

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EMERGENCY CARE RESEARCH)	
INSTITUTE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	
GUIDANT CORPORATION,)	
)	
Defendant.)	

COMPLAINT FOR A DECLARATORY JUDGMENT

INTRODUCTION

1. This is an action under the Declaratory Judgment Act seeking a declaration that Emergency Care Research Institute (“ECRI”), a non-profit organization, may continue to publish truthful information that hospitals voluntarily provide to it concerning the prices they pay for medical devices. Years after ECRI began reporting such prices, Guidant Corporation, one of three major makers of cardiac rhythm management devices, adopted a business model under which it tries to keep confidential the prices it charges for its products. Pursuant to that business model, Guidant has inserted confidentiality clauses into its contracts with hospitals and demanded that ECRI stop publishing information about its prices. ECRI does not believe that the confidentiality clauses prevent hospitals from voluntarily disclosing information about the prices they have paid for specific medical devices, or that such contracts prevent it from publishing information that hospitals voluntarily provide to it. Moreover, the exclusion of this data from ECRI’s publication would effectively destroy its value for the community of those interested in these key medical devices, to the disadvantage of consumers and the detriment of public health.

2. Despite the fact that ECRI and other members of the public did not know about this new

business model, or consent to be bound by the ensuing confidentiality clauses in Guidant's contracts with its customers, Guidant claims that the public is bound to accept this model and to obey the contracts, in that anyone who obtains from its customers information about Guidant's "confidential" prices becomes duty bound to "return" that information to defendant or be deemed to have committed the tort of interfering with its contracts. In furtherance of that contention, Guidant has demanded that ECRI "cease and desist" from obtaining and publishing the prices of its products.

3. Because ECRI's publication does not tortiously interfere with Guidant's contracts, and because the First Amendment and the Due Process Clause bar Guidant from binding third parties to non-publication obligations to which they have never agreed, the Court should declare that no tort has been committed and that ECRI may continue to publish information about Guidant's prices.

JURISDICTION

4. The Court has jurisdiction of this case under 28 U.S.C. § 1332 because the parties have diverse citizenship and the amount in controversy exceeds \$75,000.

PARTIES

5. Plaintiff ECRI is a Pennsylvania non-profit corporation whose principal place of business is in Plymouth Meeting, Pennsylvania.

6. Defendant Guidant Corporation is an Indiana corporation whose principal place of business is in Indianapolis, Indiana.

PERSONAL JURISDICTION AND VENUE

7. The Court has personal jurisdiction of Guidant, and venue is proper in this district, because (a) Guidant markets to customers in this district the products whose prices are at issue; (b) Guidant's threats of tort liability were directed to ECRI in this district and would harm ECRI in this

district; and (c) ECRI obtains price information from Guidant's customers in this district and publishes information about Guidant's prices to customers in this district.

FACTS

ECRI's Protected Activity

8. ECRI is an independent, nonprofit health services research agency whose mission is to improve the safety, quality, and cost-effectiveness of healthcare. Since 1968, it has provided publications and programs dedicated to upgrading medical product safety, efficacy, reliability and cost-effectiveness and the related skills of healthcare professionals. ECRI believes that an educated and informed free marketplace, which consciously selects, purchases, and uses superior technologies in preference to suboptimal products, encourages and even forces manufacturers to respond by producing better products.

9. ECRI provides information services and technical assistance to more than 5,000 hospitals, healthcare organizations, ministries of health, government and planning agencies, voluntary sector organizations, associations, and accrediting agencies worldwide. Its more than 30 databases, publications, information services, and technical assistance services are widely valued by the healthcare community. These consist of medical product evaluation and testing, patient safety and quality information, hazards and recalls, evidence-based healthcare research, medical product problem investigation, and related materials. To facilitate international communication, ECRI has promulgated a standardized nomenclature for medical products called the Universal Medical Device Nomenclature System ("UMDNS"), which has been adopted by many countries and is supported by the World Health Organization and the Pan American Health Organization.

10. As an independent evaluator of the safety and efficacy of medical devices, ECRI has

established conflict-of-interest rules that govern its arms-length relationship with the medical device industry. Neither ECRI nor its employees accept grants, gifts or consulting fees from medical device or pharmaceutical firms, or are permitted to own stock shares in such firms.

11. ECRI publishes information about medical devices on its web site, located at www.ecri.org. Some parts of the web site are generally accessible to the public; other portions are accessible only by paid subscription. Subscription revenues are used to fund ECRI's publications, its product-testing, and other services.

12. One of ECRI's publications is PriceGuide, a searchable database of the actual prices paid for a wide range of single-use medical products. Approximately 400 hospitals, health systems, manufacturers, group purchasing organizations, health care consultants, health plans and government agencies subscribe to PriceGuide. By examining PriceGuide, subscribers who are in the market to purchase medical devices to be used by their staff or their patients can obtain information that helps them both to make decisions about the cost-effectiveness of various competing medical devices that they are considering, and to negotiate prices in light of knowledge of what prices are being charged to other customers for the same and competing items.

13. Hospitals typically track their purchases through materials management information systems. ECRI obtains information for PriceGuide from hospitals that voluntarily send ECRI data in electronic format from those systems. ECRI refines the data by standardizing the vendor name, the manufacturer name, and the item description and by mapping the data to ECRI's UMDNS codes. ECRI then places the refined data into the database so that subscribers can review it and search for it in the format that they select. Subscribers can, for example, compare the prices they are currently paying with the average price paid by other customers and with the low price paid by other customers

across the nation or in their own region.

14. Since PriceGuide was started in 1996, it has included information about prices paid for various devices manufactured by Guidant, including cardiac rhythm management devices.

15. The publication of ECRI's database constitutes noncommercial speech protected by the First Amendment.

Guidant's Adoption of Its Demand for Price Secrecy

16. Through its wholly-owned subsidiary, Cardiac Pacemakers, Inc., Guidant makes cardiac rhythm management ("CRM") devices that are sold throughout the United States and the world through a subsidiary Guidant Sales Corporation. Guidant CRM devices are sold in Pennsylvania, and hospitals in Pennsylvania are among the hospitals that supply price information about Guidant CRM devices to ECRI.

17. In 2001, Guidant retained the services of an independent consulting organization, McKinsey and Company. At some later date, pursuant to advice from McKinsey, Guidant adopted a business model pursuant to which it demanded that customers agree to keep confidential the actual prices paid to Guidant for CRM devices. McKinsey first subscribed to PriceGuide in 2001 and has renewed its subscription to the present. At the time Guidant decided on its new business model, it knew or should have known that ECRI's PriceGuide included information about the prices that customers were paying for Guidant devices.

18. Guidant did not consult with ECRI or ask ECRI to agree that it would no longer accept or publish price information about Guidant's CRM devices. ECRI was unaware of Guidant's new business model and did not agree, and has never agreed, to keep confidential the prices Guidant is paid for CRM devices.

Guidant's Demands That ECRI Stop Publishing Its Prices

19. On May 17, 2004, an attorney for Guidant contacted ECRI to object to the inclusion of a spreadsheet on the public portion of ECRI's web site that set forth an example of the kind of information that could be obtained from its PriceGuide. The spreadsheet set forth representative pricing information for medical devices from three fictitiously-named manufacturers, one of which, "Guardian," could be understood as a reference to Guidant. Guidant contended that the "Guardian" price information was subject to confidentiality agreements between Guidant and its customers, that ECRI could not lawfully possess the information, and that all such information had to be removed from ECRI's web site and "returned" to Guidant immediately.

20. ECRI had not and still has not seen Guidant's CRM sales contracts signed with its customers, including the prices stated in such contracts or any clauses regarding confidentiality of the contracts (except as mentioned in the 2006 court opinion described below in paragraph 23). However, in response to Guidant's demand, ECRI removed its references to "Guardian" and the related price information from the public portion of its web site.

21. In addition, ECRI asked the hospitals from whom it obtained pricing information for PriceGuide not to supply ECRI with information that the hospitals were required to keep confidential. Both a provision in ECRI's contract with subscribers, and a statement on ECRI's web site, ask them not to submit such information.

22. In August 2004, Guidant filed suit in Minnesota against Aspen Healthcare Metrics, a consulting company, alleging, inter alia, that by obtaining pricing information about Guidant CRM devices and using that information to help its hospital customers save money in the purchase of CRM devices from Guidant, Aspen was tortiously interfering with Guidant's contracts with its

customers.

23. On November 30, 2005, while the *Aspen* case was pending, Guidant's counsel wrote to ECRI to state that the pricing information that ECRI was publishing in its PriceGuide concerning Guidant's CRM devices "is proprietary to Guidant and is subject to confidentiality agreements between Guidant and its hospital customers." Guidant insisted that ECRI "immediately cease and desist" from publishing or otherwise communicating such pricing information, and that ECRI confirm in writing that it had stopped doing so. Guidant offered to discuss with ECRI what Guidant pricing information was non-confidential and hence could be revealed by ECRI.

24. By letter dated December 2, 2005, by further email communications, and at a meeting at ECRI's headquarters with Guidant representatives, ECRI has attempted to discuss with Guidant what information it could publish. However, Guidant has been unwilling to provide such information, while at the same time reiterating its demand that ECRI remove all Guidant price information from its database. Instead, Guidant sent ECRI a copy of a decision from the Minnesota case granting partial summary judgment for Guidant on its tortious interference claims against Aspen, denying Aspen's summary judgment motion, and setting the case for trial on damages.

25. Because the parties to the Minnesota case filed their summary judgment briefs under seal by consent of the parties, ECRI is unable to determine whether any of the statements in the court's opinion are applicable to ECRI's activities, or to determine whether some of its potential common law or constitutional defenses has been presented to that court. Accordingly, ECRI obtained Aspen's waiver of any confidentiality claims, and asked Guidant to send it copies of the summary judgment briefs. Guidant has ignored that request.

26. On March 31, 2006, Guidant provided ECRI with a copy of the transcript of the

summary judgment hearing and reiterated its demand that ECRI cease and desist from including Guidant price information in PriceGuide.

27. Upon information and belief, Aspen does not currently provide any service comparable to ECRI's PriceGuide, and the ruling against Aspen in Minnesota does not apply to ECRI's own situation, either factually or legally. Indeed, at the summary judgment argument (whose transcript is not under seal), Guidant listed several reasons why its arguments against Aspen would not apply to ECRI.

28. Recently, however, Guidant has moved for injunctive relief against Aspen, alleging that Aspen is preparing to publish a database of pricing that would include information about Guidant's CRM pricing, and contending that the liability ruling it has obtained against Aspen on its tortious interference claim includes a prohibition against the publication of such a database. Guidant has also argued in that motion that Aspen cannot simply take its hospital customers' word in deciding what price information they are entitled to reveal, but must decide for itself whether price information is "confidential" under Guidant contracts before it accepts such information.

ECRI's Good Faith and Justification, and Its Need for a Ruling On Its Rights

29. By making safety, quality and pricing information available, ECRI serves the interests of patients, doctors, hospitals, taxpayers and manufacturers alike. Society and, in particular, health care consumers benefit when price information is readily available to the market. ECRI's PriceGuide provides an important public service. Its continued availability furthers the important public policy of promoting price transparency in the market for medical services, drugs and devices which, in turn, permits purchasers to make better informed decisions when buying health care products and services.

30. Guidant's repeated demands that ECRI cease and desist from receiving and publishing information about Guidant's prices threaten ECRI with litigation unless it complies with Guidant's demand. Compliance, however, would burden ECRI's First Amendment right to publish truthful information that is central to its mission, that is useful to its subscribers, and that serves an important public interest.

31. ECRI has no motive or intent to harm Guidant by obtaining and publishing pricing information about medical devices, including Guidant's. ECRI does not believe that its PriceGuide violates Guidant's rights, or tortiously interferes with Guidant's contracts with its customers by publishing truthful information that those customers choose to provide it. However, Guidant's repeated cease and desist demands put ECRI at risk of accruing possible claims for actual or punitive damages if the issue remains unresolved.

32. This case presents an actual and live controversy between Guidant and ECRI. Guidant alleges that ECRI is violating its rights under its confidentiality contracts with its customers. ECRI contends that it has not committed and is not committing any such tort or violation of Guidant's rights, that it has a First Amendment right to publish information that others voluntarily provide it, and that Due Process forbids Guidant from imposing on ECRI the obligation to respect contractual obligations to which ECRI has not agreed.

33. ECRI derives more than \$75,000 from subscriptions for the PriceGuide. Because Guidant is one of three major manufacturers of CRM devices, omission of Guidant price information from PriceGuide would substantially diminish the usefulness of the publication. If ECRI is compelled to eliminate all Guidant information from its PriceGuide, its product will be much less attractive to subscribers, and much of the revenue from PriceGuide would be lost.

34. Guidant's damages claims against Aspen are based on the theory that any reductions in price that its customers are able to negotiate by using their knowledge of discounts provided to other Guidant customers constitute damages to Guidant. In the *Aspen* case, Guidant has claimed that one customer alone saved \$1.7 million in this manner. Guidant is likely to assert similar damages claims against ECRI. Accordingly, the amount in controversy in this case exceeds \$75,000.

ECRI HAS NOT VIOLATED GUIDANT'S RIGHTS

35. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, ECRI asks the Court to declare that it has not committed and is not committing the tort of interference with contract or with contractual relations, and that, in any event, the constitutional protections of free speech and due process bar the application of state tort law to forbid ECRI from accepting information that hospitals voluntarily provide about the prices that they pay for Guidant's products, and from publishing that information.

36. The publication of ECRI's PriceGuide, and its request for and receipt of information for inclusion in PriceGuide, does not tortiously interfere with Guidant's contracts or contractual relations because:

(a) ECRI has not deliberately encouraged any of Guidant's customers to breach any clauses of their contracts with Guidant; on the contrary, ECRI specifically tells its customers not to supply information if doing so would breach a contract;

(b) ECRI has not encouraged or caused any of Guidant's customers to break off its contracts with Guidant;

(c) ECRI has not used improper means to obtain information about the prices that hospitals pay for Guidant's medical devices;

(d) the conduct that Guidant claims is tortious is privileged and justified; and

(e) the tort of interference with contractual relations should be construed narrowly in these circumstances to avoid conflict with the free speech and due process clauses of the United States Constitution and Article 1, Section 7 of the Constitution of the Commonwealth of Pennsylvania.

37. Application of Guidant's tort theories to support injunctive relief that bars ECRI from compiling or publishing its PriceGuide, or an award of damages for past compilation or publication, would violate the First Amendment and Article 1, Section 7 of the Constitution of the Commonwealth of Pennsylvania because

(a) ECRI obtains the price information by lawful means; and

(b) ECRI publishes only truthful information about the prices.

38. Application of Guidant's tort theories to enforce against ECRI the provisions of contracts that Guidant has entered with its customers, to which ECRI has not consented and to which ECRI has never been given any chance to object, would violate ECRI's right to due process of law.

WHEREFORE, PLAINTIFF PRAYS THAT THE COURT ENTER JUDGMENT AS FOLLOWS:

A. Declaring that whatever confidentiality clauses Guidant may have included in its contracts with its customers are not binding on ECRI because ECRI has not agreed to them;

B. Declaring that ECRI does not tortiously interfere with Guidant's contractual relations or with Guidant's contracts with its customers by obtaining Guidant pricing information and publishing such information;

C. Declaring that the First Amendment and Due Process Clause forbid the application of Guidant's tortious interference claims to prevent ECRI from compiling and publishing its PriceGuide;

D. Awarding ECRI its reasonable costs in this action; and

E. Awarding ECRI such additional relief as the Court may deem just and proper..

Respectfully submitted,

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