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 UNSEAL SUMMARY JUDGMENT BRIEFS AND SUPPORTING PAPERS

In this motion, Public Citizen seeks to enforce the strong presumption under both the common law and the First Amendment that briefs and evidence submitted to a court in support of or in opposition to summary judgment should remain open to public inspection. In this case, two subsidiaries of Guidant Corporation, which makes and sells highly controversial cardiac rhythm management devices, sued a health care consulting company, arguing that its business model requires it to enter contracts with all hospital customers providing for secrecy of the prices paid for those controversial devices, and that a third party who obtains such information from Guidant's customers is liable for "tortious interference with contract" and for stealing trade secrets. During the course of the litigation, the parties stipulated to a blanket protective order allowing them to keep secret any information produced in discovery, without any judicial supervision of their secrecy decisions. Then, when it came time for both sides to seek summary judgment, rather than making any

judgments about what portions of their papers had to be kept secret, they just filed everything under seal, thus concealing from the public the basis for the arguments about compulsory price secrecy, again without any judicial supervision of their secrecy decisions. The Court expressed uneasiness about the extent of the sealing, but the parties have nevertheless left everything under seal.

Under well-established law, the public has a presumptive right of access to judicial records, which may only be overcome by a showing of important countervailing interests. The burden of such a showing rests on the party opposing disclosure, and that showing must be made with specificity on a document-by-document basis. Guidant has never made such a demonstration, and it does not appear that Guidant will be able to do so. Because of the intense public interest in the subject of this lawsuit, because Guidant has been threatening other third parties with liability based on the Court's summary judgment ruling, and because there are indications that Guidant has misused its secrecy claims, the Court should unseal all papers submitted by the parties in support of or in opposition to the cross-motions for summary judgment in this case, including briefs, statements of material facts, and attached affidavits and exhibits.

FACTUAL BACKGROUND

Guidant sued Aspen Health Care Metrics, LLC ("Aspen") in 2004 in state court, alleging four causes of action: (1) tortious interference with confidentiality agreements; (2) tortious interference with contracts; (3) tortious interference with prospective contractual

relations; and (4) misappropriation of trade secrets. See *Cardiac Pacemakers v. Aspen II Holding Co.*, 413 F. Supp 2d 1016, 1019 (D. Minn. 2006). Aspen removed to this Court and filed its answer on September 14, 2004, counterclaiming for defamation and tortious interference with its prospective contractual relationships. *Id.* at 1021.

On November 19, 2004, the Court adopted the parties' stipulation for a blanket protective order governing discovery materials "produced by any party or non-party during the proceedings in this action, which contain[] 'confidential information.'" Docket Entry Number ("DEN") 24, Protective Order ¶ 1. The protective order allowed the parties to keep secret any information produced in discovery (and later included in subsequent court filings), without any judicial supervision of the parties' secrecy decisions. See Protective Order ¶¶ 1-3, 10, 15. On November 1, 2005, the parties filed cross-motions for summary judgment. Between November 1 and December 5, 2006, Guidant and Aspen filed numerous memoranda in support of and in opposition to these motions for summary judgment. Both parties filed all these memoranda, including attachments, under seal pursuant to the Court's November 19, 2004 Protective Order. No party or non-party challenged the filing of these memoranda under seal, and the Court has made no determination about whether good cause existed to file and keep these memoranda under seal. In its December 15 hearing on the cross-motions, however, the court noted that "[i]t doesn't seem like most of this should probably be under seal" and that it saw "only a few items" in the sealed documents that ought to be redacted. Transcript of Summary Judgment Arguments, DEN 207, at 5. Nevertheless, the briefs and

their attachments remain under seal.

On February 2, 2006, the Court granted partial summary judgment in plaintiffs' favor, holding Aspen liable on Guidant's tortuous interference claims, denied summary judgment on Guidant's trade secret claims, and dismissed Aspen's counterclaims, leaving the trade secret claims and the issue of damages for trial. *Cardiac Pacemakers*, 413 F. Supp 2d at 1030. On the eve of trial, the parties settled the case, and the Court 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. DEN 382, Order of Dismissal with Prejudice 1-2. The summary judgment briefs and their attachments remain under seal to this date.

On June 15, 2006, undersigned counsel Mr. Levy contacted counsel for Aspen and Guidant to request their consent to Public Citizen's motions for leave to intervene and to unseal the summary judgment papers. Aspen's counsel promptly gave his client's consent, but Guidant's counsel requested time to review the papers whose unsealing was sought and to consult with his client. On June 26, 2006, Guidant's counsel responded that he was unable to take a position on the motion, but would respond after reviewing Public Citizen's motion papers.

ARGUMENT

A. A PRESUMPTIVE RIGHT OF PUBLIC ACCESS EXISTS UNDER BOTH THE COMMON LAW AND THE FIRST AMENDMENT.

The right of access to judicial proceedings and records is "an essential component of

our system of justice" and is "instrumental in securing the integrity of the [judicial] process." *Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F.3d 1304, 1311 (11th Cir. 2001) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564-74 (1980)). Openness "enhance[s] and safeguard[s] the integrity of the factfinding process," *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1982), because it gives "assurance that the proceedings [a]re conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. Further, access to judicial proceedings and records increases public confidence in the judicial system. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.").

The common law provides a presumptive right of "public access to judicial records." *Nixon v. Warner Communications*, 435 U.S. 589, 602 (1978). The common law right of access explicitly applies to both criminal and civil judicial records. *See id.* at 597-99 (although arising in the criminal context, the Court makes no distinction between judicial records in criminal, as opposed to civil, proceedings); *Webster Groves School Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990) (applying the common law right of access in the civil context).

The common law right of access is qualified, not absolute. *Nixon*, 435 U.S. at 598. The common law right creates a presumption that must be followed unless overcome by a

"weighing of competing interests." *Webster Groves School Dist.*, 898 F.2d at 1376. Because "[e]very court has supervisory power over its own records and files," *Nixon*, 435 U.S. at 598, this weighing of competing values is to be accomplished in the first instance by "the district judge, who is in the best position to recognize and weigh the appropriate factors on both sides of the issue." *United States v. Webbe*, 791 F.2d 103, 107 (8th Cir. 1986). The party opposing disclosure, however, has "the burden to establish . . . good cause." Protective Order ¶ 15; *see also Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) ("The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.").[1]

The Supreme Court has also held that the First Amendment creates a presumptive right of public access to criminal trials, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980), voir dire proceedings in criminal trials, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13 (1984) (*Press-Enterprise I*), and preliminary hearings in criminal prosecutions. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (*Press-Enterprise II*). The Eighth Circuit has extended the First Amendment right of public access to documents and other judicial records. See *In re Search Warrant for the Secretarial*

[1] Although most circuits recognize a "strong presumption" in favor of public access, the Eighth Circuit has rejected that language in favor of an approach that is more deferential to its district judges in the exercise of their sound discretion in the administration of their own dockets. *United States v. Webbe*, 791 F.2d 103, 105, 106 (8th Cir. 1986) (citing cases stating strong presumption). Public Citizen reserves the right to argue for the majority standard should review be required in the Eighth Circuit or beyond.

Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (*Gunn*) (extending the First Amendment right of public access to search warrant applications). The *Gunn* court also heavily implied that the right of access applies to other judicial records and documents "important to the public's understanding of the function and operation of the judicial process." *Id.* Additionally, courts of appeals in other circuits have applied the First Amendment right of public access to judicial records in civil as well as in criminal cases. *See, e.g., Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (applying the First Amendment right of access to disclosure of documents submitted in support of a summary judgment motion); *Grove Fresh Distrib. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (applying the right to discovery documents).

Most Eighth Circuit cases applying the First Amendment the right of public access arose in the criminal context, see *Gunn*, 855 F.2d at 573; *United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996) (acknowledging right of access in considering a request for access to videotaped testimony at a criminal trial), and that court has not explicitly applied the presumption to all proceedings or judicial records in the civil context. The Eight Circuit has, however, recognized the presumptive First Amendment right of access to civil contempt proceedings arising out of a civil case. *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) ("the Court's reasoning for finding a First Amendment right of public access to criminal trials clearly supports such an application"). Although the Eighth Circuit's opinion in *Iowa Freedom of Info. Council* does not specify whether the contempt proceedings

were civil or criminal, the discussion of the proceedings strongly implies that it was civil contempt.[2]

Moreover, although *Gunn* itself was a criminal case, Judge McMillian's opinion strongly implies that the First Amendment right of access ought to apply to civil documents and proceedings. *See Gunn*, 855 F.2d at 573. In finding that the right of access applies to search warrant applications, he noted that "[u]nder the common law judicial records and documents have been historically considered to be open to inspection by the public" and cited approvingly *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985) (per curiam), which had held that the right of access applies to judicial records in civil proceedings. *Gunn*, 855 F.2d at 573. Judge McMillian further approvingly noted that numerous kinds of criminal and civil proceedings and the judicial records of these proceedings "have been held to be subject to the first amendment right of public access by other federal courts of appeals." *Id.* (collecting cases). Further, the policy considerations the Supreme Court employed to justify the right of access in criminal proceedings— such as providing a check on the judiciary, assuring fairness and accuracy, promoting public confidence in the judiciary — apply to civil proceedings and documents as well. *Brown &*

[2] For example, the contempt proceedings were initiated and pursued by Procter & Gamble, the defendant in the underlying civil case, *id.* at 660, which would have been improper for criminal contempt. Moreover, one of the issues in the civil contempt trial was whether Procter & Gamble suffered damage from the contempt, *id.* at 662, which is an issue relevant to the amount of a civil contempt sanction, but irrelevant in a criminal contempt proceeding.

Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983).

As with the common law, the fact that the public presumptively has a right to access judicial records, however, "does not mean that the [records] must automatically be disclosed." *Gunn*, 855 F.2d at 574 (quotation omitted). The First Amendment right to access is qualified not absolute. *Press-Enterprise II*, 478 U.S. 1, 9 (1986). The presumptive right to access judicial proceedings and records may only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* The party opposing disclosure has the burden of showing that a "restriction of the first amendment right of public access is necessitated by a compelling government interest." *Gunn*, 855 F.2d at 574. If a court ultimately determines to deny access to a proceeding or document, "it must explain why closure or sealing was necessary and why less restrictive alternatives were not appropriate." Id.

B. THE SEAL PLACED ON THE SUMMARY JUDGMENT BRIEFS AND THEIR ATTACHMENTS SHOULD BE LIFTED.

Guidant faces a significant burden in overcoming the presumptive right of the public to access the summary judgment briefs and attachments. Not only does the right require the party opposing disclosure to establish compelling and countervailing justifications, see supra Part A, but the burden is heightened because the relevant briefs and attachments were filed in support of and in opposition to motions for summary judgment. See *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180 ("Since [the document] is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional

scrutiny."); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252-53 (4th Cir. 1988) (holding that once a party submits or incorporates discovery documents as part of a motion for summary judgment, they should be disclosed to the public absent compelling, overriding interests). To date, Guidant has made no showing of any need to file the briefs and attachments under seal. In light of the Court's comments at the summary judgment hearing after having reviewed the briefs and their supporting materials – "There might be a few items, a short redaction or two in some sealing of documents. It doesn't look like most of this should probably be under seal" *see* DEN 207, Tr. 5 – Public Citizen is skeptical that Guidant can overcome its substantial burden with respect to most, if not all, of the documents under seal.

Perhaps Guidant will argue that some portions of some documents ought to remain under seal because they contain trade secrets and other confidential information. Courts, however, "should not simply take representations of interested counsel on faith." *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 663 (8th Cir. 1983). Courts must require "more than a conclusory allegation" that trade secrets or confidential information are involved, *see In the Matter of the Search of Up North Plastics*, 940 F. Supp. 229, 233 (D. Minn. 1996); there must be "particular and specific demonstration[s] of fact." *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978). Specifically, as to each redaction, the party opposing disclosure must demonstrate (1) that the material in question is a trade secret or confidential information, and (2) that disclosure would cause substantial, identifiable harm

to its competitive position. See *In re Iowa Freedom of Info. Council*, 724 F.2d at 663-64; *Hammock v. Hoffmann-LaRoche*, 142 N.J. 356, 381-82 (1995) (noting that allegations of harm must be substantiated by "specific examples or articulated reasoning").

Once a court receives the purported justifications for sealing records to which the presumption of public access applies, the court must: (1) "determine, in specific findings made on the record, if there is a substantial probability of prejudice to a compelling interest"; (2) if such a probability exists, consider reasonable alternatives to sealing; (3) if no reasonable alternatives are available, determine whether the interests of the party opposing disclosure override the public's right of access; and (4) if sealing is warranted, devise an order that is "narrowly tailored" to protect the "endangered interests." *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995) (citing *Press-Enterprise II*, 478 U.S. 1, 9 & n.2, 13-14 (1986)).

Under the circumstances, and in light of the governing legal principles, Public Citizen respectfully submits that the following relief is warranted:

1. With respect to each portion of each sealed brief and each attachment, Guidant should be required to demonstrate the continuing and compelling need for confidentiality; the seal should be removed with respect to any document for which Guidant makes no such demonstration.

2. If Guidant can demonstrate a continuing and compelling need for confidentiality that overrides the right of access, but can only establish such a need with respect to discrete

portions of particular documents, then those portions should be redacted and the remainder of the documents disclosed.

C. EVEN IF THE BRIEFS AND ATTACHMENTS CONTAIN TRADE SECRETS AND CONFIDENTIAL INFORMATION, THE DOCUMENTS STILL SHOULD BE UNSEALED

Although the existence of trade secrets and certain types of confidential information constitute "a recognized exception to the right of public access to judicial records," *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983), a showing that trade secrets or confidential information are contained therein does not automatically justify closure. *See In re Iowa Freedom of Info. Council*, 724 F.2d at 664 (stating that it was not "announcing a rule that the presence of trade secrets will in every case and at all events justify the close of a hearing"). Where more than simply "private commercial interests" are involved (*i.e.*, where the information relates to important matters of public or governmental interest), courts must weigh a party's property interests against the interests of the public. *See id.; Webster Groves School Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990) (noting that once the right of access is implicated, judges should weigh the "competing interests"). Furthermore, confidential or other proprietary information that do not qualify as trade secrets are "not entitled to the same level of protection from disclosure as trade secret information." *Hoffmann-LaRoche*, 142 N.J. at 383 (citing *Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir.1988)).

Several factors strongly support disclosure in this case even if Gudiant claims that

certain matters are trade secret or otherwise deserving of confidential treatment. First, the litigation and the court's ruling on the cross-motions for summary judgment have been the subject of media stories, particularly in trade publications in the health care industry. *E.g.*, Maier, *As Their Use Soars, Heart Implants Raise Questions*, New York Times (August 2 2005); Thill, *The Medical Device Muzzle*, Journal of Health Care Contracting, available at www.jhconline.com/article-mararp2006-lawsuit.asp; Neil, *Price transparency issue has all sides seeking clarity*, Materials Management Magazine (May 16, 2006) Mantone, *Ruling Spreads Confusion: Guidant's Victory Could Stop Sharing of Price Data*, Modern Healthcare, Volume 36, Issue 13 at 8 (March 27, 2006); Mantone, *Heart stopper: Proprietary Pricing Suit v. Denver Consultants*, Modern Healthcare, Volume 35, Issue 35, at 10 (August 30, 2004). Hospitals and others have expressed concern about the implications of the ruling for their interests, because they recognize that, as a general matter, transparency is a condition of the effective operation of the free market, and that price transparency in particular tends to force sellers and manufacturers to offer more competitive pricing. This is, indeed, but an example of the more general proposition, recognized by the Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976), that to "preserve a predominantly free market economy, . . . it is a matter of public interest that [private economic] decisions be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. [citations omitted] And, if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the

formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765.

In this regard, it is understandable why a particular manufacturer would want to keep the prices charged to one customer secret from its other customers, but it is less understandable why it is in the interest of society to allow the tort laws to be deployed to threaten liability for damages and injunctive relief against third parties who obtain and disclose "secret" prices and hence help perpetuate price transparency in the market. Thus, the public generally, and the health care industry in particular, is entitled to know both the legal and the factual basis set forth by the two sides for enforcing contractual promises of secrecy against third parties that did not themselves agree to such secrecy. Disclosure will help the public understand why Minnesota common law creates an exception to the general rule that the law favors price transparency.

Moreover, where public health and safety are involved, the public's interest is heightened, and courts should be even more hesitant to close documents to public view. *Hoffman-LaRoche*, 142 N.J. at 379; *see also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) ("[A]ccess to judicial records promotes public health and safety by not allowing secrets hidden in court records to be shielded from public view."). By fostering the artificial elevation of prices, Guidant's price secrecy policy threatens to interfere with access to more affordable health care, and the public has a heightened interest in access to information showing why such secrecy is justifiable.

In addition to the general public interest in price transparency, individual market actors in the health care industry have a concrete interest in learning the precise arguments and evidence marshaled by the two sides in support of or in opposition to the ruling eventually rendered by the Court. As the media reports on the case reveal, many hospitals, purchasing organizations and others have expressed concern about the implications of the decision for their own conduct, such as whether they are potentially at risk for receiving price information or communicating such information to others. These companies must confront the possibility that Guidant might sue them too, and they need to know just what was argued in Guidant's suit against Aspen in order to determine their own prospects for avoiding such liability. Indeed, Guidant has actively been promoting the Court's ruling as a warning to other companies as a reason for them to stop accepting price information that Guidant customers volunteer to them.

Disclosure of the summary judgment briefs will likely provide crucial guidance to potentially liable parties and to those parties that Guidant has threatened or sued, because "court records often provide important, sometimes the only, bases or explanations for a court's decision." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983). Disclosure of the briefs will elucidate what arguments were before the court, what arguments the Court found persuasive or so insubstantial that they were not discussed in the Court's opinion, and what arguments were not before the Court at all. Consequently, targets of threats or suit by Guidant will be able to determine whether statements in the

Court's opinion are applicable to them, and whether their potential defenses have been presented to the Court.

Moreover, hospitals and other health case industry entities are not the only potential defendants under Guidant's expansive theories of tortious interference with contract. Taken at is most extreme, Guidant's theories could be employed by manufacturers or other companies to threaten media organs for liability when they accept information from employee or private contractor whistleblowers who disclose company "secrets" in violation of confidentiality agreements that are commonplace for staff in the private sector. Undersigned counsel Mr. Levy has spoken with several media lawyers who expressed concern about the implication of the Court's summary judgment ruling for their clients, which commonly derive great benefits from the increased circulation or viewership ratings that they derive from reporting on company misdeeds that grab the public interest. Although, to our knowledge, Guidant has not yet threatened any newspapers using this theory, its poor track record with respect to the safety of some of its CRM devices certainly gives it much to hide. Thus, the media too have an interest in knowing exactly what arguments were, and were not, presented to the Court for and against the application of the tort of interference with contract.

For example, the public policy favoring price transparency could come into play in a tortious interference with contract case under section 767 of the Restatement (Second) of Torts, and other potential Guidant defendants are entitled to know whether Aspen raised that

defense but the Court deemed the issue unworthy of discussion, or whether this issue was never even presented to the Court for decision. Similarly, the First Amendment affords a possible defense – even a purely commercial company can invoke the First Amendment to protect commercial speech, and nonprofits that put information about prices in their publications are likely engaged in noncommercial speech – and those considering how to respond to Guidant's warnings should be able to determine whether the First Amendment was offered as a defense, but the Court deemed it unworthy of discussion.

Third, there are some indications that Guidant is be misusing its insistence on secrecy as a means of misrepresentation and even fraud, so that the doctrine of unclean hands may provide an additional reason to deny Guidant's demands for secrecy of the briefs on summary judgment. For example, the Court's summary judgment opinion refers in passing to Guidant's argument that ECRI, a Philadelphia-area non-profit that includes Guidant price information in a subscription-based database of prices of medical devices, was distinguishable from what Aspen was doing, 413 F. Supp.2d at 1022, and the transcript of the summary judgment argument reveals that Guidant enumerated several such differences in arguing for Aspen's liability. DEN 207, at 105-107. Yet at the same time that Guidant was making this argument to the Court, it was threatening ECRI with liability, and Guidant's in-house counsel even told ECRI's counsel that ECRI was doing "the same thing as Aspen," for which had Aspen been held liable. Solomon Affidavit submitted in support of Motion to Enjoin Prosecution of Second-Filed Action for Injunction in *ECRI v. Guidant*, No. 2:06-cv-

01898-HB (E.D. Pa.) (attached as Exhibit A), ¶ 10. Yet when ECRI's counsel asked for copies of the summary judgment papers in order to assess how far Guidant had gone to distinguish Aspen from ECRI, her request was ignored. *Id.* ¶¶ 7-8.

Another example of possible misuse of secrecy is supplied by the amended complaint in *United States ex rel. Fry v. Guidant*, No. 3-03-0842 (M.D. Tenn.), *see* Exhibit B, in which former employees allege that Guidant deliberately concealed the actual prices paid for its CRM devices to perpetrate a sophisticated fraud on state and federal payors of the medical bills of senior and indigent citizens. Public Citizen has no direct knowledge of the accuracy of the allegations in the complaint, but the sheer detail offered with respect to specific incidents of the alleged fraud strongly suggest that the employees are speaking from personal knowledge of the manipulations. And, if the allegations are correct, the Court should treat with skepticism any general claims of the need for confidentiality, but should require a highly detailed showing, based on uncontrovertible evidence, before concluding that any Guidant claims of the need for secrecy are justified.

CONCLUSION

The seal on all the briefs and supporting papers filed in support of or in opposition to the cross-motions for summary judgment, DEN 158, 159, 160, 161, 164, 167, 179, 182, 183, 184, 185, 187, 189, 191, 193, 194, 201, and 205, should be lifted.

Respectfully submitted,

/s/

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[3]Counsel wishes to express appreciation for the substantial assistance of David Becker, a student at George Washington University Law School, in the preparation of this memorandum.

CERTIFICATE OF COMPLIANCE

I hereby certify that my Word Perfect software counted 4774 words in the foregoing Memorandum (exclusive of the caption).

/s/
Paul Alan Levy