IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN BRENNAN, on behalf of himself and all others similarly situated, Plaintiffs, v. GUIDANT CORPORATION and GUIDANT SALES CORPORATION, Defendants.	Case No. 1:05-CV-0827-DFH-TAB

STIPULATED PROTECTIVE ORDER

Introduction. Fed. R. Civ. P. 26(c) requires parties to show good cause for the entry of a protective order by the Court. *Citizens First National Bank v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999); *Union Oil Co. of California v. Leavell,* 220 F.3d 562 (7th Cir. 2000); *Baxter Intern., Inc. v. Abbott Laboratories,* 297 F.3d 544 (7th Cir. 2002). In order to establish good cause for this protective order, to protect the public interest, and to allow for future judicial review or public challenges, the parties stipulate to the following facts, and the following principles are the basis upon which documents and information in this action may be determined to be subject to this protective order.

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

Attachment A

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. However, some do not, and others may be redacted.

Both Plaintiffs and Defendants have taken reasonable steps to maintain the confidentiality of such information as is in their possession, custody, or control. There is, however, a need for discovery of such information, provided that confidentiality can be preserved. 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 the privacy of the parties and, under Fed. R. Civ. P. 26, is necessary to protect them from "annoyance" and "embarrassment."

Accordingly, the parties have hereby stipulated and agreed -- and the Court now finds that good cause has been shown and therefore Orders -- that discovery in this action shall be subject to the following restrictions and that the following terms and conditions shall govern the treatment of Confidential Information in this proceeding.

1. **"Confidential Information".** "Confidential Information" refers to information, documents, or other material that the designating party reasonably and in good faith believes constitutes or reflects trade secrets or information whose confidentiality is otherwise protectable under applicable law. This includes but is not limited to 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.

2. **Designation of Confidential Information.** Any party may reasonably designate any document containing Confidential Information, or portion thereof, which it may produce as "Confidential" by labeling the document to be so designated substantially as follows: "CONFIDENTIAL: SUBJECT TO PROTECTIVE ORDER".

3. **Use of Confidential Information.** Anyone who is provided with access to Confidential Information under this Order shall use such information solely in connection with this action, shall keep such information strictly confidential, and shall in no way disclose such information, or any portion, summary, abstract or other derivation thereof, to any firm, person, or entity, except as provided in paragraph 4.

4. **Disclosure of Confidential Information.** Access to Confidential Information shall be limited to:

(a) *Attorneys.* Attorneys of record and other personnel in their law firm(s) (including other attorneys, paralegals, and other staff personnel (collectively "staff personnel")) who require access for the purpose of representing any party in this action.

(b) *Named parties.* The named parties in this action and Cardiac Pacemakers, Inc. ("CPI"), a wholly-owned subsidiary of Guidant Corp.

(c) *Experts and consultants.* Outside experts or consultants retained in connection with this action; however, Plaintiffs must provide notice to that Defendant or CPI before providing access to Confidential Information to that expert or consultant if any such expert or consultant is currently an employee of any competitor of any Defendant or CPI. (This notice requirement is not intended to include any expert or consultant retained in connection with this action who

may have, or have had, an independent consultant contractor contract with any competitor of any Defendant or CPI, as long as he or she is not currently an employee of any such competitor.)

(d) *Witnesses.* Witnesses who testify at depositions, hearings, or trial, if any such further proceedings occur in this case; however, Plaintiffs must provide notice to that Defendant or CPI before providing access to Confidential Information to that witness if any such witness is currently an employee of any competitor of any Defendant or CPI. (This notice requirement is not intended to include any witness who may have, or have had, an independent consultant contractor contract with any competitor of any Defendant or CPI, as long as he or she is not currently an employee of any such competitor.)

(e) *Court reporters and videographers.* Court reporters and videographers appearing at depositions, hearings, or trial, if any such further proceedings occur in this case.

(f) *Court.* The Court and its personnel.

(g) *Other persons.* Without the necessity of further Court order, any other person who the parties jointly agree may have access to the Confidential Information.

(h) *Attorneys in other actions.* Attorneys of record (and their staff personnel) in any other action against any Defendant and/or CPI generally involving CPI's products, which action has been included in a notice of related actions to the Judicial Panel on Multidistrict Litigation in *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL Case No. 1708.

Prior to such disclosure, each such attorney shall execute, file with the Court, and serve on all attorneys of record in this action the Agreement To Comply With Stipulated Protective Order attached as Attachment A. Such attorney shall not further disclose Confidential Information in the other action without further order of this Court. Such an order will issue if a protective order no less protective of Confidential Information is entered in the other action. The parties agree that such attorneys in other actions include those on the list attached as Attachment B.

5. **Non-Waiver of Confidentiality or Objection to Production.** Review of Confidential Information by any person in paragraph 4 shall not waive the confidentiality of that information and shall not waive any objection to production of that information.

6. **Execution of Agreement To Comply With Stipulated Protective Order (Attachment A).** Each person who is permitted access to Confidential Information under paragraph 4(a)-(g) above, except the Court and its personnel, shall first be shown a copy of this Order, shall be advised of the obligation to honor the confidentiality designation, and shall sign the Agreement To Comply With Stipulated Protective Order ("Agreement") that is attached as Attachment A. Any attorney of record in this action who provides such access to any such person shall retain that person's signed Agreement in his or her files during the pendency of this action, and upon request shall make the signed Agreement available for inspection by the Court.

7. **Inadvertent Disclosure of Confidential Information.** The inadvertent, unintentional, or *in camera* disclosure of Confidential Information shall not be deemed a waiver, in whole or in part, of any party's claim of confidentiality. Within 15 days of

discovering such inadvertent or unintentional disclosure, any party to this Order may advise the other parties that the Confidential Information is to be designated as Confidential under the terms of this Order.

8. **Inadvertent Disclosure of Privileged Information.** In the interest of expediting discovery in these proceedings and avoiding unnecessary costs, (a) inadvertent or unintentional disclosure in this litigation of privileged information and/or work product shall not be deemed a waiver, in whole or in part, of any otherwise valid claim of privilege, immunity, or other protection; and (b) failure to assert a privilege and/or work product in this litigation as to one document or communication shall not be deemed to constitute a waiver, in whole or in part, of the privilege, immunity, or other protection as to any other document or communication allegedly so protected, even involving the same subject matter. In the case of inadvertently produced privileged and/or work product documents, upon the recipient becoming aware that he or she has received such documents that clearly were inadvertently produced, or upon a request made by producing party, the documents together with all copies made of them and any notes made from them shall be returned forthwith to the party claiming privilege and/or work product immunity. Any party may, within five (5) court days after notification of inadvertent disclosure under this paragraph, object to the claim of inadvertence by notifying the designating or producing party in writing of that objection and specifying the designated or produced material to which the objection is made. The parties shall confer within fifteen (15) days of service of any written objection. If the objection is not resolved, the designating party shall, within fifteen (15) days of the conference, file and serve a motion to resolve the dispute. If a motion is filed, information subject to dispute shall

be treated consistently with the designating or producing party's most recent designation until further order of this Court.

9. **Depositions.** Any deposition which a party determines will or might reasonably include disclosure of Confidential Information shall be attended only by those persons entitled to receive such Confidential Information pursuant to this Order, but this shall not be construed to allow any such person to attend a deposition he or she otherwise would not be allowed to attend. 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 taken at the deposition 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-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-day period expires, such transcripts, exhibits or portions thereof designated as Confidential shall be treated as such under this Order. If no such designation is made within thirty days, such transcripts or exhibits shall not be subject to this Order, except for good cause shown by the designating party.

10. **Filing With Court.** 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. Any such Confidential Information shall be filed under seal, in a sealed envelope (or other sealed container) marked with the title of this action, the title of each such transcript or document being filed, and a statement substantially in the following form:

CONFIDENTIAL

> Pursuant to the Order of the Court dated _____, 2005, this envelope containing the above-entitled transcripts or documents filed by [the name of the party], is not to be opened nor the contents thereof displayed or revealed, except in accordance with an Order of the Court.

11. **Objection to Designation.** If any party to the litigation disputes the designation of any document or information as Confidential Information, before seeking the assistance of the Court, the parties must 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. The party objecting to the Confidential designation shall notify the designating party, and the designating party shall respond within ten (10) days. If the parties are unable to agree as to whether the document or information is properly designated as Confidential Information, the party objecting to the designation may file an appropriate motion with the Court. The burden of proving the propriety of the designation rests on the party who has made the designation. 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.

12. **Return of Confidential Information Upon Termination.** Upon the termination of this action, whether by Court order, judgment, settlement, or otherwise, including the termination of any appeals, each party will return to the other all documents designated as Confidential and all copies or reproductions of such documents designated as Confidential. The return of Confidential materials shall be completed within thirty (30) days

after termination of this action and of all other actions that have been included in a notice of related actions to the Judicial Panel on Multidistrict Litigation in *In re Guidant Corp. Implantable Defibrillator Products Liability Litigation*, MDL Case No. 1708. Plaintiffs shall return the device(s) at issue to Cardiac Pacemakers, Inc. within thirty (30) days after termination of the action. Any attorney of record in this action who provides access to Confidential Information to any expert, consultant, witness, or other person (as defined in paragraph 4) is responsible for the retrieval from any such expert, consultant, witness, or other person of all documents designated as Confidential and for the return of all documents designated Confidential; and the work product prepared by any such expert, consultant, witness, or other person derived from that Confidential Information shall be destroyed and/or returned to that attorney of record. This Order, and the obligation to keep Confidential Information confidential, shall survive the final termination of this action and all other actions that have been included in a notice of related actions to the Judicial Panel on Multidistrict Litigation in *In re Guidant Corp. Implantable Defibrillator Products Liability Litigation*, MDL Case No. 1708.

13. **Request to Produce Confidential Information by Subpoena or Otherwise.** If any party who has received Confidential Information is asked to produce such information, by subpoena or otherwise, for purposes of use in a separate legal action, the party receiving such a request shall promptly inform the producing party that such request has been received and shall object to such request on the basis of this Order.

14. **Waiver of Privilege and Admissibility.** Nothing in this Order shall be deemed a waiver of any type of privilege applicable to any type of information in this or

any other action or proceeding. Nothing in this Order shall be construed to affect the evidentiary admissibility of any Confidential Information.

15. **Use of Documents Acquired Lawfully or Through Other Litigation.** This Order shall not prevent any persons bound hereby from making use of any document or information without the restrictions of this Order if the document or information came into their possession lawfully or through discovery in state litigation or any other litigation in which such document or information was not designated "Confidential," was not subject to a protective order or other restrictive court order, or where there has been a final judgment (including any appeal therefrom) where the document or information was deemed to not be confidential.

16. **Non-Party's Confidential Information.** Any non-party producing discovery material or giving deposition testimony in this action may avail herself, himself, or itself of the confidential treatment provided for in this Order for her, his, or its discovery material or testimony by following the procedures provided herein. This Order shall be binding on such non-parties unless they object to its terms within 10 days of service upon them of this Order.

17. **Others' Challenges to Confidentiality Designation.** Nothing contained herein shall prevent a member of the general public from filing a motion with the Court contesting any party's designation of information as confidential, seeking to have information filed under seal unsealed, or seeking an order permitting the disclosure of Confidential Information to non-party witnesses. Nothing shall prevent disclosure beyond the terms of this order if the party designating the materials or testimony as confidential either publicly discloses such information or consents in writing to such disclosure, or if the

Court, after notice to all affected parties, orders such disclosure and there has been a final judgment (including conclusion of any appeal therefrom) on this issue.

18. **Modification.** This Order shall not prevent any party from applying to the Court for modification of the Order or for further relief.

19. **Failure to Comply.** Failure to comply with this Order shall be a basis for monetary sanctions or other appropriate relief.

20. **Subtitles.** The subtitles in this Order have been provided for convenience only and are not to be considered in construing or interpreting the meaning of this Order.

Stipulated And Agreed To By:

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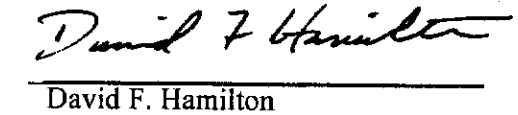
Counsel for Defendants Guidant Corp. and Guidant Sales Corp.

SO ORDERED:

Dated: September____, 2005



David F. Hamilton
United States District Court
Southern District of Indiana

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Attachment "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN BRENNAN, on behalf of himself and all others similarly situated, Plaintiffs, v. GUIDANT CORPORATION and GUIDANT SALES CORPORATION, Defendants.	Case No. 1:05-CV-0827-DFH-TAB

AGREEMENT TO COMPLY WITH STIPULATED PROTECTIVE ORDER

I hereby acknowledge and affirm that I have read the terms and conditions of the Stipulated Protective Order entered by the Court in this action. I understand the terms of the Court's Order and under oath consent to be bound by the terms of that Order as a condition to being provided access to Confidential Information (including documents and discovery) furnished by the parties. Furthermore, by executing this Agreement To Comply With Stipulated Protective Order ("Agreement"), I hereby consent to the jurisdiction of the above-captioned Court for the special and limited purpose of enforcing the terms of the Stipulated Protective Order.

I recognize that any breach of this Agreement may be punishable as a contempt of court. All civil remedies, except those for money damages against counsel, for breach of this Agreement are specifically reserved by the party producing the Confidential

Information (including documents and discovery), and are not waived by the disclosure provided for herein. Further, in the event of a breach of this Agreement, I recognize that the producing party may pursue all civil remedies available to it as a third-party beneficiary of this Agreement.

_____
(NAME)

_____
(ADDRESS

_____
(CITY) (STATE) (ZIP)

_____
(TELEPHONE NUMBER)

STATE OF _____)
) ss.
COUNTY OF _____)

Subscribed and sworn to, before me a Notary Public, this _____ day of _____, 2005.

(SEAL) Notary Public

_____
Typed or Printed Name

1757402v1

Attachment "B"

LIST OF ATTORNEYS IN OTHER ACTIONS

The parties agree that the following are considered "attorneys in other actions" as defined in paragraph 4(h) of the Stipulated Protective Order in *Brennan v. Guidant Corp., et al*, Case No. 1:05-CV-0827-DFH-TAB, pending in the United States District Court for the Southern District of Indiana, Indianapolis Division, and each of them therefore may be provided access to "Confidential Information" after he or she has executed, filed with the Court, and served on all attorneys of record in *Brennan* the Agreement To Comply With Stipulated Protective Order (Attachment A).