

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ETHICON LLC, ETHICON ENDO-)
SURGERY, INC., and ETHICON US LLC,)

Plaintiffs,)

v.)

Civil Action No. 17-871-LPS-CJB

INTUITIVE SURGICAL, INC.,)
INTUITIVE SURGICAL OPERATIONS,)
INC, and INTUITIVE SURGICAL)
HOLDINGS, LLC,)

Defendants.)

MEMORANDUM ORDER

Presently pending before the Court is Defendants Intuitive Surgical, Inc., Intuitive Surgical Operations, Inc. and Intuitive Surgical Holdings, LLC’s (collectively, “Intuitive”) motion for relief against Plaintiffs Ethicon LLC, Ethicon Endo-Surgery, Inc. and Ethicon US LLC (collectively, “Ethicon”), requesting that the Court: (1) grant third-party Springhill Consulting Group, Inc. (“Springhill”) an extension of time until January 2019 to respond to Intuitive’s subpoena and compel Ethicon to provide Rule 30(b)(6) testimony on Springhill’s work for Ethicon; and (2) grant third-party Covidien LP (“Covidien”) an extension of time until December 31, 2018 to respond to Intuitive’s subpoena. (D.I. 227) The Court,¹ having considered the parties’ letter briefs, (D.I. 231, 234), and having heard argument on the motion on December 17, 2018, hereby ORDERS as follows:

1. Each of Intuitive’s requests would involve a modification to the currently-operative scheduling order. The Federal Rules of Civil Procedure provide that “[a] schedule may

¹ This case has been referred to the Court to hear and resolve all discovery disputes. (D.I. 48)

be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Good cause exists when the schedule "cannot reasonably be met despite the diligence of the party seeking the extension." *Id.*, advisory committee's note to 1983 amendment; see also *ICU Med., Inc. v. RyMed Techs., Inc.*, 674 F. Supp. 2d 574, 577 (D. Del. 2009).

2. Intuitive's requests relating to Springhill are DENIED. Ethicon produced to Intuitive documents relating to ██████████ in August 2018. (*See* D.I. 231 at 1) Although the documents themselves clearly demonstrated the importance of ██████████ Intuitive did not attempt to serve Springhill with a third-party subpoena until November 21, 2018, following the deposition of Paul Ritchie, Ethicon's Vice President for business development related to surgical robotics. (*Id.* at 1-2) Ritchie's deposition was the first time that Intuitive questioned any of Ethicon's witnesses regarding ██████████, despite having previously deposed: (1) Nitin Jain, the designated custodian for a majority of the documents at issue; and (2) Jeff Swayze, the individual designated for Intuitive's topic concerning "Ethicon's knowledge or analysis of the products or product development efforts of Intuitive, including but not limited to, any competitive testing, analysis or evaluation of Intuitive's products." (D.I. 234 at 2) In its discovery dispute letter, Intuitive made one (very brief) argument as to why it had been diligent with regard to its seemingly late requests related to Springhill: Intuitive asserted that while "[t]he [Springhill] exhibits marked at Ritchie's deposition were produced in August . . . it was *Ritchie's testimony that made clear the importance of ██████████*." (D.I. 231 at 3 (emphasis added)) In the letter, Intuitive failed to further explain how it was that Ritchie's deposition testimony (as opposed to the Springhill documents themselves, which Intuitive had had for months) was the thing that first highlighted to Intuitive the importance of ██████████ And Ritchie's deposition testimony did not make

this any clearer, since “the majority of Intuitive’s questions [to Ritchie during the deposition] simply involved . . . Ritchie confirming information contained on the face of [the Springhill] documents that Ethicon produced during discovery.” (D.I. 234 at 3; *see also* D.I. 231, ex. A) Indeed, during the discovery dispute teleconference, Intuitive abandoned this diligence argument, and instead put forward a *new* argument: it now asserted that because Ethicon produced the Springhill-related documents in August along with 100,000 other documents, it had simply taken time for Intuitive to actually find and review the Springhill documents (and to learn of the documents’ importance). Intuitive’s sparse, shifting explanations as to its diligence has resulted in its failure to establish the requisite good cause needed to justify a modification of the scheduling order. Thus, the Court will not grant its request to: (1) permit Springhill an extension of time to respond to the subpoena or (2) compel Ethicon to provide Rule 30(b)(6) testimony regarding Springhill.

3. Intuitive’s request that the Court grant third-party Covidien an extension of time to December 31, 2018 to respond to the subpoena is GRANTED. With respect to this issue, Intuitive has shown that it has diligently worked with Covidien to identify relevant prior art products and systems. (D.I. 231 at 4 & ex. P) After learning in November 2018 that Covidien had documents concerning the relevant SurgAssist product, Intuitive immediately acted to obtain more information about that product. (*Id.* at 4) Although Ethicon asserts that Intuitive has known about the SurgAssist since 2009, (D.I. 234 at 5), the record does not demonstrate that Intuitive should be faulted for failing to identify the product as a prior art system any sooner than it did. Accordingly, there is good cause to modify the Scheduling Order with respect to this issue.

4. Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the document. Any such redacted version shall be submitted by no later than **December 21, 2018** for review by the Court, along with a motion for redaction that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

Dated: December 19, 2018



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE