

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE:

Multidistrict Litigation
No. 08-1905 (RHK/JSM)

MEDTRONIC, INC. SPRINT FIDELIS
LEADS PRODUCTS LIABILITY
LITIGATION

ORDER NO. 5

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PROTECTIVE ORDER

WHEREAS pursuant to Fed. R. Civ. P. 26(c), the Court deems it appropriate to limit disclosure of certain confidential information, as set forth below, and the parties to this action, by counsel, have stipulated and agreed to give effect to the stipulations set forth below.

IT IS HEREBY ORDERED that Plaintiffs in the individual and putative class actions (hereinafter, collectively, "Plaintiffs") transferred to Multidistrict Litigation No. 08-1905 (hereinafter, "MDL 1905") and Defendants Medtronic, Inc., Medtronic Puerto Rico Operations Co., Medtronic International Technology, Inc., f/k/a Medtronic Puerto Rico, Inc., and Medtronic USA, Inc. (hereinafter, collectively, "Defendants" or "Medtronic"), and their respective counsel, shall be subject to this Protective Order, as follows:

1. **Discovery Materials.** This Order applies to all products of discovery and all information derived therefrom, including, but not limited to, all documents and deposition testimony and any copies, excerpts or summaries thereof (“Discovery Materials”), obtained by any party pursuant to the requirements of any court order, requests for production of documents, requests for admissions, interrogatories or subpoenas.

2. **Confidential Discovery Materials.** All Discovery Materials which contain, describe, identify or refer to information of a confidential or proprietary nature or any trade secret or other confidential research, design, development, licensing, manufacturing, sales, marketing, distribution, commercial or business information, may in good faith be stamped “CONFIDENTIAL” by the producing party and shall be subject to the provisions of this Protective Order. Such stamping or marking will take place prior to production by the producing person, or subsequent to selection by the receiving party for copying but prior to the actual copying. The stamp shall be affixed in such manner as not to obliterate or obscure any written matter. Subject to the provisions of paragraph 5 of this Protective Order, disclosure of any Confidential Discovery Materials shall be limited to:

- a. the Court and its staff;
- b. Inside Counsel and Outside Attorneys and their office associates, legal assistants, stenographic and clerical employees;
- c. persons shown on the face of the document to have authored or received it;

- d. court reporters retained to transcribe testimony;
- e. the parties;
- f. Outside Independent Persons (*i.e.*, persons not currently employed by or otherwise associated with any party) who are retained by a party or its Attorneys to provide assistance as mock jurors or focus group members or the like, or to furnish technical, consulting, or expert services, and/or to give testimony in this action; and
- g. Outside Vendors (*i.e.*, messenger, copy, coding, and other clerical-services vendors not employed by a party or its Attorneys).

3. Counsel for a party to MDL 1905 may challenge the “CONFIDENTIAL” designation made by the producing party of any of the Discovery Materials by first requesting a “meet and confer” with the producing party in an attempt to amicably resolve the challenge. In the event agreement cannot be reached, the challenging party may make written application to this Court, which application shall describe with specificity the particular materials for which the designation is being challenged and set forth with specificity any and all grounds for the challenge, and the party seeking to maintain the Materials as “CONFIDENTIAL” generally will bear the burden of proof as to such designation. The Discovery Materials designated “CONFIDENTIAL” shall continue to be treated as such and subject to the provisions of this Protective Order pending determination by the Court of the merits of any such challenge. In the event that the Court upholds such a challenge and enters an order that particular Discovery Materials are not entitled to the designation “CONFIDENTIAL,” the Discovery Materials

shall nevertheless continue to be treated as “CONFIDENTIAL” and subject to the terms of this Protective Order for 20 days following the entry of such order to enable the producing party to seek review and a stay of such order.

4. The parties agree that Discovery Materials will be used only for the litigation of actions under IN RE MEDTRONIC, INC. SPRINT FIDELIS LEADS PRODUCTS LIABILITY LITIGATION, MDL 08-1905 (“Litigation”), including any appeals of the Litigation, and (except as provided in this paragraph below) for no other purpose. Discovery Materials designated as Confidential may not be disclosed to any attorney who is not acting as counsel for a party in the Litigation or to anyone not authorized by Paragraph 2 of this Protective Order. Counsel who have claims pending in this MDL 1905 and Minnesota State Court (“State Court Action”) brought by or on behalf of a current or former Medtronic Sprint Fidelis user alleging injuries or other damages therefrom may also use Discovery Materials in the State Court Action, so long as all persons using the Discovery Materials in connection with the State Court Action have agreed to be governed by the terms of this Protective Order.

5. The disclosure by counsel for a party to MDL 1905 of the Discovery Materials to paralegals and clerical staff employed by the disclosing counsel’s office is allowed under the terms of this Protective Order without limitation and without the need to execute an Affidavit. Such disclosure shall not constitute a violation or a waiver of the protections afforded by the Protective Order. Said paralegals and staff, as employed as agents of the disclosing counsel, are bound by this Order to the same extent as the parties and attorneys are bound. Disclosure by counsel for a party in the Litigation to his/her

client in the Litigation of Discovery Materials designated as “Confidential” by another party shall not constitute a violation or waiver of the protections afforded by this Protective Order to the extent that such disclosure is necessary to enable the party to assist in the prosecution or defense of the Litigation and so long as the party (or, in the event that the party is not a natural person, the party’s employees) to whom disclosure is made has executed an Affidavit in the form attached hereto as Exhibit A. A copy of each such executed Affidavit shall be maintained by the disclosing counsel. Disclosure by counsel for a party to MDL 1905 of the Discovery Materials designated as “Confidential” to Outside Independent Persons or Outside Vendors appropriately designated pursuant to Paragraph 2.f. or 2.g. of this Protective Order shall not constitute a violation or waiver of the protections afforded by this Protective Order to the extent that such disclosure is necessary to enable such Outside Independent Persons or Outside Vendors to perform their work in connection with the Litigation and so long as each such Outside Independent Person or Outside Vendor to whom disclosure is made has executed an Affidavit in the form attached hereto as Exhibit A. A copy of each such executed Affidavit shall be maintained by the disclosing counsel.

6. Except as provided for herein, nothing in this Protective Order shall prevent or restrict counsel for any party in any way from inspecting, reviewing, using or disclosing any Discovery Materials produced or provided by that party, including Discovery Materials designated as Confidential. The parties reserve all their respective rights concerning whether or not there has been a waiver of confidentiality in the event

that the producing party shares such Discovery Materials designated as Confidential with third parties other than as provided for elsewhere in this Protective Order.

7. Disclosure of Discovery Materials designated as “Confidential” other than in accordance with the terms of this Protective Order may subject the disclosing person to such sanctions and remedies as the Court may deem appropriate, including (without limitation) contempt, injunctive relief, and damages.

8. All persons receiving or given access to Discovery Materials designated as “Confidential” in accordance with the terms of this Protective Order consent to the continuing jurisdiction of this Court for the purposes of enforcing this Protective Order and remedying any violations thereof. All parties and their respective counsel, paralegals and the employees and assistants of all counsel, and experts receiving Discovery Materials designated as “Confidential,” shall take all steps reasonably necessary to prevent the disclosure of Confidential Discovery Materials other than in accordance with the terms of this Protective Order.

9. In the event the Discovery Materials themselves, or the contents of the Materials designated “CONFIDENTIAL,” are to be identified, discussed, or disclosed during a deposition taken in the Litigation of any person or entity other than those persons or entities described in Paragraphs 4 and 5 above, the deponent shall be required to acknowledge on the record, before any identification, discussion or disclosure of the Discovery Materials occurs, that he or she has been advised of and has agreed to be bound by the terms of this Protective Order.

10. During a deposition, any party may ask the reporter to designate certain portions of the testimony as Confidential, in which case the Confidential portions shall be separately transcribed and labeled as “Confidential.” In addition, within thirty (30) days after a copy of the transcript is delivered to the parties, counsel may designate the entirety or any specified portion of the transcript or exhibits thereto as “Confidential” by letter to the opposing party. Until such thirty (30) day period expires, the entirety of such transcripts and all exhibits thereto shall be treated as Confidential and subject to this Order. After such thirty (30) day period expires, such transcripts, exhibits or portions designated as “Confidential” shall be treated as such under this Order. If no such designation is made within thirty (30) days, such transcripts or exhibits shall not be subject to this Order, except for good cause shown by the designating party.

11. In the event the Discovery Materials designated as “CONFIDENTIAL” or transcripts or other things wherein the Discovery Materials or the contents of the Discovery Materials designated “CONFIDENTIAL” are identified, discussed, or disclosed, are filed electronically or otherwise or are otherwise deposited with the Clerk of this Court or any Transferor Court, the Discovery Materials or the contents of the Discovery Materials shall not be filed electronically and the Discovery Materials shall be filed or deposited with the Clerk of this Court or any Transferor Court in a sealed envelope bearing the following designation:

“CONFIDENTIAL: THE CONTENTS OF THIS ENVELOPE ARE NOT TO BE SCANNED AND ARE SUBJECT TO A PROTECTIVE ORDER OF THIS COURT AND SHALL NOT BE SHOWN TO ANY PERSONS OTHER THAN A JUDGE OF THIS COURT OR AN ATTORNEY IN THIS CASE.”

In addition, a conventional filing placeholder shall be filed in ECF in place of the document(s) being filed conventionally describing the document(s) being filed, together with a note that the document(s) are deemed confidential.

12. The producing party of any Confidential Discovery Materials attached to or referenced in a document filed with the Court under seal may assent to the unsealing of the document at any juncture without waiving its assertion of confidentiality as to any other Discovery Materials.

13. Nothing shall prevent disclosure beyond that required under this Protective Order if the producing party consents in writing to such disclosure, or if the Court, after notice to all affected parties, orders such disclosure and that Order is not subject to an appellate stay within [20] days after it is issued.

14. Any party who inadvertently fails to identify documents as “Confidential” shall, promptly upon discovery of its oversight, provide written notice of the error and substitute appropriately-designated documents. Any party receiving such inadvertently unmarked documents shall, following receipt of notice of the error, treat such documents as Confidential as if they had initially been designated as such, make good faith and reasonable efforts to retrieve documents distributed to persons not entitled to receive documents with the corrected “Confidential” designation and, upon receipt of the substitute documents, promptly return or destroy the improperly-designated document(s) and/or the electronic media on which such document(s) reside.

15. Any party who inadvertently discloses documents that are privileged or otherwise immune from discovery shall, promptly upon discovery of such inadvertent disclosure, so advise the receiving party and request that the documents be returned. The receiving party shall return such inadvertently produced documents, including all copies, within 10 days of receiving such a written request. The party returning such inadvertently produced documents may thereafter seek re-production of any such documents pursuant to applicable law.

16. **Procedure for Use in Court.** Confidential Information may be offered into evidence at any Court hearing, trial, or conference in open Court only if: (1) the Confidential Information has previously been identified in the Court filings addressing the subject matter of the hearing, trial, or conference; or (2) the Confidential Information is identified, with specificity, (e.g., by Bates number(s) when possible), to the producing party at least 24 hours prior to commencement of the hearing, trial, or conference. The producing party may request an Order that evidence be received only *in camera* or under other less public circumstances to prevent unnecessary disclosure, and Confidential Information received by the Court in such a fashion shall not lose its status as Confidential Information as a result of such use.

17. Counsel for a party shall not, in the presence of the jury, comment on the reasons or motivation for designating the Discovery Materials as “CONFIDENTIAL” without first having obtained permission of the Court to do so.

18. This Protective Order shall be binding throughout and after final adjudication of this action, including but not limited to, (i) any action subject to MDL

1905 that has been transferred back to the Transferor Court for trial or any other proceedings, and (ii) any final adjudication of any appeals and petitions for extraordinary writs.

19. Within thirty (30) days after final adjudication of MDL 1905 or any proceeding before a Transferor Court, the Clerk of this Court or the Clerk of any Transferor Court, Plaintiffs and Defendants shall request that the Clerk return under seal to counsel for the producing party all Discovery Materials designated “CONFIDENTIAL” including, without limitation, all transcripts or other things which were subject to the provisions of this Protective Order, and within thirty (30) days after final adjudication of MDL 1905 and any proceeding before a Transferor Court, counsel then having possession, custody or control of such Discovery Materials designated “CONFIDENTIAL” including, without limitation, all transcripts or other things, shall verify the complete destruction or return to counsel for the producing party of all such Discovery Materials by executing and mailing to counsel for the producing party an Affidavit in the form attached hereto as Exhibit B. A copy of each such executed Affidavit shall be maintained by counsel for Plaintiffs or Medtronic, respectively. Attorneys shall be entitled to retain a set of all documents filed with the Court and all correspondence generated in connection with the Litigation. To the extent they do so, however, they shall remain subject to and bound by this Protective Order even after final adjudication of the Litigation.

20. Any party may apply to the Court for a modification of the Protective Order, and nothing in this Protective Order shall be construed to prevent a party from

seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

21. No action taken in accordance with the Protective Order shall be construed as a waiver of any claim or defense in the action or of any position as to discoverability or admissibility of evidence.

22. This Protective Order supersedes any and all confidentiality agreements entered into by counsel and/or protective orders entered by a Transferor Court for any action subject to MDL 1905 while such action is or was pending in the Transferor Court.

23. If a receiving party or its counsel or expert is served with a subpoena or other process by any court, administrative or legislative body, or any other person or organization which calls for production of any Confidential Discovery Materials produced by another party, the party to whom the subpoena or other process is directed shall not, to the extent permitted by applicable law, provide or otherwise disclose such documents or information until 10 business days after notifying counsel for the producing party in writing of all of the following: (1) the information and documentation which is requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation, administrative proceeding or other proceeding in which the subpoena has been issued.

24. Nothing in this Protective Order shall be construed to prevent this Court from disclosing any facts relied upon by it in making or rendering any finding, ruling, order, judgment or decree of whatever description.

25. Each party shall bear its own costs for complying with this Protective Order.

Dated: June 20, 2008

s/ Janie S. Mayeron

JANIE S. MAYERON

UNITED STATES MAGISTRATE JUDGE

4. By signing this Affidavit, I also promise that I will not communicate, disclose, discuss, identify, or otherwise use materials or the contents of materials designated “Confidential” pursuant to the above-described Protective Order with, to, or for any person or entity other than the Court, a party to the above-described Litigation, counsel for a party to the Litigation, including other counsel, paralegals, and clerical staff employed in his or her office, persons permitted by the above-described Protective Order to attend depositions taken in the Litigation, and persons or entities assisting such counsel who have executed an affidavit in the same form as this Affidavit.

5. By signing this Affidavit, I also promise that I will not copy, transcribe, or otherwise reproduce, or cause to be copied, transcribed, or otherwise reproduced, by any means whatsoever, any materials or the contents of any materials designated “Confidential” pursuant to the above-described Protective Order except to the extent to which I am directed to do so by counsel for a party to the Litigation, in which case all such copies, transcriptions, or reproductions shall be made solely for my own use in connection with my work or assistance in the above matter. I further promise at the conclusion of the Litigation to deliver upon request all materials designated “Confidential” (originals and copies) to the counsel who originally directed that said materials be provided to me.

6. I understand that, by signing this Affidavit, I am agreeing to subject myself to the jurisdiction of this Court and any Transferor Court.

7. I understand that any use or distribution of the materials or contents of the materials designated “Confidential” pursuant to the above-described Protective Order in

any manner contrary to the provisions of the Protective Order will subject me, among other things, to the summary sanctions of this Court and the Transferor Court for contempt and to such other sanctions and remedies as this Court and the Transferor Court may deem appropriate, including (without limitation) injunctive relief and damages.

Further Affiant sayeth not.

Signature of Affiant

Subscribed and sworn to before me,
this _____ day of _____, 200__.

Notary Public

States District Court for the District of Minnesota, Multidistrict Litigation No. 08-1905

(RHK/JSM).

Further Affiant sayeth not.

Signature of Affiant

Subscribed and sworn to before me,
this _____ day of _____, 200__.

Notary Public