 325C.07:

> However, the displacement of the common law is not as broad as defendants suggest. Only that law which conflicts with the MUTSA is displaced. Conflicting law is that law dealing exclusively with trade secrets. To the extent a cause of action exists in the commercial area *not* dependent on trade secrets, that cause continues to exist.

Id. at 205 (emphasis added). Micro Display specifically refused to dismiss plaintiff's claims for tortious interference with contractual relations, among other claims, even though the allegations were "redundant." Id. See also Rehabilitation Specialists, 404 N.W.2d at 305-07 (denying summary judgment on related claims for breach of duty of loyalty and misappropriation of trade secrets); Gordon Employment, Inc. v. Jewell, 356 N.W.2d 738 (Minn. Ct. App. 1984) (upholding judgment on related claims for tortious interference and misappropriation of trade secrets); Inter-Tel, Inc. v. CA Comm., Inc., No. Civ. 02-1864, 2003 WL 23119384 (D. Minn. Dec. 29, 2003) (denying summary judgment on related claims for tortious interference and misappropriation of trade secrets).

Guidant's tortious interference claims are not premised on trade secrets common law, so the claims have not been displaced by Section 325C.07. Moreover, Guidant's claims for tortious interference and misappropriation of trade secrets are factually distinct. Guidant's confidentiality agreements with its customers provide a contractual prohibition on disclosure of the contracts and pricing information. Thus, even if the Court should find that Guidant's contracts do not constitute trade secrets, Aspen is still liable for inducing hospitals to breach their contractual obligations to Guidant.

C. Aspen Induced Hospitals To Breach Their Contracts With Guidant

In many instances, Aspen's clients issued RFPs drafted by Aspen during the middle of the contracts, thereby breaking the contracts. Coleman Aff., Exhs. 1, 28, 72. Aspen induced Eisenhower to repudiate a seven-year contract. Nolting Aff., Exhs. 62,

63. Other hospitals exercised termination provisions pursuant to Aspen's advice. See, e.g., Nolting Aff., Exh. 64.

Guidant recognizes that there are factual differences between Aspen's consulting engagements. Aspen cites only those engagements in which its clients issued RFPs at the end of their contracts and continued to honor the contracts through term. Yet many contracts were repudiated early, and trial is necessary to determine the scope of Aspen's liability and the amount of damages. See Coleman Aff., Exh. 52 at 52-10.

D. Aspen Cannot Hide Behind Honest Advice Privilege

Minnesota courts have never applied the "honest advice privilege" to a claim for tortious interference with contract. The only Minnesota decision mentioning Restatement 2d § 772 did so in the context of tortious interference with prospective economic relations. See Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co., 530 N.W.2d 867, 871-71 (Minn. Ct. App. 1995). The distinction is critical. While section 772 provides one principle for determining when interference has been "improper," that determination is only relevant in Minnesota to claims for tortious interference with prospective economic relations, because improper conduct is an element of the tort. Aspen also overstates Glass Service by claiming that it constituted Minnesota's adoption of section 772—that decision by the Court of Appeals merely mentioned section 772 as an alternative holding for its decision without further analysis.

Aspen cannot rely on the Restatement's honest advice privilege even if it applies to Guidant's claims. First, Aspen induces hospitals to breach Guidant's confidentiality agreements before it gives any advice to hospitals and before it has even been hired by its

clients. Nolting Aff., Exh. 65. The honest advice privilege only inoculates consultants from lawsuits brought when clients follow the substance of their advice. See, e.g., J.D. Edwards & Co. v. Podany, 168 F.3d 1020, 1022 (7th Cir. 1999). Aspen's practice of inducing hospitals to forward Guidant's confidential contracts is not consulting advice.

Second, to be privileged, the advice must be honest, see, e.g., Schussel v. Balter, 386 So.2d 1227, but there is nothing honest about Aspen's advice. Aspen entices clients by lying about its "benchmarking database" and vastly overstating the hospitals' potential for cost savings. See Coleman Aff., Exhs. 21, 23, 64. Aspen's own damages expert explains that Aspen's methodology for calculating cost savings is misleading and inaccurate. Id., Exh. 65. Aspen claims to keep a hospital's prices confidential, but now admits that it tells one hospital how much to pay for Guidant's CRM devices based on knowledge obtained from other clients. Id., Exhs. 24, 43, 44, 45, 46, 47; Nolting Aff., Exhs. 65, 67, 68, 69. Finally, Aspen has literally built a business on misappropriating Guidant's confidential pricing and selling its knowledge of those trade secrets.

Third, the honest advice privilege does not apply when given for self-interested purposes. See Podany, 168 F.3d at 1024-25; Trepanier v. Getting Organized, Inc., 583 A.2d 583 (Vt. 1990). Aspen induces hospitals to breach Guidant's confidentiality agreements so that it can gain unique knowledge of Guidant's prices. Id. Aspen has created a black market in Guidant's trade secrets by inducing hospitals to breach confidentiality agreements and then marketing the information to other prospective clients. Aspen has no regard for whether its clients actually benefit from its advice, so

long as Aspen perpetuates its access to Guidant's prices. Aspen's motives are wholly illegitimate, self-serving, and dishonest.

CONCLUSION

For the foregoing reasons, Guidant respectfully requests that the Court deny Aspen's motion for summary judgment.

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