

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

CARDIAC PACEMAKERS, INC. and )  
GUIDANT SALES CORPORATION, )  
 )  
Plaintiffs/Counter-Defendants, )  
 )  
v. ) Civil No. 04-CV-4048 (DWF/FLN)  
 )  
ASPEN II HOLDING COMPANY, INC., )  
d/b/a ASPEN HEALTHCARE METRICS, )  
 )  
Defendant/Counter-Plaintiff. )

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE  
TO CHALLENGE CONFIDENTIALITY ORDERS**

Pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, Public Citizen has moved for leave to intervene for the limited purpose of seeking public disclosure of the briefs filed by plaintiffs Guidant Sales Corporation and Cardiac Pacemakers, Inc. (collectively “Guidant”) and defendant Aspen II Holding Company (“Aspen”), submitted with respect to the Court’s ruling on cross-motions for summary judgment, and any attachments to these documents, including affidavits and exhibits, including but not limited to Docket Entry Nos. 158, 159, 160, 161, 164, 167, 179, 182, 183, 184, 185, 187, 189, 191, 193, 194, 201, and 205, for the following reasons:

1. On February 2, 2006, the Court granted Guidant’s Motion for Partial Summary Judgment, dismissed with prejudice Aspen’s counterclaims, and denied Aspen’s Motion for Summary Judgment. The parties submitted briefs and attachments regarding these summary judgment motions under seal pursuant to the Court’s November 19, 2004 Protective Order;

at the time of filing, neither side made any judgments about what portions of their papers had to be kept secret, but rather filed everything under seal, with no judicial supervision of the sealing decision. The Court ultimately dismissed the remaining claims in the action with prejudice on May 31, 2006, pursuant to a Stipulation of Dismissal with Prejudice filed by the parties. Guidant's summary judgment briefs and their attachments remain under seal to this date, and the Court has never made any determination as to whether good cause existed to file and keep any portion of these documents under seal.

2. Public Citizen is a national non-profit, consumer advocacy organization that represents consumer interests in Congress, the executive branch, and the courts. Public Citizen's Health Research Group promotes research-based, system-wide changes in health care policy and provides oversight concerning drugs, medical devices, doctors and hospitals and occupational health. It conducts investigations and publishes reports and databases regarding various health issues including the safety and effectiveness of drugs, medical devices, and workplace conditions, engages in advocacy before health agencies including rulemaking proceedings, and undertakes numerous public education initiatives. Public Citizen's Litigation Group is a public interest law firm that litigates cases at all levels of the federal and state judiciaries, as well as before federal regulatory agencies. It specializes in health and safety regulation, consumer rights, including class actions and access to the courts, open government, and the First Amendment, including internet free speech. The Litigation Group has handled numerous cases in federal and state courts across the country concerning

the right of public access to litigation documents, including *Chao v. Estate of Frank Fitzsimmons*, No. 78-C-342 (N.D. Ill. Oct. 21, 2004); *In re American Historical Ass'n*, 62 F. Supp.2d 1100 (S.D.N.Y. July 15, 1999); *Hammock v. Hoffmann-LaRoche*, 142 N.J. 356 (1995); *Public Citizen v. Liggett Group*, 858 F.2d 775 (1st Cir. 1988); *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983). More recently, the Litigation Group has focused on representing consumer interests in opposition to expansive intellectual property claims that unduly curtail free speech and abuse the public interest. Through its brief representation of ECRI, a Philadelphia-area non-profit whose reporting on the prices of medical devices has drawn threats of liability from Guidant, Litigation Group attorneys learned first-hand about Guidant's efforts to expand the Court's rulings in this case to govern situations that appear to be very different from those that were at issue in this case.

3. The Court's February 2, 2006 decision and the information contained in the parties' summary judgment briefs and supporting papers relate to matters of significant importance and interest to the public. Public Citizen, hospitals, and other companies in the health care industry cannot fully understand the reach of the Court's decision without knowing what arguments were presented to the Court, and they cannot appreciate the factual bases for Guidant's wide-ranging claims of the ability to prevent third parties, who have never agreed to its claimed entitlement to confidentiality, to behave as if they were parties

to such confidentiality agreements. Because Guidant is currently threatening third parties in the health care industry with liability based on the Court's summary judgment ruling, these companies need guidance with respect to acceptable price comparison and disclosure activities. The companies should be able to go to this Court's electronic docket to download the briefs and supporting papers to fully understand both the scope and the limits of the Court's decision

4. Public Citizen is concerned that Guidant's pricing model seeks to prevent hospitals from engaging in any meaningful price comparison activities, thereby creating a seller's market for Guidant and preventing hospitals from obtaining competitive pricing. Patients and government health care programs will ultimately pay the costs of resulting higher prices. Public Citizen seeks disclosure of Guidant's briefs and attachments in full to promote price transparency in the health care industry, which decreases costs for hospitals, patients, and government programs. Moreover, Public Citizen is concerned about the broader ramifications of the Court's ruling for other entities, including itself, that seek to report on developing threats to health and safety that may entail obtaining information from employees, contractors and customers that have signed secrecy agreements.

5. Thus, Public Citizen seeks the information contained in the parties' summary judgment briefs and attachments so that it can more thoroughly investigate and report about this matter of public interest, and so it can effectively assist targets of Guidant's threats of liability. We believe that various publications will also be interesting in reviewing these

materials to aid their reporting on the controversies between Guidant and consulting companies like Aspen, as well as between Guidant and publishing companies like ECRI.

6. Accordingly, Public Citizen seeks to intervene for the purpose of asserting its rights under the First Amendment and the common law presumption that judicial records will be available for public scrutiny, and to review the parties' summary judgment briefs and supporting papers, as well as other documents filed under seal in the Court's docket.

7. Permitting PCLG to intervene for this limited purpose is the most appropriate way for PCLG to gain access to these court records. "Most circuits have held that permissive intervention is the most appropriate procedural course for third party challenges to confidentiality orders." *In re Baycol Products Litig.*, 214 F.R.D. 542, 543 (D. Minn. 2003). In fact, "every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *E.E.O.C. v. National Children's Center*, 146 F.3d 1042 , 1046 (D.C. Cir. 1998) Although the Eight Circuit has not yet decided this issue, in *In re Baycol Products*, the District Court for the District of Minnesota adopted the majority approach, concluding that the factors in Rule 24(b) were satisfied where a third party sought to intervene for the limited purpose of modifying a protective order. 214 F.R.D. at 543-44. Such intervention is appropriate here.

## CONCLUSION

Public Citizen should be granted leave to intervene for the limited purpose of asking

the Court to unseal papers filed with this Court under seal.

Respectfully submitted,

/s/

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/s/

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July 5, 2006

**CERTIFICATE OF COMPLIANCE**

**I hereby certify that my Word Perfect software counted 1252 words in the foregoing Memorandum (exclusive of the caption).**

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/s/  
Paul Alan Levy

