

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CARDIAC PACEMAKERS, INC.;
GUIDANT SALES CORPORATION,

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

Plaintiffs,

vs.

**PLAINTIFFS/COUNTER
DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR A
PERMANENT INJUNCTION**

ASPEN HEALTHCARE METRICS,
LLC,

Defendant/Counterplaintiff,

vs.

**REDACTED VERSION
(MATERIAL SUBJECT TO
PROTECTIVE ORDER HAS BEEN
REDACTED)**

GUIDANT SALES CORPORATION;
GUIDANT CORPORATION,

Counterdefendants.

Plaintiffs Guidant Sales Corporation (“GSC”) and Cardiac Pacemakers, Inc. (“CPI,” and collectively “Guidant”) move the Court for a permanent injunction against Defendant Aspen Healthcare Metrics, LLC (“Aspen”).

INTRODUCTION

On February 2, 2006, the Court held that, as a matter of law, Aspen has tortiously interfered with Guidant’s confidentiality agreements. Since that time, Guidant has endeavored to have Aspen stop its tortious behavior in compliance with this Court’s ruling. Aspen has steadfastly refused. Aspen has chosen instead to “respectfully disagree” with the Court’s Order – not only in principle, but in practice. Aspen continues to obtain and use Guidant’s confidential pricing information by continuing to request that

hospitals turn over their cost data files. Aspen believes that by calling confidential pricing information “cost data,” as opposed to “pricing information,” the confidentiality clauses do not protect that information. Not only does this semantic argument fly in the face of reason, it is contrary to the Court’s Order, the testimony of Aspen’s witnesses, and the arguments Aspen has made to this Court.

Accordingly, Guidant brings this motion to seek a permanent injunction to enjoin Aspen from continuing to engage in behavior that the Court has deemed to be tortious.

FACTUAL BACKGROUND

I. GUIDANT’S MOTION FOR SUMMARY JUDGMENT

On November 1, 2005, Guidant moved for partial summary judgment on its claim for tortious interference with confidentiality agreements, and on Aspen’s counterclaims. Among other things, the parties’ briefing provided the Court with several undisputed facts. First, Guidant enters sales contracts with hospitals, the terms of which vary widely, based on many variables in the pricing process.¹ Due to the complexity of this process

¹ See Plaintiffs / Counter-Defendants’ Memorandum In Support Of Guidant’s Motion For Partial Summary Judgment, dated November 1, 2005 (Docket No. 158) (“Guidant’s Partial Summary Judgment Memo.”) at 2-3. See also Affidavit Of Jay Ethridge Filed In Support Of Guidant’s Motion For Partial Summary Judgment, dated November 1, 2005 (Docket No. 161) (“Ethridge Aff. dated November 1, 2005”) at ¶¶ 2-3 (describing the complexity of Guidant’s pricing process and the investment that Guidant has made in developing it); Affidavit Of Jay Ethridge In Support Of Guidant’s Opposition To Aspen’s Motion For Summary Judgment, dated November 28, 2005 (Docket No. 184) (“Ethridge Aff. dated November 28, 2005”) (same); Affidavit Of Jay Ethridge In Support Of Guidant’s Motion For Permanent Injunction, dated March 14, 2006 (Exh. O) (“Ethridge Aff. dated March 14, 2006”) at ¶ 7.

and the variability of prices and terms across hospitals, the contracts contain this confidentiality provision:

Certain business information which both GSC and [customer] consider confidential (including this agreement) may not be shared. GSC and [customer] agree not to disclose this information to any third party without prior written approval.

Id. at 2 (quoting agreements). Moreover, each page of the agreement states that the information included therein is confidential between Guidant and the hospital. Id. at 3. As such, the confidentiality provision expressly includes the agreement. The agreement, in turn, includes pricing, volume, and other information relating to the terms of the sale of Guidant's CRM devices to the contracting hospital.²

Second, despite these agreements, Aspen induces hospitals to provide it with Guidant's confidential information and then uses its access to that pricing information to instruct hospitals what they should pay for Guidant's devices. See Guidant's Partial Summary Judgment Memo. at 4-5. Indeed, Aspen tells hospitals to disregard their existing contracts with Guidant, and to initiate a new bidding process based on the ill-gotten information. Id. at 5-6. Moreover, Aspen shares Guidant's information with its parent company, MedAssets, which is one of the largest group purchasing organizations

² See, e.g., Affidavit Of Craig S. Coleman In Support Of Guidant's Motion for Partial Summary Judgment, dated November 1, 2005 (Docket No. 159) ("Coleman Aff.") at Exh. 1.

in the country.³ Aspen also has plans to sell Guidant's pricing information through an online subscription service called PPI Profiles or CostFacts. See Guidant's Partial Summary Judgment Memo. at 6-7. See also Exh. A.⁴ (testimony of Aspen witness Jeanne Jenkins on plans to launch Cost Facts).

Aspen never denied these facts. Aspen claimed instead that it had a right to obtain and use this confidential information.⁵ In particular, Aspen argued that the confidentiality provision is ambiguous because it does not define the meaning of the terms "certain business information" and "third party." Aspen's Opposition Memo. at 3.⁶ Aspen argued that "the scope of the confidentiality clause depends on what hospitals 'consider confidential.'" Id. Aspen further argued that "hospitals own the information pertaining to their own costs," and that the confidentiality clause did not prohibit the hospitals "from sharing *their own cost data.*" Id. (emphasis in original).

On February 2, 2006, the Court rejected Aspen's arguments and granted Guidant's motion for partial summary judgment. In relevant part, the Court held that Guidant met

³ See Plaintiffs / Counter-Defendants' Memorandum In Opposition To Aspen's Motion For Summary Judgment, dated November 28, 2005 (Docket No. 182) ("Guidant's Opposition Memo.") at 3 n.1.

⁴ References to the lettered exhibits herein refer to the exhibits attached to the Index filed in support of this motion.

⁵ See Defendant / Counter-Plaintiff's Response To Plaintiffs' / Counter-Defendants' Motion For Partial Summary Judgment, dated November 28, 2005 (Docket No. 187) ("Aspen's Opposition Memo.") at 3-4. See also Guidant's Opposition memo. at 2-3.

⁶ See also Corrected Memorandum In Support Of Defendant / Counter-Plaintiff's Motion For Summary Judgment, dated November 1, 2005 (Docket No. 164) at 3.

all four prongs of a tortious interference claim. At the outset, Aspen conceded the first two prongs: that the confidentiality agreements existed and that Aspen knew about them.

See Order at 9.⁷ As to the remaining two prongs, the Court's holding was clear:

The Court finds that, as a matter of law, the confidentiality agreements were breached. Aspen has not sustained its burden of asserting a valid legal justification, and Guidant has demonstrated that there is no genuine issue of material fact as to whether Guidant has been damaged by Aspen's intentional procurement of the breach of the confidentiality agreements.

Id. at 10. In support of this holding, the Court found that there is "no ambiguity" in the confidentiality provision; namely, the provision plainly states that Guidant's pricing information is confidential and cannot be shared with third parties. Id. Further, the Court found that Aspen is a "third party" under the contracts, and rejected Aspen's claim that it is an "agent" of the hospitals. Id. at 10, 13.⁸

The Court outright rejected Aspen's argument that the agreements did not somehow cover the pricing data included in the contracts:

The Court finds that Aspen could not invoke an honest-advice privilege even if such a defense existed in Minnesota because obtaining Guidant's confidential pricing and using that information at other hospitals does not constitute honest advice.

⁷ Memorandum Opinion and Order, dated February 2, 2006 (Docket No. 222) ("Order").

⁸ The Court also held that Guidant's tortious interference claim was not displaced by the Minnesota Uniform Trade Secrets Act, nor was it a "repleading" of Guidant's trade secret claim. Order at 10-11.

Id. at 14 (emphasis added). There is no ambiguity in this holding – it applies unambiguously as it should to all of “Guidant’s confidential pricing.” Id. In fact, earlier in the Order, the Court made the same observation:

Aspen’s clients disclose their historical purchasing data for CRM devices as well as their vendor contracts to Aspen. Aspen then uses its knowledge of hospitals’ confidential pricing information to advise other hospital clients what to pay for CRM devices.

Id. at 3 (emphasis added). The Court drew no distinction between contract prices and the hospital’s “cost data,” which is, of course, exactly the same information.

Aspen’s own summary judgment memorandum stated that “Aspen’s clients then give Aspen their historical purchasing data, comprising the prices the hospital paid for all products it purchased.” Aspen’s Summary Judgment Memo. at 5 (emphasis added). Aspen’s witnesses agreed. In a Rule 30(b)(6) deposition of Aspen, Aspen’s President testified as follows:

[REDACTED – SUBJECT TO PROTECTIVE ORDER]

Exh. B at 125 (emphasis added). See also Exh. C at 98 (Aspen’s Vice President describing the “cost file” as including “the device, the model number, the vendor, the units, the dollars, the cost information, and the total spent”). Aspen’s Senior Vice President likewise equated the cost files with “historical purchasing data,” which the Court’s Order referred to as confidential pricing information:

[REDACTED – SUBJECT TO PROTECTIVE ORDER]

Exh. D at 113 (emphasis added); Order at 3. That only makes sense, as by definition, the “cost” that the hospital pays for a CRM device is the “price” that Guidant charges – the very contract prices subject to confidentiality agreements.

Finally, the Court found that, “as a matter of law, Guidant has sustained damages,” and that “there is no genuine issue of fact as to whether Aspen’s tortious interference damaged Guidant.” Order at 14. In support of its findings, the Court cited to Aspen’s own documents, which evidenced the damages caused by Aspen’s acquisition and misuse of Guidant’s confidential prices. Order at 14.⁹ Accordingly, the Court held that, “Guidant prevails on its claim of tortious interference with confidentiality agreements,” and thereby granted summary judgment on this claim. Order at 14.¹⁰

II. ASPEN’S CONTINUED USE OF GUIDANT’S INFORMATION

On February 7, 2006, Guidant contacted Aspen (through its attorneys) to seek confirmation that Aspen was taking the Court’s Order to heart by discontinuing its

⁹ The Court held, and Guidant acknowledged, that a trial to determine the amount of damages was still necessary. Order at 14 n.4.

¹⁰ The Court further denied Aspen’s motion for summary judgment on Guidant’s tortious interference and misappropriation of trade secrets claims, and further granted Guidant’s motion for summary judgment on Aspen’s counterclaims for defamation and tortious interference with prospective contractual relations. Order at 15-21.

practice of obtaining and using Guidant's confidential pricing information. Exh. E. Guidant specifically wanted to ensure that Aspen was not continuing to rely on the notion that it can obtain Guidant's confidential prices through the ruse of re-characterizing the hospital's "cost data" or electronic pricing files as anything other than what it is – "pricing information" subject to confidentiality provisions. Id.

Guidant further sought confirmation that Aspen would return Guidant's confidential pricing information back to the hospitals that had provided it, would destroy documents containing such information, and would stop using such information in connection with any of its other engagements. Id. Guidant further advised that it might be forced to seek permanent injunctive relief if Aspen intended to defy the Court's Order, and for this reason, that both Guidant and the Court would have an interest in Aspen's commitment to honor the Court's Order. Id. Unfortunately, Aspen has shown no intention to respect the Court's Order, and continues to obtain Guidant's confidential pricing information. Ethridge Aff. dated March 14, 2006 (Exh. O) at ¶¶ 3-5 (describing Aspen's continued efforts to obtain Guidant's confidential pricing information).

On February 9, 2006, Aspen wrote to the Court for leave to file a motion to reconsider the Court's February 2 Order. Exh. F. Aspen claimed that it did not intend to re-litigate any issue, yet with respect to the question of "agency," it sought to do just that.

See id. Aspen raised no issue regarding the scope of the confidentiality provision, as it had previously argued. See Aspen Opposition Memo. at 3.¹¹

On February 14, 2006, Aspen responded to Guidant's February 7 letter. Exh. G. Aspen declined to provide any assurances or confirmation regarding its business practices. Instead, Aspen stated that it "respectfully disagree[d]" with the Court's February 2 Order, and that Guidant had "misconstrued the Court's ruling."¹² Id. Aspen then disputed that Guidant is entitled to an injunction, "because, among other reasons, the passage of time and changes Aspen has made to its business process since the ruling." Id. Aspen gave no explanation of what it meant.

On February 16, 2006, Guidant contacted Aspen to inquire as to what changes Aspen had made in its business, and again sought assurance that Aspen had stopped obtaining and using Guidant's confidential information. Exh. H. Later that day, Guidant sent a letter to Aspen, again stating its concern about Aspen's continued acquisition and use of Guidant's confidential information, and requesting that Aspen update discovery responses relating to Aspen's acquisition and use of Guidant's information. Exh. I.

Aspen responded on February 17, 2006. Exh. J. Aspen again noted its disagreement with the Court's Order and that it has asked the Court to reconsider that

¹¹ The Court denied Aspen's request for leave on March 14, 2006.

¹² Aspen's habit in this case has been to argue that any language obstructing it from obtaining Guidant's confidential pricing information must be "ambiguous." It argued that first with respect to the confidentiality provisions at issue, and now that the Court has rejected that argument, it seeks to do so with respect to the Court's Order.

Order. Aspen then outlined the “changes” it had referenced in its previous letter. The totality of these changes are as follows: Aspen had discarded Guidant’s contracts, stopped asking hospitals for the physical contracts, and removed Guidant “pricing” from its “MIF files.” The last measure was misleading at best, considering that Aspen’s Senior Vice President had testified that Aspen’s “master item file” did not contain cost or price information, Exh. D at 110-11,¹³ as well as Aspen’s current position that such isolated “cost data” is not protected pricing information. In sum, these measures give no assurance that Aspen is not continuing to obtain and use Guidant’s confidential pricing information and continuing its attempts to circumvent the Court’s Order.

Beyond that, the only other change Aspen reported was that it now limits the information that it obtains from hospitals to that which *the hospitals* do not consider confidential. Exh. J. Aspen outright denied that the Court’s Order covered “cost data about Guidant’s pricing.” *Id.* Instead, Aspen now takes the same position that it argued to the Court and lost: that the confidentiality provision is triggered only if the hospitals “expressly agree” that Guidant’s pricing information is confidential. *Id.*

In other words, Aspen continues to obtain the same information that the Court concluded it could not obtain, by the same charade the Court rejected. In flagrant

¹³ To the extent that this “master item file” does contain information either from or derived from Guidant’s confidential pricing information, then Guidant expects that Aspen would delete that information as a result of the Court’s Order. At a minimum, however, given the testimony of Aspen’s own witnesses, the “master item file” is not the *only* repository of Guidant’s confidential pricing information at Aspen.

disregard of the Court's Order, Aspen still instructs hospitals that, other than the contracts themselves, hospitals can continue to hand over to Aspen whatever pricing information the hospitals wish, as long as the hospitals have not expressly agreed that the information is confidential. As the Court correctly concluded, however, the hospitals *have unambiguously agreed* that the pricing information is confidential. Order at 10.

On February 27, 2006, Aspen filed its response to Guidant's motion for voluntary dismissal without prejudice. See Docket No. 233. Aspen denied that it was proceeding without regard to the Court's Order. Instead, Aspen noted that it had sought reconsideration of that Order, and that the Order did include any injunctive relief. Id. at 2. Further, Aspen noted that it was no longer requesting *contracts* from hospitals, and that its data requests to hospitals would, at some point, state that the request is not seeking information "which hospitals have agreed should not be disclosed." Id.

Without expressly saying it, Aspen is again taking the position that the confidentiality agreements apply only to the physical contracts themselves, but that any other forms of information contained in those agreements – such as supply cost files – are fair game, absent an additional express agreement that would prohibit disclosure. Moreover, Aspen refrains from telling hospitals *not to provide* Guidant's confidential pricing information, but rather, only that such information is not included in its request. That way, Aspen can further disregard the Court's Order by shedding all responsibility for any confidential pricing or cost information that it receives and freely using that information for its own profit.

On March 3, 2006, Guidant contacted Aspen again regarding negotiations that Guidant was having with Christiana Care, a hospital group located in Delaware, for a new CRM contract. Exh. K. During those negotiations, Christiana Care advised Guidant that it had hired Aspen to assist in the contract negotiations. Guidant offered to allow Aspen to obtain Guidant's confidential pricing information from Christiana Care if Aspen would sign a non-disclosure agreement with Guidant. Id. Such an agreement, in sum, would simply have limited Aspen's use of Guidant's confidential information to the Christiana Care negotiations. Id. Aspen, in continued disregard of the Court's Order, refused. Exhs. L, M.

Aspen has sought two parallel paths in order to avoid having to come to terms with the Court's conclusion that it cannot, without Guidant's consent, obtain Guidant's confidential pricing information. In one, Aspen has attempted to get the Court to reconsider (and undo) its February 2 Order. In another, Aspen has attempted to distort the plain meaning of that Order so that it can continue to get the same confidential pricing information that it always has.

In its Order of March 14, 2006, the Court has now foreclosed Aspen's first path, recognizing that "[t]he parties fully briefed this issue, and the Court will not re-litigate an old issue." March 14, 2006 Order at 3. Accordingly, Guidant now seeks permanent injunctive relief to stop Aspen from obtaining and using Guidant's confidential pricing information, from tortiously interfering with Guidant's contracts, and from willfully disregarding the Court's February 2 Order.

ARGUMENT

Guidant is entitled to a permanent injunction to enjoin Aspen's efforts to obtain and use Guidant's confidential pricing information without Guidant's consent. Guidant prevails on all four factors that govern whether permanent injunctive relief is warranted:

- (1) Guidant has already succeeded on the merits;
- (2) Guidant faces an undeniable threat of irreparable harm;
- (3) the balance of harms favors Guidant; and
- (4) the public interest favors an injunction.

See Taylor Corp. v. Four Seasons Greetings, 403 F.3d 958, 967 (8th Cir. 2005) (citing the last three factors where success on the merits was not an issue); citing Bank One v. Guttau, 190 F.3d 844, 847 (8th Cir. 1999) (adapting generally for a permanent injunction the factors announced in Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981)). See also Mga Susu, Inc. v. County of Benton, 853 F. Supp. 1147, 1153 (D. Minn. 1994) (citing the Dataphase factors for a permanent injunction).

I. GUIDANT HAS SUCCEEDED ON THE MERITS

As should be obvious from this Court's February 2 Order, Guidant has succeeded on the merits of its tortious interference claim. As the Court recognized, there is "no ambiguity" in the confidentiality provisions at issue, and those provisions cover Guidant's confidential pricing information. Order at 3, 10, 14. In fact, as the Court found, the contracts between Guidant and the hospitals *twice* state that information shared between Guidant and the hospitals is confidential: once in the confidentiality clause, and again on *each page* of the contract. Order at 10.

Aspen's attempts to get around that Order amount to sheer disregard of its plain terms. The confidentiality clauses between Guidant and the hospital do not, as Aspen claims, require the hospital to "expressly agree" – in some *additional* agreement – as to what of Guidant's pricing information is confidential. Exh. J. The clauses specifically state that the business information subject to confidentiality protections "include[es] this agreement," and the agreement includes Guidant's pricing information. See, e.g., Coleman Aff. Exh. 1. The Court likewise correctly recognized that the information at issue was "Guidant's confidential pricing." Order at 14.

Aspen continues to maintain that hospitals are free to provide, and Aspen is free to use, whatever "cost data" the hospitals have, based on the meaningless semantic distinction between "cost" and "price." Aspen has already made this argument to the Court, see Aspen's Opposition Memo. at 3, and the Court rejected it, as did Aspen's own witnesses. Exhs. B, C, D.

Beyond that, none of the alleged "changes" that Aspen claims to have made make any material change to Aspen's tortious business practices. See Exh. J. That Aspen may have returned the physical copies of Guidant's contracts, and that it may have erased pricing information from files that its witnesses say never contained such information, says nothing about whether Aspen is continuing to obtain and use Guidant's confidential pricing information. Likewise, Aspen's purported changes to its information requests are belied by the fact that it still obtains "cost data" from hospitals. With these purported "changes," the Court's Order is a mere formality, completely avoidable simply by requesting the same information in a form other than the physical contract itself.

Aspen's distorted theories and token gestures are disingenuous. As should already be clear, the confidentiality provisions cover the pricing and other information contained in Guidant's agreements with the hospitals, however the hospitals maintain that information. Guidant has satisfied this factor for a permanent injunction.

II. GUIDANT IS SUFFERING IRREPARABLE HARM

By disregarding the Court's Order, and by continuing to solicit Guidant's confidential information from hospitals, Aspen is continuing to cause Guidant irreparable harm. Guidant suffers irreparable harm because it has no adequate remedy at law and cannot be fully compensated by money damages. See Taylor, 403 F.3d at 967-68 (finding in a copyright action that an award of damages would only amount to a "forced license" to use the plaintiff's protected work); Bank One, 190 F.3d at 850-51 (irreparable harm in the form of "irreparable economic loss"); Fogie v. THORN Americas, Inc., 95 F.3d 645, 654 (8th Cir. 1996) (imposing injunction where damages provided compensation only for past harm and future damages would be difficult to estimate); Overholt Crop Ins. Services Co. v. Travis, 941 F.2d 1361, 1371 (8th Cir. 1991) (rejecting the argument that an injunction is not necessary where a plaintiff has already been compensated for future harm); N.I.S. Corp. v. Swindle, 724 F.2d 707, 710 (8th Cir. 1984) (damages not sufficient because it would require a new lawsuit every time the defendant solicited another customer).

As the Minnesota Supreme Court has recognized, tortious interference by its very nature threatens irreparable harm. Kallok v. Medtronic, 573 N.W.2d 356, 356 (Minn. 1998); Metropolitan Sports Facilities Comm'n v. Minnesota Twins Partnership, 638

N.W.2d 214, 228 (Minn. Ct. App. 2002) (holding that a court can grant necessary injunctive relief on tortious-interference-with-contract claims). See also Overholt, 941 F.2d at 1371 (irreparable harm can be inferred from a finding of a breach of a restrictive covenant).

In cases where confidential information is misappropriated, parties like Guidant always face the threat of irreparable harm to their goodwill, competitive position, and continuity of their business relationships. Saliterman v. Finney, 361 N.W.2d 175, 177-78 (Minn. Ct. App. 1985); Alside, Inc. v. Larson, 220 N.W.2d 274, 279-280 (Minn. 1974) (plaintiff suffered irreparable harm because it was losing customers); Creative Communications Consultants v. Gaylord, 403 N.W.2d 654, 657 (Minn. Ct. App. 1987) (plaintiff suffered irreparable harm due to the potential loss of clients and disclosure of confidential information) (citing Cherne Indus., Inc. v. Grounds & Associates, Inc., 278 N.W.2d 81, 92 (Minn. 1979)).¹⁴ Likewise, the Eighth Circuit has held that the loss of physician relationships due to misappropriation of trade secrets is a form of irreparable harm. Wyeth v. Natural Biologics, 395 F.3d 897, 903 (8th Cir. 2005).

Courts have long recognized that, when former employees divulge confidential information, irreparable harm arises from “the loss of goodwill, the disclosure of confidential business information, and the loss of business.” Medtronic, Inc. v. Gibbons,

¹⁴ The Eighth Circuit has likewise recognized that injury to goodwill is a form of irreparable harm. See N.I.S., 724 F.2d at 710; Medtronic, Inc. v. Gibbons, 684 F.2d 565, 567 (8th Cir. 1982).

684 F.2d 565, 567 (8th Cir. 1982). See also Guidant Sales Corp. v. George, No. 01-1638, 2001 WL 1491317, at *8 (D. Minn. Nov. 19, 2001) (finding irreparable harm from the loss of business relationships in the limited and competitive CRM market) (copy attached at Exh. N. This also applies to third parties who poach information from competitors by tortiously interfering with their employment contracts. Kallok v. Medtronic, Inc., 573 N.W.2d 356, 361 (Minn. 1998). As the Minnesota Supreme Court held, injunctive relief “can protect an employer’s investment in its business by decreasing the risk that confidential proprietary information it developed will be plundered through tortious employee raids.” Id.

Here, the Court has already determined that Aspen has tortiously interfered with Guidant’s valid confidentiality agreements, and that Guidant has suffered damages. Order at 8-14. Despite Guidant’s attempts to seek assurances that Aspen would honor the Court’s ruling, Aspen continues its tortious conduct, and Guidant continues to suffer harm. No greater proof of that exists than the openly cavalier conduct of Aspen relative to the Court’s Order in the situation involving Christiana Care. There, rather than agreeing to limit its use of Guidant’s pricing information to those negotiations, Aspen continues its course of inducing customers to violate confidentiality provisions solely to promote its own objectives; namely, to be able to shop Guidant’s confidential information around to other customers.

This harm is irreparable and warrants an injunction for several reasons. First, Guidant is irreparably harmed by the disclosure and use of its confidential information. See Medtronic, 684 F.2d at 569. Even despite the threat of an impending damages trial,

Aspen openly continues to divest Guidant of the significant investment it has made in developing its pricing structure and protecting the confidentiality thereof. See Ethridge Aff. dated November 1, 2005 (Docket No. 161) at ¶¶ 2-3; Ethridge Aff. dated November 28, 2005 (Docket No. 184) at ¶¶ 2-14; Ethridge Aff. dated March 14, 2006 (Exh. O) at ¶¶ 3-5.

Although previous harm caused to Guidant can and will be determined at trial, it is difficult to estimate the harm that Guidant will continue to suffer if Aspen's actions continue unabated, which they will given Aspen's current conduct. See Fogie, 95 F.3d at 654; Ethridge Aff. dated March 14, 2006 (Exh. O) at ¶¶ 3-5. Absent injunctive relief, Guidant will have no effective remedy at law to address its prospective harm. Guidant's only option would entail perpetually filing lawsuits to obtain discovery on and potential damages for Aspen's ongoing actions, which even then would not fully compensate Guidant for the harm it suffers, nor would it guarantee that Aspen would ever stop its tortious behavior. Ethridge Aff. dated March 14, 2006 (Exh. O) at ¶¶ 5-8.

Second, Aspen has made no secret of its desire to obtain and use Guidant's confidential information in order to disrupt Guidant's business relationships, not only with the hospitals from which the information is obtained, but also with other hospitals with whom Guidant does business. Guidant has spent significant resources establishing these relationships, creating goodwill, and developing a pricing structure that can be tailored to each hospital, depending on their needs and circumstances. See Ethridge Aff. dated November 28, 2005 (Docket No. 184) at ¶¶ 2-14; Ethridge Aff. dated March 14, 2006 (Exh. O) at ¶ 7. Aspen intends to use Guidant's confidential information in order to

create havoc with all of that and do what it can to damage Guidant's relationships with its customers. Ethridge Aff. dated March 14, 2006 (Exh. O) at ¶¶ 6-8.

Aspen could avoid any issue with Guidant with the most modest of steps – by signing a simple non-disclosure agreement, agreeing not to disclose Guidant's pricing information from one hospital with any other hospital. Yet Aspen refuses to do so, even when faced with a finding of liability and a pending damages trial. See Exh. L, M. Plainly, Aspen's true intent is to disrupt Guidant's relationships with its customers and to allow itself the latitude to continue to share confidential pricing information, notwithstanding Guidant's unambiguous agreements and the Court's unambiguous Order. This indisputable conclusion shows that money damages are not enough.

Third, without injunctive relief, Aspen will continue to instruct hospitals to turn over confidential pricing information according to Aspen's own unjustifiably narrow interpretation of the confidentiality agreements and the Court's Order. Indeed, Aspen is now instructing hospitals that they are free to provide virtually any of the pricing or other information contained within Guidant's contracts as long as they do not hand over the contracts themselves, and as long as they do not have a *separate agreement* with Guidant beyond the confidentiality agreement itself. Exh. J. Under that flawed and disingenuous interpretation, Aspen can take the position that it is free to use, sell, or provide to the world, *any* Guidant pricing information that the hospitals provide to it.

In fact, Aspen continues to scheme regarding new ways to traffic in Guidant's confidential pricing information. In particular, Aspen has developed and has plans to market CostFacts, an online subscription service with detailed information about

Guidant's prices. Exh. A. Further, as Aspen's witnesses have testified, Aspen is providing pricing information to its parent company, MedAssets, which makes further use of the information. See Exh. A at 24-26. An injunction is necessary to insure that the correct standard of confidentiality is applied, and to foreclose Aspen and those working in concert with it from putting Guidant's confidential information to use. See Fed. R. Civ. P. 65(d) (an injunction is binding both on the party to the action as well as any other party working in active concert or participation with them who receive actual notice of the order).

Any one of these reasons is enough to establish that Aspen's tortious interference is causing irreparable harm. The only feasible way to address that harm is to prevent Aspen from getting and using Guidant's confidential information in the first place. Under this factor, an injunction is warranted.

III. THE BALANCE OF HARMS FAVORS GRANTING AN INJUNCTION

Aspen certainly suffers no harm from an injunction preventing them from engaging in behavior that this Court has already deemed tortious. See Fogie, 95 F.3d at 654 (refusing to factor loss of income from wrongful activity into balance of harms). Even if Aspen could make that argument, the information at issue covers CRM products sold by only one vender in only one line of Aspen's many lines of business. See Taylor, 403 F.3d at 968 (recognizing that harm to a copyright infringer is minimal because the infringer can continue to engage in other legitimate lines of business). Aspen will continue to provide numerous other services that it offers, including those relating to orthopedic, spinal, cardiovascular, vascular, and other areas beyond just CRM devices, as

well as consulting with respect to cost-management and purchasing strategies, information on Guidant's competitors, product usage and practice patterns, physician engagement strategies, and negotiation skills for hospital staff.¹⁵

Moreover, Aspen has argued to the Court that it is perfectly capable of obtaining all the information it needs for CRM cost savings consulting from a variety of legitimate sources other than Guidant pricing information. Aspen's Summary Judgment Memo. at 9-16, 18-21. See also Order at 5-7. Indeed, Aspen believes that Guidant's pricing information has "no economic value." Id. at 21. If Aspen has been forthright in its representations to the Court, then it will not incur any harm from an injunction prohibiting it from accessing and using the pricing information contained in Guidant's contracts. It will only be forced to operate as all of its competitors do.

By contrast, Guidant has a strong and valid interest in protecting its confidential information. Guidant has expended a significant amount of time and effort developing its pricing terms and strategies and protecting that information with confidentiality agreements with hospitals. See Ethridge Aff. dated November 1, 2005 (Docket No. 161) at ¶¶ 2-3; Ethridge Aff. dated November 28, 2005 (Docket No. 184) at ¶¶ 2-14. Absent an injunction, Guidant is faced with the risk of losing that effort. Guidant is irreparably

¹⁵ See Coleman Aff. Exh. 20 (showing Aspen's many lines of business); Aspen's Brief In Support Of Its Motion To Exclude The Testimony Of George M. Murphy, dated January 31, 2006 (Docket No. 210) at 3 (same).

harm by Aspen's efforts to use Guidant's confidential information in tortious interference with those relationships. This factor weighs in favor of an injunction.

IV. THE PUBLIC INTEREST FAVORS GRANTING AN INJUNCTION

The public interest favors an injunction here on many different levels. Tortious interference with any contract is not in the public interest, because the public has a strong interest in maintaining and enforcing valid contracts. See N.I.S., 724 F.2d at 710. This is especially true for contracts that preserve the confidentiality of information shared between the contracting parties, so as to prevent the disclosure and use of that information by third parties. By issuing an injunction, the Court will be upholding contract terms that the Court has found to be clear on their face.

Likewise, tortious interference with contracts between a medical device manufacturer and the hospitals that use its devices is not in the public interest. Aspen's intent with respect to obtaining and using Guidant's confidential information is not to benefit the public. Aspen's sole motivation is to profit from that information. In fact, Aspen misleads the very hospitals it claims to consult by openly misconstruing the terms of confidentiality agreements, as well as this Court's Order, in an effort to get hospitals to continue to breach their agreements. No public interest is served in that.

This factor weighs in favor of granting an injunction.

CONCLUSION

For the foregoing reasons, Guidant respectfully requests that the Court grant Guidant's motion and enter an order permanently enjoining Aspen from obtaining and using Guidant's confidential information, as described in the proposed order filed herewith.

Dated: March 15, 2006

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