

UNITED STATES TAX COURT
WASHINGTON, DC 20217

GUIDANT LLC F.K.A. GUIDANT)		
CORPORATION, AND SUBSIDIARIES,)		
ET AL.,)		
)		
Petitioners,)		
)		
v.)	Docket Nos. 5989-11,	5990-11,
)	10985-11,	26876-11,
COMMISSIONER OF INTERNAL REVENUE,)	5501-12,	5502-12.
)		
Respondent)		
)		

PROTECTIVE ORDER

On September 3, 2013, petitioner filed a Motion for a Protective Order (motion). On September 30, 2013, respondent filed an objection to petitioner’s motion and on October 31, 2013, petitioner filed a reply to respondent’s objection. On November 7, 2013, respondent filed a Motion for Leave to File a Response to petitioner’s reply as to section 6103 issues, which the Court granted on November 8, 2013. On November 18, 2013, respondent filed a response to petitioner’s reply as to section 6103 issues.

Upon due consideration, it is

ORDERED that petitioner’s motion is granted in part in that, in these consolidated cases, discovery shall be subject to the following restrictions, and the following terms and conditions shall govern the treatment of Confidential Information:

(1) Confidential Information. “Confidential Information” refers to any information, document, or other material that the designating party reasonably and in good faith believes constitutes or reflects trade secrets; any information, document, or other material that petitioner or any of its affiliates is required to maintain in secrecy; or any information, document, or other material the confidentiality of which is otherwise protectable under applicable law. Confidential Information would include, but not be limited to, non-public

information, documents, or other materials containing details related to the business, operations, or financial position of petitioner and/or any of its affiliates; and third-party contracts and agreements entered into by petitioner and/or any of its affiliates.

(2) Designation of Confidential Information for Discovery Purposes.

(a) A party producing any information, document, or other material described in paragraph 1 shall give notice thereof by labeling such information, document, or other material as follows: "CONFIDENTIAL FOR DISCOVERY PURPOSES: SUBJECT TO PROTECTIVE ORDER."

(b) Within 15 days of production, any party to this Protective Order may advise the other party that information inadvertently or unintentionally disclosed is to be designated as Confidential under the terms of this Protective Order.

(c) The designating party bears the burden of asserting and establishing the confidential nature of the information it seeks to protect with respect to each of its designations.

(d) Each party has the right to object to the other party's designation at any time, including after trial. If the non-designating party disputes the classification, the parties shall confer in good faith. If the parties are unable to agree as to whether the document or information is properly designated as Confidential Information, the designating party may file an appropriate motion with the Court. Until a resolution of the dispute is achieved either through consent or by an Order of the Court, the parties shall treat the designated document or information as Confidential Information.

(3) Use of Confidential Information. Anyone who is provided with access to Confidential Information under this Protective Order shall use such information solely in connection with these consolidated cases, 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 at Mayer Brown LLP and the Internal Revenue Service and the Chief Counsel's Office (including other attorneys, paralegals, agents, specialists, clerical assistants, and other staff personnel (collectively, "staff personnel")) (or, in the event of an appeal in this case, the Department of Justice) who require access for the purpose of representing any party in these consolidated cases.

(b) Named parties. The named parties in these consolidated cases.

(c) Experts and consultants. Outside experts and consultants and their personnel (including associates, clerical assistants, and other staff personnel) contacted in connection with these consolidated cases; however, respondent must provide notice to petitioner before providing access to Confidential Information to any expert or consultant who is currently an employee of any competitor of petitioner. (This notice requirement does not 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 petitioner, as long as she or he is not currently an employee of any such competitor.)

(d) Witnesses. Witnesses or potential witnesses who may have knowledge relevant to the issues in these consolidated cases; however, respondent must provide notice to petitioner before providing access to Confidential Information to any witness who is currently an employee of any competitor of petitioner. (This notice requirement does not include any witness who may have, or have had, an independent consultant contractor contract with any competitor of petitioner, as long as she or he 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 these consolidated cases.

(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.

(5) Non-Waiver of Confidentiality or Objection to Production. Review of Confidential Information by any person identified 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 Protective Order. Each person who is permitted access to Confidential Information under paragraph 4 above, except (a) the Court and its personnel and (b) any party's attorneys of record, shall first be shown a copy of this Protective Order, be advised of the obligation to honor the confidentiality designation, and sign the Agreement To Comply With Protective Order ("Agreement") that is attached. Any attorney of record in this action who provides such access to any such person shall retain that person's signed Agreement in her or his files during the pendency of these consolidated cases, and upon request shall make the signed Agreement available for inspection by the Court.

(7) In Camera Disclosures. *In camera* disclosure of Confidential Information shall not be deemed a waiver, in whole or in part, of any party's claim of confidentiality.

(8) Inadvertent Disclosure of Privileged Information. In the interest of expediting discovery in these consolidated cases 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 protection 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's becoming aware that she or he has received such documents that clearly were inadvertently produced, or upon a request made by the 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 protection. 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 producing party in writing of that objection and specifying the produced material to which the objection is made. The parties shall confer within 15 days of service of any written objection. If the objection is not resolved, the producing party shall, within 15 days of the conference, file and serve a motion to resolve the dispute. If a motion is filed,

information subject to the dispute shall be treated consistently with the 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 the disclosure of Confidential Information shall be attended only by those persons entitled to receive such Confidential Information pursuant to this Protective Order; however, this shall not be construed to allow any such person to attend a deposition that she or he 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 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 30-day period expires, the entirety of such transcripts and all exhibits thereto shall be treated as Confidential and subject to this Protective Order. After such 30-day period expires, such transcripts, exhibits, or portions thereof designated as Confidential shall be treated as such under this Protective Order. If no such designation is made within 30 days, such transcripts or exhibits shall not be subject to this Protective Order, except for good cause shown by the designating party.

(10) Filing with the 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, motions, 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 the 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 Protective Order of the Court, dated _____, this envelope containing the above-captioned 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) Return of Confidential Information upon Termination. Within 90 days of the termination of these consolidated cases, whether by an Order of the Court, 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. Any attorney of record 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 Protective Order, and the obligation to keep Confidential Information confidential, shall survive the final termination of these consolidated cases.

(12) 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 Protective Order.

(13) Waiver of Privilege and Admissibility. Nothing in this Protective Order shall be deemed a waiver of any type of privilege applicable to any type of information in these consolidated cases or in any other action or proceeding. Nothing in this Protective Order shall be construed to affect the evidentiary admissibility of any Confidential Information.

(14) Use of Documents Acquired Lawfully or through Other Litigation. This Protective Order shall not prevent any persons bound hereby from making use of any document or information without the restrictions of this Protective Order if the document or information came into their possession lawfully or through discovery in 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 conclusion of any appeal therefrom) where the document or information was deemed to not be confidential.

(15) 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 Protective Order for her, his, or its discovery material or testimony by following the procedures provided herein. This Protective Order shall be binding on such non-parties unless

they object to its terms within ten (10) days of service upon them of this Protective Order.

(16) 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 Protective 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.

(17) Modification. This Protective Order shall not prevent any party from applying to the Court for modification of the Protective Order or for further relief.

(18) Failure to Comply. Failure to comply with this Protective Order shall be a basis for appropriate relief.

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

**(Signed) David Laro
Judge**

Dated: Washington, D.C.
November 21, 2013

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AGREEMENT TO COMPLY WITH PROTECTIVE ORDER

I hereby acknowledge and affirm that I have read the terms and conditions of the Protective Order entered by the Court in these consolidated cases. I understand the terms of the Court’s Protective Order and under oath consent to be bound by the terms of that Protective 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 Protective Order ("Agreement"), I hereby consent to the jurisdiction of the Court for the special and limited purpose of enforcing the terms of the Protective Order.

I recognize that any breach of this Agreement may be punishable as a contempt of court. All civil remedies, except those for monetary 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.

(Signature)

(Name)

