UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: GUIDANT CORP. IMPLANTABLE DEFIBRILLATORS PRODUCTS LIABILITY LITIGATION	MDL No. 05-1708 (DWF/AJB)
This Document Relates to Leopoldo Duron, Jr. vs. Case No. 06-00025 Guidant Corp., et al.	**DEFENDANTS' RESPONSE TO BLOOMBERG L.P.'S MOTION TO INTERVENE AND UNSEAL THE SUMMARY JUDGMENT MOTION PAPERS AND ASSOCIATED MATERIALS**

TABLE OF CONTENTS

I. INTRODUCTION

Bloomberg L.P. ("Bloomberg") has moved to intervene in this action pursuant to Federal Rule of Civil Procedure 24(b), It seeks the public disclosure of materials referenced in the hearing before the Court on Guidant Corp.'s ("Guidant") several summary judgment motions, as well as papers filed under seal in support of these summary judgment motions (collectively, the "Summary Judgment Materials").

While Guidant does not object in general to Bloomberg's right to intervene in a limited degree, limitations must be imposed on this intervention. In this Response, Guidant outlines its proposed framework for facilitating this intervention without sacrificing Guidant's confidential data and parties' privacy rights. Guidant recognizes the general legal principle underlying Bloomberg's motion – namely, that federal common law supports public access to unprotected judicial documents. But Bloomberg's motion fails to recognize an equally important legal principle: that trade secrets, other proprietary information, privacy interests in personally identifiable health or financial information, and the parties' rights to a fair trial must be balanced with the media and the public's "right to know." Eighth Circuit law provides this Court with substantial discretion to balance these interests.

The information Bloomberg seeks – which Guidant disclosed to Plaintiffs under the safeguard of the Court's Protective Order – includes Guidant's valuable trade secrets and other highly sensitive confidential and proprietary information, as well as some personal medical information. Federal common law and the First Amendment, even if they were to govern Bloomberg's request, do not provide Bloomberg free rein to

acquire such documents, thereby injecting them into the public domain and destroying their value. Nor do they provide Bloomberg with authority to obtain and disseminate documents filed under seal that could jeopardize the parties' rights to a fair trial. Discussion of those documents in open court does not entitle Bloomberg access to those documents or cause them to lose their protected status.

Guidant accordingly proposes the following, as described in more detail herein: Guidant will act within the next ten days to provide a list of documents filed in support of its several summary judgment motions that it will agree to unseal. In light of Bloomberg's motion, Guidant has conducted a review of the documents submitted under seal in support of its summary judgment motions and determined that it likely will agree to unseal the vast majority of them. Guidant, however, will not agree to unseal documents that contain trade secrets and other significantly sensitive information included in the definition of "Confidential Information" in paragraph 1 of the Order, namely "confidential research, development, or commercial information (as those terms are used in Fed. R. Civ. P. 26(c)), and personal medical information, private personal information, protected health information, tax returns, and other information reasonably sought to be kept confidential."

This approach appropriately balances any public right to access materials filed in a dispositive motion with Guidant's specific right to protect the confidentiality of its proprietary and highly commercially sensitive documents, and other sensitive, private material. This approach would also recognize the Court's broad discretion to consider the propriety of releasing such information and the effect of its release on the opportunity

for a fair trial. To the extent that Bloomberg's motion to unseal the summary judgment materials would result in the disclosure of protected material, as designated and justified by this response, its motion must be denied.

II. BACKGROUND

A. The Protective Order

On January 6, 2006, the Court entered the Protective Order in this action, agreed upon by the parties, recognizing that the parties would produce documents during discovery that would not be disclosed to the public in order to expedite the litigation process. The Protective Order has been an indispensable tool facilitating discovery in this complex MDL, as Guidant has produced more than 14 million pages of documents in the litigation. When appropriate and pursuant to paragraph 2 of the Protective Order, Guidant marked some of those documents as "CONFIDENTIAL: SUBJECT TO PROTECTIVE ORDER." Some of those confidential materials were relied upon and attached to Guidant's summary judgment motion and Plaintiff's response. They also may be used at trial. The Court should extend its protection over materials produced in discovery when they are used in the litigation, including when they are used as part of a dispositive motion or at trial.

Like other protective orders of its type, the introduction of this Protective Order states that:

> Businesses such as Defendants ordinarily maintain the confidentiality of trade secrets and other confidential research, development, or commercial information (as those terms are used in Fed. R. Civ. P. 26(c)). Also, medical device manufacturers, such as Cardiac Pacemakers, Inc., may derive a competitive advantage from

> the foregoing information and from the fact that such information is kept confidential. In addition, because this case involves the performance of medical devices, medical records pertaining to those devices may be relevant. Many such records include patient-identifying information and are protected from disclosure by the physician-patient privilege, HIPAA, or other applicable law.
>
> * * *
>
> Not only may the foregoing information constitute "trade secrets" under state law, the information qualifies as "other confidential research, development, or commercial information" within the meaning of Fed. R. Civ. P. 26(c), and the Court so finds. In addition, the protection of certain information from unnecessary disclosure is necessary to protect privacy of the parties and, under Fed. R. Civ. P. 26, is necessary to protect them from "annoyance" and "embarrassment."

With regard to filings with the Court, the Protective Order states in paragraph 10 that parties may attach under seal any document containing protected information:

> In filing materials with the Court in pretrial proceedings, counsel shall file under seal only those specific documents and that deposition testimony designated as Confidential, and only those specific portions of briefs, applications, and other filings that either contain verbatim Confidential Information or set forth the substance of such Confidential Information. The Court retains the power, either upon motion of any interested party or on its own motion, to determine whether materials filed under seal shall remain sealed.

This is the situation the parties find themselves in with regard to Bloomberg's motion to unseal the documents submitted as part of the summary judgment motions. In paragraph 17, the Court anticipated such a motion, but the Protective Order does not set forth a process for how the Court will review the materials at issue. In paragraph 11, the Protective Order states that when a party to the lawsuit seeks to unseal

a document marked as confidential, the parties are to "first confer in good faith in an attempt to resolve the question of whether or on what terms the document or information is entitled to Confidential treatment." In such a situation, the Protective Order continues, Guidant will be afforded ten (10) days to respond, and if the parties cannot reach agreement, "the party objecting to the designation may file an appropriate motion with the Court." Guidant respectfully requests that this process be adhered to with respect to the Bloomberg motion. A precursory look at the documents suggests that Guidant will consent to having a majority of the documents unsealed. Bloomberg's motion seems to be amenable to this process.

B. The Summary Judgment Materials

Bloomberg's motion seeks to unseal "the summary judgment motion papers and the associated materials filed with the Court" and seeks access to "sealed documents specifically referenced in the hearing before the Court on defendant's summary judgment motions." Some of those summary judgment papers were filed unsealed and remain unsealed. Other papers relating to or accompanying the Motion were filed under seal by the Plaintiffs or Guidant because they contain confidential, proprietary, and other commercially sensitive information.

For example, some of the summary judgment materials described in detail the testing Guidant performed on cardiac devices at the design and manufacturing stages of the devices' production. Other documents relate to Guidant's own operating and compliance procedures, which are proprietary and commercially sensitive information. Guidant also disclosed documents related to the Food and Drug Administration's Pre-

Market Approval (PMA) of its products, including "extensive safety testing data and descriptions of manufacturing methods and materials." *Reiter v. Zimmer, Inc.*, 897 F.Supp. 154, 157 (S.D.N.Y. 195). These documents are confidential and proprietary information, and the FDA regularly rejects Freedom of Information Act ("FOIA") requests to release those and similar documents on grounds that the information contains trade secrets or otherwise privileged commercial information. *See*, *e.g.*, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006) (acknowledging that the FDA often declines to release information submitted with new drug applications in response to FOIA requests pursuant to FOIA's exemptions for "documents containing trade secrets and privileged commercial or financial information").

III. ARGUMENT

A. Guidant's Sensitive Commercial Information And Any Individual Personal Information Contained In The Documents Should Be Kept Under Seal

As the Court clearly recognized in issuing the Protective Order, Rule 26 provides for the entry of protective orders specifically to protect sensitive documents used in civil litigation from public disclosure. *See* Fed. R. Civ. P. 26(c)(7) (court may enter a protective order requiring "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way" for "good cause shown"). Both the Eighth Circuit and this Court have repeatedly affirmed that litigants are entitled to protection from public disclosure of confidential documents that are used during litigation. *See, e.g., In re Iowa Freedom of Information Council*, 724 F.2d 658, 664 (8th Cir. 1983) (affirming district court decision

to close court proceedings to the press when trade secrets were discussed because the value of the trade secret is "completely destroyed by disclosure"); *In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991) (holding that Fed. R. of Civ. P. 26(c)(7) allows a court to prevent unnecessary disclosure and discovery of trade secrets); *Medtronic, Inc. v. Boston Scientific Corp.*, 2003 U.S. Dist. LEXIS 2286, *4-*6 (D. Minn. 2003) (denying Medtronic's motion to unseal a portion of a protective order because it contained confidential information and trade secrets). A court analyzing a request to disclose sealed documents, therefore, must balance the benefits of public access against the potential harms from public intrusion. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

Similar issues raised by Bloomberg in the instant case were adjudicated by this Court in a matter involving Guidant last year. *See Cardiac Pacemakers, Inc. v. Aspen II Healthcare Metrics, LLC*, Civil No. 04-4048, 2006 WL 3043180, slip op. at *5 (D. Minn. Oct. 24, 2006). In *Aspen II*, a third party intervened seeking disclosure of documents filed in support of and against summary judgment motions. *Id.* at *4. This Court recognized that, while there is a common-law right of access to judicial records, "[t]he Eighth Circuit has held that this right of access is not absolute, but requires a weighing of competing interests." *Id.* (internal citations omitted). The Court further stated that there is a heightened burden to overcome the presumptive right of public access for documents filed in support of and in opposition to motions for summary judgment. *Id.* Under this heightened standard, the Court found that any interest in public

access to these records was "generally outweighed by Guidant's interest in keeping trade secrets and proprietary business information confidential." *Id.* at *5 n. 5.

Guidant's interest in maintaining the confidentiality of certain materials filed in support of and against summary judgment motions in the instance case is even greater than in *Aspen II*, where the matter at issue had already been closed. In the instant case, not only has the matter not been closed, it is progressing to trial and will be followed in rapid succession by an additional four bellwether trials in the same jurisdiction. Consequently, the Court should hold that under Rule 26(c)(7), Guidant need not unseal documents that contain any trade secret, proprietary information, personal medical information, or any information that could unduly prejudice the outcome of this or any of the bellwether trials. *See* Fed. R. Civ. P. 26(c)(7) (the court "may make any [protective] order which justice requires to protect a party of person from annoyance, embarrassment, oppression, or undue burden or expense.").

Under these guidelines and in accordance with Bloomberg's motion, Guidant will agree to unseal a majority of the documents at issue. There remain, however, a handful of documents that should remain confidential because they contain extensive proprietary business information including trade secrets. It has been well-established by this and other courts that the privacy right to trade secrets and other proprietary documents should be maintained throughout civil litigation and not end after the pre-trial discovery process concludes. *See, e.g., Ruckelhouse v. Monsanto Co.*, 497 U.S. 986, 1002 (1984) (property right exists in a trade secret); *In re Remington Arms*, 952 F.2d at 1032 ("Public disclosure of trade secrets extinguishes the owner's property rights.

. . . an after-the-fact remedy is largely ineffectual in a trade secrets case, however, for once the information is wrongfully released, the trade secret is lost forever."). Further, in *Aspen II*, this Court specifically held that "[f]or the documents that contain trade secrets and other proprietary information, the Court finds that there is no reasonable alternative to sealing most of these documents. Indeed, trade secrets only value consists in their being kept private. If they are disclosed or revealed, they are destroyed." *Aspen II*, 2006 WL 3043180 at *5 (internal citations omitted).

Guidant participates in a highly competitive and highly concentrated industry. Guidant's subsidiaries' primary businesses involve researching, developing, designing, and manufacturing pacemakers, defibrillators and other medical devices. Guidant's competitors would be given a fortuitous and utterly undeserved windfall if, by virtue of Bloomberg's motion, they were to gain access to Guidant's propriety and commercially sensitive information, including that described above. The same would be true if Guidant were to receive access to similar information as a result of any litigation involving these competitors. Each of these companies, including Guidant, keep their trade secrets, commercially sensitive and other proprietary information in close confidence. In fact, Guidant only agreed to disclose its proprietary and commercially sensitive information in this MDL under the safeguard of the Protective Order that this Court put in place before discovery began. This Court should decline to impose serious commercial harm on Guidant that would result from the disclosure of the most sensitive of these materials, and Bloomberg seems to concede that where trade secrets and other

such highly sensitive information would be revealed, the documents should remain under seal. (Mot. at *10).

Other documents that Guidant moves to keep sealed contain confidential personal records, including medical records likely protected under federal or state law. Their disclosure might violate the law, would be contrary to the public interest, and would amount to an unwarranted invasion of privacy. In *Webster Groves School District v. Pulitzer Publ'g Co.*, 898 F.2d 1371 (8th Cir. 1990), the Eighth Circuit reviewed the appropriateness of releasing, pursuant to a third party intervenor, a party's school records and other private information. The court held that the media's interest in access to the records "clearly is outweighed by [the] privacy interest" of the person whose records would be exposed. *Id.* at 1377. As with proprietary business information, for personal records, "there is no reasonable alternative to sealing the file. We cannot unseal the record and then restrict dissemination of the sensitive information therein." *Id.*

This Court's authority to maintain the confidentiality of documents is not lessened, as Bloomberg suggests, because Guidant may have referenced or shown it in open court in arguing its summary judgment motion. *See McDougal v. Reporters Comm. for Freedom of the Press*, 103 F.3d 651, 657 (8th Cir. 1996) ("the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom . . . there was, and is, no additional common law right to obtain" those materials); *Imageware, Inc. v. U.S. West Comm.*, 219 F.3d 793, 796 (8th Cir. 2000) ("the fact that the documents were offered into evidence in open court without restriction is irrelevant."); *Jochims v. Isuzu Motors, LTD*, 151 F.R.D. 338 (S.D. Iowa 1993) (exhibits

introduced at trial covered by protective order were ordered sealed pursuant to the terms of the protective order).

In *McDougal*, the document in question was an edited videotape of President Clinton's deposition that was shown to the jury. The court observed that any right of public access "was adequately protected" by the fact that "the courtroom was open to the public," the public "had an opportunity to view the edited videotape at the time and in the manner it was played to the jury in the courtroom," and the transcripts of the parts of the videotapes used at trial were available. *Id.* at 653, 659. The public right of access, the court held, did not extend to the documents themselves. *See id.* at 659. Similarly, slides and other documents in the instant case that were referenced or available for viewing at the summary judgment hearing should not be unsealed simply because they were used or referenced at an open hearing. This Court has fulfilled its right to public access by allowing the news media and the public to attend the summary judgment hearing and report on all information used. The salient information was available to those who attended the hearing. The Court need not and ought not allow the media additional access to confidential business and personal information.

B. The Eighth Circuit Provides This Court With Additional Broad Discretion To Seal Documents When Necessary For The Fair Administration Of Justice

As stated above, Guidant asserts that the information it seeks to keep under seal are trade secrets or private records of individuals. Even if the Court does not agree with Guidant's classifications, this Court has broad discretion, under United States Supreme Court and Eighth Circuit law, to seal sensitive information that is used in

summary judgment, other dispositive motions, and at trial when necessary for the fair administration of justice. It is clear that while "courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents," *Nixon*, 435 U.S. at 597, "the right to inspect and copy judicial records is not absolute." *Id.* at 598. The Eighth Circuit has further held that "[w]hen the common law right of access to judicial records is implicated, we give deference to the trial court rather than taking the approach of some circuits and recognizing a 'strong presumption' favoring access." *Webster Groves*, 898 F.2d at 1376. In accordance with Rule 26, a party must show "good cause" that information should remain under seal. Fed. R. Civ. P. 26(c)(7).

Despite this long-established Eighth Circuit precedent, Bloomberg curiously argues that the Court is bound by the First Amendment, the "strong presumption" standard, and its companion "compelling interest" test that some other circuits have adopted. Not surprisingly, Bloomberg relies on case law from the other circuits to make this argument. For example, it cites the District of Columbia Circuit in suggesting that there is a "First Amendment right of access to . . . civil proceedings." Mot. at *8 (citing *Center for Nat'l Sec. Studies v. United States*, 215 F. Supp. 2d 94, 111-12 (D.D.C. 2002). It cites the Sixth Circuit for the proposition that "simply showing that the information would harm the company's reputation is not sufficient to overcome the *strong common law presumption* in favor of public access to court proceedings and records." Mot. at *11 (citing *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983). In addition, Bloomberg cites the Ninth Circuit to argue that

Guidant must "articulate *compelling reasons* supported by specific factual findings" to justify the continued sealing of a document. *Id.* (emphasis in original) (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2006). The Eighth Circuit has rejected these lines of cases. *See, e.g., United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (stating that the Eighth Circuit "declines to adopt in toto the reasoning of the Second, Third, Seventh, and District of Columbia Circuits in recognizing a 'strong presumption' in favor of the common law right of access.").

The First Amendment and the heightened standards suggested by Bloomberg have no bearing on Bloomberg's request to unseal Guidant's documents. In *Webster Grove*, the Eighth Circuit explicitly rejected the notion that non-parties have a First Amendment interest in access to court records in civil lawsuits: "Although the Supreme Court has held that the right to attend criminal trials is implicit in the guarantees of the First Amendment, it never has held that there is a constitutional right of access to civil trials." *Webster Groves*, 898 F.2d at 1374 (internal citations omitted); *see also In re Iowa*, 724 F.2d at 661 (explaining the distinction between civil and criminal trials for purposes of non-party First Amendment right to access). The court explained that the interests of the litigants to privacy and to a fair adjudication of their dispute may override any First Amendment interest, even if it existed. *Webster Groves*, 898 F.2d at 1377. Bloomberg's arguments on these points, therefore, ring hollow.

Consequently, the Court has the discretion, even where a document does not contain a trade secret or personal private information, to keep a document used in a dispositive motion or at trial sealed if doing so would protect the parties from being

prejudiced by the document's disclosure. "When the concern is the efficient administration of justice and the provision to defendants of fair trials, the consideration of competing values is one heavily reliant on the observations and insights of the presiding judge." *Webbe*, 791 F.2d at 106 (quoting *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 n.18 (5th Cir. 1981)); *In re Baycol Prods. Litig.*, 214 F.R.D. 542, 544 (D. Minn. 2003) ("The principle consideration for this Court in determining whether permissive intervention should be granted is whether such intervention will unduly delay or prejudice the adjudicated parties' rights.").

The impact on justice is particularly high where, as in *Webbe* and the instant case, the party has other trials pending in the same jurisdictions. In *Webbe*, the court reasoned that publicity from the documents "posed [a] threat to selecting impartial secondary jury, independent of whether [the documents] would be introduced at second trial." *Webbe*, 791 F.2d at 107. With five bellwether trials scheduled to occur in rapid succession, there would be no time for undue publicity about key information to dissipate. Future jurors could readily form opinions about information or the parties upon reading the news articles now, instead of when presented with evidence at trial.

In the event the Court determines that Bloomberg is entitled to view certain documents, the Court should do so in a way that minimizes the potential impact that disseminating a company's sensitive materials may cause. There has been a growing movement by courts to allow individuals to view documents at the courthouse, but not to copy, disseminate or publish them to a larger audience. *See*, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770-71, 780 (1989)

(recognizing that mistaken disclosure at the courthouse is different than mistaken disclosure on the Internet); *In re Providence J. Co.*, 293 F.3d 1, 16-18 (1st Cir. 2002) (allowing right of access, but not to copy); *Imageware*, 219 F.3d at 796 (discussing a protective order that would allow anyone going to the Clerk's office to view the documents and copy them, but not to disseminate them); *In re Supreme Court Advisory Comm. on Rules of Public Access to Records of the Judicial Branch*, No. C4-85-1848, *9 (Minn. 2004) (discussing a proposed rule to put documents created or maintained by courts available on-line, but have many of the documents attached to motions or pleadings only accessible from the courthouse).

C. This Court Should Use A Process Modeled On The One In The Protective Order For Providing Guidant And Bloomberg An Opportunity To Reach An Accommodation

In concert with the procedure specified in the Protective Order for when a party to the lawsuit objects to the Confidential designation of a document, Guidant respectfully requests that the Court permit Guidant ten (10) days to provide Bloomberg with a list of summary judgment materials that Guidant will agree to unseal. There are ___ documents that are responsive to Bloomberg's motion. Based on Guidant's precursory review, Guidant anticipates that it would agree to unseal a majority of the documents entirely. Where redaction is practicable, Guidant will agree to unseal portions of documents. Where redaction is not possible, Guidant will seek to keep those documents under seal. *See In re Search Warrant for Secretarial Area Outside of Gunn*, 855 F.2d 569 (8th Cir. 1988) ("line-by-line redaction of the sealed documents was not practicable"). Guidant will agree to meet and confer with Bloomberg in good faith in

order to resolve any question Bloomberg may have of whether and/or on what terms the remaining summary judgment materials may be unsealed or maintain their Confidential designation.

If Guidant and Bloomberg cannot agree as to whether a specific document is properly designated as Confidential, Bloomberg may file an appropriate motion with the Court. Guidant recognizes that the burden of showing good cause as to the designation of confidentiality rests on the party who has made the designation, which often will be Guidant. Guidant requests that it have ten (10) days from that time to submit documentation as to why each document is properly designated as "Confidential." As in *Aspen II* and in accordance with Eighth Circuit law and practice, the Court may choose to subject these documents to *in camera* review. *See In re Iowa*, 724 F.2d at 662 (instructing lower courts to assess sensitive documents *in camera* prior to making a discretionary judgment regarding public access).

Until a resolution of the dispute is achieved either through consent or Court Order, the parties shall treat the designated document or information as Confidential information.

IV. CONCLUSION

Based on the foregoing, Guidant requests that this Court allow Guidant and Bloomberg to confer about the specific documents and present to the Court, in accordance with the process stated above, any document where agreement cannot be reached.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

By: /s/ Timothy A. Pratt

Missouri Bar No. 26729
Andrew D. Carpenter
2555 Grand Blvd.
Kansas City, Missouri 64108-2613
Telephone: 816.474.6550
Facsimile 816.421.5547

Joseph M. Price
FAEGRE & BENSON
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: 612.766.7000
Facsimile: 612.766.1600

Attorneys for Defendants