UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTUITIVE SURGICAL, INC., Petitioner,

v.

ETHICON LLC, Patent Owner.

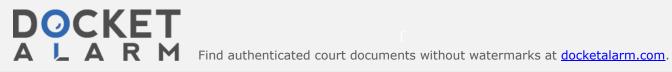
IPR2018-01254 U.S. Patent No. 8,479,969

PATENT OWNER'S MOTION TO SEAL



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I. INTRODUCTION

At Petitioner's (Intuitive) request, Patent Owner (Ethicon) moves to seal portions of Exhibit 2026 pursuant to 37 C.F.R. §§ 42.14 and 42.54. Petitioner has also requested that certain portions of Patent Owner's Sur-Reply that rely on Ex. 2026 be sealed. Patent Owner is not in a position to provide a basis for sealing Ex. 2026 or Patent Owner's Sur-Reply. See 37 C.F.R. § 42.14 (providing for provisional sealing).

By agreement of the parties, Patent Owner also requests entry of the Proposed Protective Order (Attachment 1).² Patent Owner has conferred with Petitioner, and the parties have stipulated to the Proposed Protective Order.

² Attachment 2 is a redline showing the differences between the proposed protective order and the PTAB default protective order.



¹ Petitioner is in the best position to explain why it believes the documents are and should remain confidential. *RPX Corp. v. Applications in Internet Time, LLC*, IPR2015-01750, Paper 42 at 2 (P.T.A.B. January 26, 2016) (clarifying who should move to seal).

II. REASONS FOR THE REQUESTED RELIEF AND STATEMENT OF FACTS

A. Good Cause Exists for Sealing Confidential Information

The Board will seal documents for good cause. See 37 C.F.R. § 42.54(a); see also Argentum Pharms. LLC v. Alcon Research, Ltd., Paper 27, 2 (2013). "The rules aim to strike a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information." Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48760 (2012). The public's interest in having access to confidential business information that is only indirectly related to patentability is "minimal." Garmin v. Cuozzo, IPR2012-00001, Paper 36, 8-9 (2013) (granting a motion to seal an agreement relating to the "commercializ[ation]" of the patent-at-issue). Such documents should be subject to the Proposed Protective Order. See Attachment at 5 ("Information designated as confidential that is disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as "PROTECTIVE ORDER MATERIAL" and shall be produced in a manner that maintains its confidentiality.").

B. Ex. 2026: Deposition Transcript from Co-Pending Litigation

Exhibit 2026 includes excerpts of deposition testimony from the co-pending litigation between Patent Owner and Petitioner. As noted above, Patent Owner is not in a position to make the necessary representations about why Ex. 2026 may



warrant sealing. At Petitioner's request, however, Patent Owner has filed Ex. 2026 under seal.

C. Sur-Reply

Patent Owner's sur-reply refers to Ex. 2026. Again, Patent Owner is not in a position to make the necessary representations about why discussion of Ex. 2026 might warrant sealing portions of Patent Owner's sur-reply. At Petitioner's request, however, Patent Owner has filed these documents under seal. Public, redacted versions of these documents have also been filed by Patent Owner.

III. CERTIFICATION OF NON-PUBLICATION

As noted above, Patent Owner is not in a position to make the necessary representations about Ex. 2026 or the portions of Patent Owner's sur-reply that refer to it. Any certification regarding Ex. 2026 and the sur-reply references to Ex. 2026 will need to be provided by Petitioner in any supplemental motion to seal that Petitioner may file.

IV. CONCLUSION

Patent Owner respectfully requests that the Board grants its motion to seal Ex. 2026 and Patent Owner's sur-reply, which references Ex. 2026, with the understanding that Petitioner may file a supplemental motion demonstrating that this information warrants sealing. If the Board is not inclined to grant the motion to seal due to some deficiency in this motion, Patent Owner respectfully requests leave to file another motion to seal to correct that deficiency.



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