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Düsseldorf local division
UPC_CFI_1532/2026

Order

of the Court of First Instance of the Unified Patent Court,
Düsseldorf local division
issued on 5 November 2026

HEADNOTE

It constitutes an undue delay for the applicant, instead of promptly undertaking a limited investigation that would have been sufficient to assess infringement of the patent in suit, to conduct more extensive and time-consuming investigations that were not necessary for determining infringement of the patent in suit before filing its application for interim measures.

HEADNOTE

It constitutes an undue delay if, instead of promptly carrying out a limited investigation that would have been sufficient to assess infringement of the patent in suit, the applicant instead conducts time-consuming, in-depth investigations that are not necessary for determining infringement of the patent in suit before filing its application for provisional measures.

KEYWORD

Urgency; necessity; preliminary injunction

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APPLICANT

Cilag GmbH International, Gubelstraße 34, 6300 Zug, Switzerland,

represented by: Prof. Dr Tilman Müller-Stoy, Attorney-at-law
Dr Michael Kobler, Patent Attorney Dr Maximilian Vieweg,
Bardehle Pagenberg Partnership mbB,
Prinzregentenplatz 7, 81675 Munich

RESPONDENTS

1) **RiVOLUTION GmbH**, Innaustraße 11, 83026 Rosenheim, Germany,

First Respondent),

2) **Shanghai International Holding Corporation GmbH (Europe)**, Eiffestraße 80, 20537 Hamburg, Germany

Defendant 2),

represented by: Dr Peter Koch, Attorney-at-law, Penforce, Gabelbergerstr. 9, 80333 Munich

PATENT APPLICATION

EP 2 349

022

CHAMBER

Panel 2 of the Düsseldorf local division

DECIDING JUDGES

The order was issued by the presiding judge Dr Thom, the legally qualified judge Dr Rinken and the legally qualified judge Adocker, acting as judge-rapporteur.

LANGUAGE OF THE PROCEEDINGS

German

SUBJECT MATTER OF THE PROCEEDINGS

Application for provisional measures – Section 32(1)(c), Section 62(1), Section 67 UPC Agreement, Rule 206.1 of the RoP in conjunction with Rule 211.1 of the RoP

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ORAL HEARING

18 September 2026

BRIEF SUMMARY OF THE FACTS

1. The applicant bases its application for provisional measures on European Patent EP 2 349 022 B1 (hereinafter also
the 'patent in question'), which protects surgical cutting and stapling instruments. This was filed on 9 October 2009, claiming priority from 10 October 2008. The application underlying the patent in question was published on 3 August 2013. The notice of the grant of the application patent as a European patent was published on 6 June 2018; it is in force in Germany, France and Italy (Annexes BP 3 and BP 4). In the German and French registers, the applicant was already registered as the proprietor at the time the application for provisional measures was filed; at that time, an application for transfer of title to the applicant had already been filed in the Italian register, on the basis of which the registration took place even before the oral hearing.

2. No preliminary objections have been filed against the patent in question, nor are any nullity proceedings pending.

3. Claim 1 of the patent in question relates to the manual return mechanism of a surgical instrument for cutting and stapling tissue, comprising an end effector, a drive shaft and a motor. The return mechanism allows the surgeon to move the advanced drive shaft back, particularly if the motor (or its power source) fails. The objective task is to improve safety during surgery.
.

4. To solve the aforementioned problem, the patent application proposes a surgical instrument having the features set out in its sole independent claim 1. Claim 1 can be structured as follows:

1 A surgical cutting and fastening device, comprising

2 an end-effector comprising a movable cutting element for cutting an object disposed within the end-effector;

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3 a drive shaft operatively connected to the cutting element;

4 a motor selectively engageable with the drive shaft; and

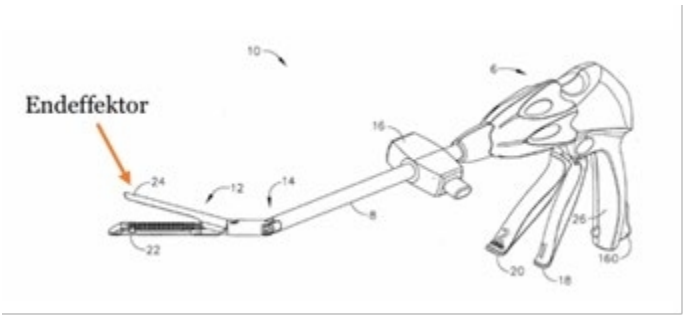
5 a return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is configured to move the drive shaft when the return actuator is moved in the first direction

characterised in that

5.1 the return actuator is configured to operatively disengage the motor from the drive shaft when the return actuator is moved in the first direction, and

5.2 further comprising a pinion operatively engaged with the motor, wherein the pinion is displaceable away from the drive shaft to operatively disconnect the motor from the drive shaft.

5. Figures 1 and 2 of the patent application show such a surgical instrument for cutting and stapling tissue (feature 1 with an end effector at the distal end of the instrument (i.e. away from the surgeon holding the handle, cf. para. [0009]):



6. Respondent 1) is a German distribution company based in Rosenheim which distributes products from various companies in Germany. These products include, amongst others, stapling instruments from the Chinese manufacturers Ningbo David Medical Device Co., Ltd. and Ningbo Verykind Medical Device Co., Ltd. (hereinafter collectively referred to as 'David Medical').

7. In November 2024, the first respondent announced the termination of its 'BARIATRIC

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CONCEPT by RiVOLUTION', which, amongst other things, included the 'EnDrive Beluga' instruments manufactured by David Medical.

8. As part of the 'BARIATRIC CONCEPT by RiVOLUTION' study, the first respondent markets in Germany the 'EnDrive Orca', which has replaced the 'EnDrive Beluga', and also the 'EnDrive Zero' (hereinafter also 'contested variants'). For these purposes, it also imports the aforementioned items from the Chinese manufacturers into Germany and holds them here.

9. The second respondent is listed as the authorised representative ('EU REP') on the back of the packaging of the 'EnDrive Orca' and the 'EnDrive Zero'. It is also listed as the authorised representative in the European Database on Medical Devices (EUDAMED). The appointment of such an authorised representative by the manufacturer is required under Article 11(1) of the European Medical Devices Regulation (Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, EU Medical Devices Regulation) when a medical device not manufactured in an EU Member State is to be placed on the market in the EU.

10. In any event, the 'EnDrive Orca' product is also offered and distributed by the Chinese manufacturers in France (by the French company Echovitalis SAS) and in Italy.

11. The 'EnDrive Orca' and 'EnDrive Zero' products are both single-use, battery-powered endoscopic cutting and stapling instruments ('Disposable Powered Endoscopic Linear Cutting Stapler').

Image of the *'EnDrive Orca*':



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Image of the *'EnDrive Zero*':



12. With regard to a predecessor product from David Medical known as 'EnDrive Beluga', the Munich I Regional Court issued two interim injunctions in favour of the applicant's legal predecessor, together with a seizure order against David Medical, on the grounds of infringement of the German part of a European patent (EP 2 621 360 B1) through its sale at the MEDICA 2024 trade fair, which took place in Düsseldorf from 11 to 14 November 2024.

13. In a letter dated 26 March 2025 (Exhibit AG 9), the applicant pointed out to the first respondent that the predecessor product 'EnDrive Beluga' potentially infringed further patents. The patent in question is explicitly mentioned in this letter.

14. Furthermore, in 2025, the applicant, together with its legal predecessor Ethicon LLC, filed two applications for provisional measures against the first respondent: on 25 April 2025, an application for provisional measures concerning European Patent EP 3 689 262 (staple cartridges) at the The Hague local division (Case No.: UPC_CFI_374/2025) and, on 29 April 2025, a further application for provisional measures concerning European Patent EP 2 515 768 (surgical stapling instrument) with the Munich local division (Ref.: UPC_CFI_381/2025).

15. By decision of 6 August 2025, the Munich local division issued a provisional injunction against the first respondent for infringement of European Patent EP 2 515 768 on the grounds of the sale of the 'EnDrive Beluga'. The further application concerning infringement of European Patent EP 3 689 262 was dismissed by the Hague local division on 29 August 2025 on the grounds of lack of urgency, although the court clarified during the oral hearing that it regarded the patent at issue there as valid and infringed.

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16. The representative of the first respondent mentioned during the proceedings in case UPC_CFI_381/2025 at the oral hearing before the Munich local division in August 2025 that David Medical was already in the process of providing a successor product which would no longer infringe the patent in question, and that it would only take a few months to replace the infringing product ('EnDrive Beluga') with the successor product.

17. [redacted]

18. Despite repeated requests, the first respondent did not provide the claimant with a sample of the modified versions.

[redacted]ew instrument itself. This proved difficult due to David Medical's tightly controlled distribution structure. It was not until 13 February 2026 that the claimant became aware of a source of supply (Exhibit BP 2).

19. The subsequent steps were as follows (Exhibit BP 2):

On 20 February 2026, the items potentially infringing the patent were ordered. On 6 March 2026, the applicant received the relevant samples. It then commissioned an analysis of the items in the USA at the campus of the group to which the applicant belongs. The analysis began on 18 March 2026. Various in-depth examinations, such as CT scans, were carried out on the dismantled instruments. On 2 April 2026, the applicant received the results of the examination. In the applicant's view, the final determination of an infringement was made on 9 April 2026. The application for provisional measures was then filed on 4 May 2026.

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APPLICATIONS OF THE PARTIES

20. The applicant requests:

A. That the first respondent be ordered to refrain from and desist from

surgical cutting and fastening devices comprising

an end-effector comprising a movable cutting element for cutting an object positioned within the end-effector;

a drive shaft operatively connected to the cutting element;

a motor that can be selectively engaged with the drive shaft; and

a return mechanism comprising a return actuator movable in a first direction, the return actuator being configured to move the drive shaft when the return actuator is moved in the first direction,

to be offered, placed on the market, used, imported or possessed in the Federal Republic of Germany for the aforementioned purposes,

characterised in that the return actuator is designed to functionally disconnect the motor from the drive shaft when the return actuator is moved in the first direction,

and further comprising a pinion operatively engaged with the motor, wherein the pinion is displaceable away from the drive shaft to operatively disconnect the motor from the drive shaft.

(direct infringement of claim 1 of EP 2 349 022)

B. The second defendant is ordered to refrain from providing its services as an ‘authorised representative’ in such a way that the acts referred to in paragraph A are carried out by the first defendant and/or Ningbo David Medical Device Co., Ltd. and/or Ningbo Verykind Medical Device Co., Ltd. in the Federal Republic of Germany, in France

and in Italy;

in particular, the second respondent is ordered to declare to the competent authorities that, with regard to the products covered by Section A, it will no longer act as an ‘authorised representative’ for Ningbo David Medical Device Co., Ltd. or Ningbo Verykind Medical Device Co., Ltd. in the Federal Republic of Germany, in France and in Italy.

C. In the event of any breach of the order set out in paragraph A. or paragraph B., the respective respondent shall pay a penalty payment (which may be repeated) to the court, amounting to up to EUR 250,000 per breach (Rule 354.3 of the RoP).

D. The respondents are provisionally ordered to reimburse the costs.

E. This order is immediately enforceable.

Ea. In the alternative to D:

This order shall be enforceable against the applicant only if the applicant has provided security in favour of the respective respondent in the form of a deposit or a bank guarantee. The amount of the security shall be determined separately in respect of each respondent.

21. The respondents apply

(1) that the application for provisional measures dated 4 May 2026 be dismissed;
– in the alternative –
(2) to make the issuance of provisional measures conditional upon the applicant providing security, the amount of which is to be determined by the court but should not be less than EUR 5,000,000;

(3) to order the applicant to bear the costs of the proceedings;

(4) and to order the applicant to pay the respondents provisional costs of EUR 30,851.20 within 30 days of the decision being served on the applicant;

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(5) to stay the proceedings against the second respondent;

(6) in the event that the court seised affirms the second respondent's standing to be sued, that the court should determine whether an authorised representative within the meaning of the Medical Devices Regulation (Regulation (EU) 2017/745)) can be regarded as an intermediary within the meaning of the UPC Agreement solely on the basis of the fulfilment of the duty incumbent upon him under the Medical Devices Regulation, in accordance with Article 267 TFEU and Article 21 UPC Agreement, to the Court of Justice of the European Union for a preliminary ruling.

22. At the oral hearing, the parties agreed that the recoverable costs would be mutually recognised, subject to the order for costs in accordance with Rule 118.5 of the RoP, up to an amount of EUR 50,000.00.

FACTUAL AND LEGAL ISSUES

1. Standing to bring proceedings

23. The *applicant* takes the view that it has standing to bring proceedings. It is registered in the DPMA register as the proprietor of the German part of the patent in application, so that the presumption under Rule 8.5(c) of the RoP applies. The same applies to the French part of the patent in application. With regard to the Italian part, an application for transfer of ownership had already been filed at the time of the application for provisional measures (Exhibit BP 12); as stated at the oral hearing, the transfer of ownership to the applicant has since been completed in respect of the Italian part as well, meaning that the presumption also applies to the Italian part. The patent in question, which was (undisputedly) granted in the name of Ethicon LLC, Puerto Rico, United States (hereinafter: 'Ethicon LLC'), as the applicant (Exhibit BP 4), was assigned by the latter, together with all claims arising therefrom, to the applicant by means of a Patent Assignment Agreement (PAA) "PAA") with an "Effective Date" of 5 April 2021 (Annex BP 5, BP 5a). In the alternative, Ethicon LLC granted the applicant standing to sue (Annexes BP 6 and BP 6a).

24. Furthermore, both the Munich local division in proceedings UPC_CFI_381/2025 and the Hague local division in proceedings UPC_CFI_374/2025 confirmed the validity of the assignment of the respective

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patent-in-suit and the associated claims on the basis of the PAA.

25. In their pleadings, the *respondents* argue that the applicant is not registered as the proprietor of the Italian part of the patent in question. The registration, which had taken place in the meantime and was referred to by the applicant at the oral hearing, was not contested by the respondents.

26. Furthermore, the respondents contest the lawful assignment of the patent in question by the PAA. It follows from the claimant's submissions that the PAA was subject to 'conditions and prerequisites'. It is disputed that these prerequisites were met. In addition, the authority of the signatories to the PAA to act on behalf of the party is disputed. This is also disputed with regard to a subsidiary claim for retrospective approval.

2. Standing to be sued

27. The *claimant* argues, with regard to the standing to be sued of the second respondent, that the first respondent could not place the infringing products on the market in the EU without the cooperation of the second respondent. In this respect, the actions of the second respondent are comparable to those of an online service provider. In this regard, the claimant refers to the reference decision of the Court of Appeal dated 6 March 2026, UPC_CoA_789/2025 and UPC_CoA_813/2025, paras. 30 and 31 –
Dyson v Dreame. With regard to the respondents' applications, the claimant states that, in any event, a stay of proceedings pending a decision by the ECJ would only be considered in so far as claims are brought against the second respondent.

28. The *respondents* state, on the issue of standing to be sued, that the second respondent does not itself carry out the acts referred to in Article 25 of the UPC Agreement. Liability as a co-perpetrator is ruled out due to the absence of a joint plan, as is attribution of liability as an accessory due to a lack of knowledge. Nor can liability arise as an intermediary within the meaning of Article 63(1), 62(1) of the UPC Agreement. Similar to a managing director, the mere position does not lead to the person being classified as a co-perpetrator. Liability on the part of the managing director is ruled out if the latter has no control whatsoever over the acts; the respondents refer in this regard to UPC_CoA_683/2024; UPC_CoA_19/2026, UPC_CoA_534/2024 – Belkin v Philips). In her capacity as an authorised representative pursuant to Article 11(1) of the European Medical Devices Regulation (Regulation (EU) 2017/745), the second respondent is the point of contact for the authorities, but

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carry out no specific acts that are intrinsically linked to the patent infringement or constitute constitute an adequate causal contribution to the infringement.

29. The question of whether the authorised representative, who merely ensures compliance with certain laws and is in practice unable to control the alleged infringement by the third party, is nevertheless liable as an intermediary for patent infringements was recently referred to the European Court of Justice for clarification by the Court of Appeal (UPC_CoA_789/2026 and UPC_CoA_813/2025 – Dyson v Dreame) has recently referred this question to the Court of Justice of the European Union for clarification. Against this background, the respondents propose that the proceedings be stayed pending the decision of the Court of Justice of the European Union or that a reference be issued to the Court of Justice of the European Union.

3. Infringement

30. The *claimant* takes the view that both the *'EnDrive Orca'* product and the *'EnDrive Zero'* product from David Medical – which are offered and distributed in Germany by the first respondent and for which the second respondent acts as authorised representative in accordance with the EU Medical Devices Regulation – fulfil all the features of the patent in suit.

31. In particular, feature group 5 is also realised, namely the presence of a

5 return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is designed to move the drive shaft when the return actuator is moved in the first direction

characterised in that

5.1 the return actuator is configured to functionally disconnect the motor from the drive shaft when the return actuator is moved in the first direction, and

5.2 further comprising a pinion operatively engaged with the motor, wherein the pinion is slidable away from the drive shaft to operatively disconnect the motor from the drive shaft.

32. In particular, it is irrelevant whether the return actuator

is an integral part of the claimed device. Neither the wording nor the function of feature 5, in solving the technical problem of the patent application, requires that the return actuator be formed as a single piece with the surgical instrument. The subject-matter of the patent application relates to a safety function in that it allows the surgeon to move the advanced drive shaft back in the event of motor failure. This function is only required in exceptional circumstances and, consequently, it would, on the contrary, be natural not to form the return actuator as an integral part of the instrument, but rather as an 'add-on'. Furthermore, the description of the patent application expressly mentions the possibility of an integral design for other elements (the carriage, in paragraph [0022], drive shaft, in paragraph [0074], and pinion, in paragraph [0075]) – the fact that this is not provided for in the wording of the claims with regard to the return actuator also argues against the return actuator being designed as an integral part of the instrument.

33. The fact that the rotary knob of the infringing products is not supplied in an assembled state does not, for legal reasons, preclude infringement, as the simultaneous offering and supply of individual parts of a complete device is regarded as direct patent infringement. In this respect, the respondents are taking advantage of the fact that the rotary knob is fitted by their customers.

34. Furthermore, there is only a single direction of movement for the return actuator itself; the direction of movement of other elements of the return mechanism is irrelevant to the realisation of feature group 5.

35. The *respondents* contend that the contested embodiments do not make use of the subject-matter of the teaching set out in the claimed patent.

36. In particular, the respondents argue that feature group 5 is not fulfilled in the contested products. The rotary knob enclosed with the packaging is a separate tool key and not an integral part of the surgical cutting and fastening device. The claim requires that the surgical cutting and fastening device comprise various components which form an integral part of that device and do not merely need to be optionally added.

37. Furthermore, contrary to feature 5, the contested products do not have a single direction in which the return actuator is moved, but rather two different directions: namely, a first direction for moving the rack and a second direction for decoupling the motor from the

rack, the second direction being different from the first direction. Consequently, the contested products lack the claimed mobility in a first direction and the associated configuration of the return actuator, which, in mechanical interaction with the first direction, causes both the movement of the drive shaft (feature 5) and the decoupling of the motor from the drive shaft (features 5.1 and 5.2.1), with the result that feature group 5 is not realised.

4. Validity

38. The *respondents* take the view that the subject-matter of the patent in suit is, on the one hand, inadmissibly broadened. The term 'return actuator' in feature 5 is disclosed neither in the description of the patent in suit nor in the description of the original application WO 2010/042786 A2, but only in the original claims 17 and 24. Whilst claim 1, as granted, requires immediately, directly and unambiguously that the return actuator is movable in a first direction, whereby
(1) the return actuator is designed to move the drive shaft when the return actuator is moved in the first direction, and (2) the return actuator is designed to functionally disconnect the motor from the drive shaft when the return actuator moves in the first direction, claim 17 does not, in fact, provide this unambiguity. It leaves open, with regard to the disengagement from the drive shaft, whether this is effected exclusively when the return actuator is moved in the first direction, as required by granted claim 1.

39. Furthermore, all the features of claim 1 of the patent in application are pre-empted by WO 2006/005342 A1 (Annex AG5) in a manner detrimental to novelty.

40. Furthermore, claim 1 of the patent in suit lacks an inventive step when based on document US 2008/245842 A1 in combination with prior art from US 5421555 A or with WO 2008118707 A2.

41. The *applicant* is of the view that the legal position is sufficiently secure. The objections raised by the respondents are unfounded.

42. With regard to the issue of impermissible extension, the applicant argues that, given the wording of the original claim 17 and its grammatical structure, a person skilled in the art would unambiguously understand it to mean that the effect of the motor decoupling is linked to the movement of the return actuator in the first direction

is linked, so that there is no unauthorised extension.

43. Novelty over WO 2006/005342 A1 (Annex AG5) is established because, in any event, that document lacks the features

1 surgical cutting and fastening device and

5 a return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is configured to move the drive shaft when the return actuator is moved in the first direction

characterised in that

5.1 the return actuator is configured to functionally disconnect the motor from the drive shaft when the return actuator is moved in the first direction, and

5.2 further comprising a pinion operatively engaged with the motor, wherein the pinion is slidable away from the drive shaft to operatively disconnect the motor from the drive shaft.

were not disclosed.

44. Inventive step is also present. The respondents' arguments on this point oversimplify the distinguishing features, formulate the objective technical problem in an impermissibly narrow manner from a retrospective perspective, and rely on a document from outside the relevant technical field (US5421555) or a document from a remote technical field (WO 2008118707 A2), which a person skilled in the art would have had no reason whatsoever to consult. Furthermore, the document US 2008/245842 A1 had already been taken into account by the examiner during the grant procedure and had been expressly acknowledged in the patent application. The subject-matter of claim 1 of the patent application had correctly been deemed to be inventive in relation to US842. Nor did the additional consideration of US555 and WO707 alter this conclusion.

5. Urgency

45. The *applicant* submits that the application for provisional measures

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is also time-sensitive. It faces the risk of substantial damage if it were only able to enforce its claims for an injunction in proceedings on the merits. The application was filed at the earliest possible opportunity and without culpable delay (Rule 211(4) of the RoP). The applicant only gained reliable knowledge of the infringement of the patent in suit a few weeks before filing the application for provisional measures, namely upon confirmation of the implementation of claim 1 of the patent in suit on 9 April 2026. The earlier proceedings between the parties concerned technical aspects of predecessor products which had nothing to do with the subject-matter of the patent in question: EP 2 515 768 relates to the delayed activation and deactivation of a switch, and EP 2 837 262 relates to a staple magazine.

46. The claimant further submits that [redacted] it would therefore first have had to obtain the physical infringing articles in order to assess whether an infringement had taken place, which, due to the refusal of the first respondent to make such items available, and the defendants' tightly controlled distribution structure, meant that it was only on 13 February 2026, after numerous attempts, that a possible source of supply was identified, from which an order was then placed on 20 February 2026. It was then necessary to examine the items in depth in the USA in order to assess whether the patent in suit had been infringed; only then would it have been possible to prepare and file the application for provisional measures.

47. The *respondents* claim that the applicant could already have asserted that the patent in question was infringed by the 'original form of infringement' (the product
'EnDrive Beluga'). The 'EnDrive Zero' is structurally identical to the 'EnDrive Beluga', which the applicant had already examined extensively in 2024/2025. The reset mechanism has not changed since then. Furthermore, the applicant's letter of 26 March 2025 (Exhibit AG 9), in which the respondents' representative was informed that the predecessor product 'EnDrive Beluga' potentially infringed further patents, explicitly mentions the patent in question. This shows that the applicant was apparently already aware at that time that there was a potential infringement of the patent in application by the predecessor product.

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48.  Furthermore, the new product ‘EnDrive Orca’ had been available on the market since 21 November 2026.

49. Furthermore, the respondents contend that the applicant has failed to put forward any substantiated arguments as to why an in-depth and time-consuming examination of the contested embodiments was necessary to assess whether there had been an infringement of the patent in question in the USA.

6. Objective necessity and balancing of interests

50. The *claimant* submits that, on weighing up the respective interests, the claimant’s interest in the issuance of provisional measures to safeguard its rights under the patent in suit prevails.

51. It is generally accepted that an injunction is, by its very nature, temporary in the event of its subsequent revocation. In principle, any act refrained from during the period in which the injunction is in force may be carried out retrospectively. In the case of a provisional injunction, therefore, prejudging the merits of the main proceedings is ruled out on its very basis, and the respondents’ interests are already reflected in this temporary restriction. Furthermore, a provisional injunction based on (monopoly) rights arising from a patent would, as such, entail economic disadvantages for the party subject to the injunction. This lies in the nature of patent law as a monopoly on invention. Economic disadvantages associated with an injunction could therefore, in principle, not be regarded as conflicting interests of the party subject to enforcement. Only if these economic disadvantages went beyond what is normal could they be taken into account at all in the context of the balancing of interests.

52. The applicant contends that no such economic disadvantages are apparent on the part of the respondents. In particular, the first respondent

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has no reason to fear any unreasonable disadvantages, as, being a distributor, it could easily switch to other, non-infringing products. By contrast, the applicant would face irreparable harm if it were required to await the decision on the merits: As the first respondent is under pressure to launch the successor product 'EnDrive Orca', which replaces the 'EnDrive Beluga', the applicant is in urgent need of the provisional measures sought. The conduct of the first respondent

1) does not suggest that it will, of its own accord, refrain from further acts of infringement in the future. In this respect, there is a serious risk that the applicants' sister company, 'J&J Medical', will suffer considerable losses in terms of order intake, turnover and overall market share as a result of the respondents' acts of infringement. Price erosion has already occurred on the market. Furthermore, the infringing products are clear copies of the J&J products apply. [redacted]

53. The *respondents* argue in this regard that the Hague local division of UPC, in the proceedings concerning UPC_CFI_374/2025, was not convinced that the facts (which were also put forward in the present proceedings) supported the existence of objective urgency. Furthermore, it is disputed that price erosion in the market has occurred as a result of the respondents' products. Moreover, the economic disadvantages alleged by the applicant apply equally to the respondents . [redacted]

7. Security

54. In the alternative, should provisional measures be issued, the *respondents* seek the imposition of a security deposit of 'not less than' EUR 5 million each. In the event of

enforcement, they would suffer lasting damage which would significantly impair their business. Even if this damage were predominantly reputational and indirect in nature (a decline in turnover from non-infringing products as a participant), a security deposit would enable them to obtain secure compensation from the claimant for the damage caused by the claimant's application. Even to date, the claimant has repeatedly attempted to stir up unrest and mistrust through deliberate misrepresentation and direct approaches to customers, thereby causing lasting damage to the respondents' reputation.

55. The *applicant* submits that the respondents have not provided a specific account of the damages suffered, nor have they explained why it would not be possible to obtain compensation from the applicant for any damages arising from enforcement proceedings. It is therefore argued that no security should be required.

8. Provisional reimbursement of costs

56. In support of their application for provisional reimbursement of costs, the *respondents* argue that a provisional order for costs may also be made in favour of a defendant, and refer to the case law of the Court of Appeal (UPC_CoA_317/2025, order of 28 November 2025, Barco v. Yealink, para. 96 et seq.).

57. The *applicant* argues that Rule 211.1(d) of the RoP permits an order for costs only in favour of the applicant, meaning that the respondents' application in this regard is inadmissible.

KEY PROCEDURAL STEPS

58. By order of 19 August 2026, the respondents' application of 10 August 2026 for a reduction in the number of documents, the document of the same date together with the annexes submitted in connection therewith, and the respondents' unsolicited Reply of 17 August 2026 were dismissed.

59. To avoid repetition, reference is made to the entire contents of the file.

REASONS FOR THE ORDER

60. The application for an order for provisional measures is admissible. However, it is unsuccessful on the merits due to a lack of urgency.

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I. (INTERNATIONAL) JURISDICTION OF THE DÜSSELDORF LOCAL DIVISION

61. The Düsseldorf local division has international jurisdiction and, pursuant to Article 33(1)(a) of the UPC Agreement, jurisdiction within the Court of First Instance.

62. The UPC has international jurisdiction over an infringement action if the European patent asserted by the claimant is in force in at least one Contracting Member State and the alleged damage may occur in that Contracting Member State (Article 31 UPC Agreement, Article 7(2) in conjunction with Article 71b(1) of the Brussels Ia Regulation, cf. the Court of Appeal's order of 3 September 2024 – UPC CoA 188/2024 – AYLO/DISH, GRUR-RS 2024, 29446). If
it is alleged that the damage was caused via the internet, the likelihood of such damage may arise from the possibility of purchasing products and/or using services from a website accessible within the territory of the Contracting Member State in which the European patent has effect (Court of Appeal, AYLO/DISH, cited above).

63. The contested embodiments are, amongst other places, offered and sold on the internet in Germany.

II. STANDING TO BRING PROCEEDINGS, STANDING TO BE SUED

64. In the present case, an assessment of both standing to sue and standing to be sued can be left open, as the application for provisional measures has already been issued and is unsuccessful on the merits due to a lack of urgency.

III. VALIDITY OF THE PATENT AND INFRINGEMENT OF THE PATENT IN QUESTION

65. In the present case, the assessment of whether it can be established with sufficient certainty that the applicant's rights are infringed by the offering and distribution of the contested embodiments can be left open, as the application for provisional measures has already been issued on the grounds of lack of urgency in the matter. For the same reasons, and as it is not relevant to the decision in the present case, there is no need for further detailed discussion of the legal validity of the patent in question.

IV. OBJECTIVE NECESSITY OF AN INJUNCTION

66. Pursuant to Article 62(2) of the UPC Agreement and Rule 211.3 of the RoP, it is within the court's discretion to weigh up the interests of the parties against

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one another and, in particular, potential damage that might be incurred by one of the parties as a result of the application being issued or dismissed. In doing so, the court must take into account not only the damage to one of the parties, but also the time factor. In particular, the court must assess whether proceedings on the merits can be awaited or whether provisional measures are necessary (Court of Appeal, UPC_CoA_540/2024, Order of 24 February 2024, Biolitec v Light Guide, para. 19). In this regard, Rule 206.2(c) of the RoP requires the applicant to set out in its application the reasons why provisional measures are necessary to prevent an imminent infringement, to prohibit the continuation of an alleged infringement, or to make such continuation conditional upon the provision of security. This concerns the merits of the application for provisional measures and must be taken into account by the court when issuing an order pursuant to Rule 211 of the RoP (Court of Appeal, UPC_CoA_540/2024, Order of 24 February 2024, Biolitec v Light Guide, para. 20, with reference to UPC_CoA_335/2023).

67. In the present case, this balancing of interests works against the applicant, since – as set out in detail in the following point – taking the time factor into account, the issuance of provisional measures is not warranted.

V. (TEMPORAL) URGENCY

68. In the present case, the requirement of (temporal) urgency is not met, meaning that no provisional measures can be ordered.

1. Principles

69. Pursuant to Rule 211.4 of the RoP, the Court must take into account any undue delay on the part of the applicant in applying for provisional measures. Whether there has been an undue delay within the meaning of Rule 211.4 of the RoP depends on the circumstances of the individual case (Court of Appeal, UPC_CoA_182/2024, Order of 25 September 2024, Mammut Sports v Ortovox).

70. In principle, the applicant bears the burden of proof regarding the acquisition of knowledge of the potential infringement and its prompt investigation (LD Düsseldorf, UPC_CFI_1927/2025, Ottobock v BrainPortfolio Inc., para. 100). The relevant period extends from the time of becoming aware of the contested embodiment as a potentially infringing product until all the facts and evidence that must be obtained in order to

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. In this regard, all the circumstances of the individual case are relevant. Once such a submission has been made, it is in turn for the defendant to set out the indications from which it can be inferred that the defendant must have been aware of the infringement at an earlier stage and from which hesitant conduct can be inferred. Provided that such indications are substantiated by the defendant, it is then for the claimant to rebut them.

71. In so far as a defendant relies on the fact that there was already an infringement of the patent in question in relation to an earlier product, they must, in accordance with the 'more likely than not' standard applicable in interim proceedings before the UPC (Court of Appeal, Order of 3 March 2025, UPC_CoA_523/2024, para. 56, 77 – Sumi Agro v Syngenta), they must, in particular, demonstrate credibly that (i) the product now challenged is substantially the same as a product previously available in relation to the patent in question, and (ii) the product previously available gave reasonable cause to investigate whether the intellectual property right now asserted had been infringed.

72. Furthermore, on 2 July 2026, in UPC_CoA_19/2026 (Guardant Health v. Sophia Genetics), the Court of Appeal ruled on the question of the extent to which various potentially infringed patents must be asserted in a single application:

> *'A patent proprietor is not obliged to assert all patents in a single application for provisional measures. If the patent proprietor has the information required to file an application for provisional measures in respect of some, but not all, of the patents, it may be regarded as an unreasonable delay to postpone filing the application until the necessary information regarding all the allegedly infringed patents is available."* (Headnote 1)
>
> *"If a patent proprietor is aware, on the basis of a document, that one or more of his patents have been infringed, he must not overlook the fact that the same document also reveals the infringement of one or more of his other patents."*
> (Headnote 2)
>
> *"In principle, a patent holder is not obliged to monitor the market. However, if the patent holder becomes aware of specific circumstances indicating patent infringement, they are required to*

investigate the matter with due diligence so that he can take action against all infringers as promptly as possible."
(Headnote 3)

73. In UPC_CoA_901/2025 of 17 April 2026 (Abbott v. Sinocare, Menarini), the Court of Appeal held in paragraph 168 that what matters is the point in time at which the claimant or applicant can establish with the requisite certainty that the 'new' product actually infringes the patent.

74. In UPC_CoA_19/2026, the Court of Appeal further held that it is incumbent upon the applicant to provide a well-founded explanation of which further analyses or examinations were necessary to assess whether a patent infringement had occurred, for which claim or which claim features their performance was necessary, how long this took, and why this time expenditure was reasonable. This includes, in particular, a statement specifying for which patents, specifically, the technical analysis was required; see paragraph 141 of the aforementioned decision, cited below:

"141. It is incumbent upon the patent proprietor applying for the issuance of provisional measures to set out, in a substantiated manner, whether and, if so, which further analyses or investigations were necessary, in respect of which patent claims or claim features these had to be carried out, how long they took and why this period is to be regarded as reasonable."

2. <u>Assessment in the present case</u>

75. Firstly, it is already open to question whether the applicant should not have taken action on the basis of the drawings made available to her.



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[redacted]

76. In its pleadings, the applicant has not provided even a remotely substantiated account o[redacted] Insofar as the applicant argued for the first time at the oral hearing that the presence of feature group 5 in the modified embodiment [redacted], this constitutes a new argument which can no longer be taken into account, as no basis for this argument has been laid down in the pleadings. Therefore, in view of the burden of proof resting with the applicant, it is already questionable whether it was justified for the applicant to have waited for the acquisition of the modified subject-matter before taking further steps to initiate proceedings for the issuance of provisional measures against the respondents.

77. Even if one were to assume, in the applicant's favour, that the purchase was nevertheless necessary and difficult, there was in any event an unreasonable delay for the period following the purchase. Although the delivery itself took quite a long time – after all, two weeks elapsed between the order on 20 February 2026 and receipt on 6 March 2026 – the applicant did not immediately examine the products for infringement of the patent in question upon receipt, even though she was already aware of this patent or, at the very least, must have been aware of it. The latter is evident from the letter dated 26 March 2025, Annex AG 9, in which the applicant's legal representatives informed the respondents' legal representatives of potentially relevant infringed patents (with regard to the predecessor product 'EnDrive Beluga') and explicitly listed the patent in question therein. Rather, as is evident from Annexes BP2 and BP14, it
— to the USA in order to examine them, by means of extensive investigations such as CT scans, with a view to determining whether they infringed various other patents.

78. Such extensive investigations were not necessary for the patent in suit in the present case. The features of the patent in suit are purely mechanical in nature and can be ascertained with minimal investigative effort, without the need for in-depth investigations, let alone CT scans. The applicant's failure to carry out this minimal examination in a timely manner therefore constitutes an unreasonable delay on its part. The applicant has not put forward any arguments – neither in its pleadings nor at the oral hearing – as to why, instead, time-consuming, in-depth examinations in the

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USA, in particular CT scans, would have been necessary to establish infringement of the patent in question, or whether they were used for this purpose at all. Nor can the Court infer this from the annexes submitted. In particular, no examination report was submitted.

79. This stands in stark contrast to the standard which – as set out above – the Court of Appeal established in UPC_CoA_19/2026, paragraphs 141 and 142 – according to which it is incumbent upon the applicant to set out in detail which further analyses or tests were required, for which claim or which claim features their performance was necessary, how long this took and why this time expenditure was reasonable; this includes, in particular, a statement as to for which specific patents the technical analysis was required. None of this was set out by the applicant in the present case in relation to the patent in suit. Rather, the applicant argued that the respondents were known for making 'minimal changes' to earlier products that had been the subject of complaints. This further suggests that no in-depth investigations were required to assess whether the claimed patent had been infringed – all the more so as the claimed patent was already under scrutiny due to the predecessor product 'EnDrive Beluga', see Annex AG 9.

80. The Court therefore concludes that, upon receiving the items potentially infringing the patent, the applicant deliberately delayed initiating proceedings for the issuance of provisional measures in respect of the patent in question until it had carried out extensive investigations to obtain the necessary information regarding the infringement of further patents, which, however, were not necessary for the purpose of assessing an infringement of the patent in question. This is also indicated by the fact that, on the same day that it filed the application for provisional measures at issue here (4 May 2026), the applicant filed an application for provisional measures before the LD Hamburg against the same parties in respect of the same infringing items (UPC_CFI_1535/2026), which was based on a patent other than the patent at issue here.

81. This course of action constitutes an unreasonable delay, particularly in light of the first headnote cited above in the decision of the Court of Appeal UPC_CoA_19/2026, with the result that the requirement of (temporal) urgency for the issuance of provisional measures must be deemed not to have been met.

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82. Consequently, it is no longer relevant whether there was an unreasonable delay during the period prior to receipt of the infringing items.

VI. STAY OF PROCEEDINGS, REFERRAL TO THE CJEU

83. Since the application for provisional measures is already unsuccessful on the merits due to a lack of urgency, a reference to the CJEU or a stay of proceedings pending the CJEU's decision in the pending preliminary ruling proceedings in *Dyson v Dreame* (UPC_CoA_789/2025 and UPC_CoA_813/2025) is out of the question.

VII. PROVISIONAL REIMBURSEMENT OF COSTS

84. The applicant's application for provisional reimbursement of costs is unsuccessful, as the application for provisional measures has already been dismissed on the grounds of a lack of urgency in the matter.

85. By contrast, the respondents' application for provisional reimbursement of costs is well founded. In its decision of 28 November 2025 in the case *of Barco v Yealink* (UPC_CoA_317/2025 and UPC_CoA_376/2025), the Court of Appeal held:

> *"A provisional order for costs may also be made in favour of the respondent in proceedings for provisional measures. The fact that Rule 211.1(d) of the Rules of Procedure (RoP), unlike Rule 150.2 RoP, does not expressly provide for a provisional order for costs in favour of the successful party does not preclude this. In this respect, the same principles apply to proceedings for interim relief as to the main proceedings. A provisional assessment of costs up to the applicable upper limit for reimbursement renders separate proceedings for a costs order under Rule 150 of the Rules of Procedure unnecessary."*

86. Accordingly, a provisional reimbursement of costs may be sought not only by the applicant but also by the respondents.

87. As regards the amount, according to the case law of the Court of Appeal, the approach is to award provisional reimbursement of costs amounting to half the upper limit of the reimbursable costs based on the value of the claim. Where the value of the claim is EUR 1 million, the upper limit is EUR 112,000; half of this is therefore EUR 56,000, meaning that, subject to a corresponding application, an award of this amount would be possible (UPC_CoA_898/2025,

Order of 27 March 2026, Onward v Niche Biomedical). However, as the respondents are seeking only a lower amount, namely EUR 30,851.20 based on the German Lawyers' Fees Act, an award is made solely in that amount.

VIII. VALUE OF THE CLAIM

88. The claimant has 'provisionally estimated' the value of the claim at EUR 1 million. This figure has not been contested by the respondents and appears reasonable in view of the economic value of the dispute. The court therefore sets the value of the claim at EUR 1 million.

IX. PRELIMINARY RULING ON COSTS

89. A decision on costs is also justified in interim proceedings (Hamburg local division, Order of 21 February 2025, UPC_CFI_701/2024; Order of 26 June 2024, UPC_CFI_124/2024). This is also in line with the view of the Court of Appeal (Order of 3 March 2025, UPC_CoA_523/2024 – Sumi Agro v Syngenta; Order of 6 August 2024, UPC_CoA_335/2024, 10x Genomics et al. v NanoString) that a decision on costs should be made in inter partes proceedings concerning provisional measures, as these proceedings bring the case to a close. Pursuant to Article 69(1) of the UPC Agreement, the reasonable and proportionate costs of the proceedings and other expenses incurred by the successful party shall, in principle, be borne by the unsuccessful party, unless equity dictates otherwise. Consequently, in the present case, the applicant is liable for the costs.

ORDER

I. The application for provisional measures is dismissed.

II. The applicant shall bear the costs of the proceedings.

III. The applicant must pay the respondents a provisional reimbursement of costs amounting to [redacted] within 30 days of the order being served on the applicant.

IV. The value of the claim is set at EUR 1,000,000.00.

Düsseldorf, 5 November 2026

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Presiding Judge Dr Thom	Anna Bérénice Dr THOM Digitally signed by Anna Bérénice Dr THOM Date: 4 November 2026 14:04:31 +01'00'
Legally qualified judge Dr Rinken	Ingo Rinken Digitally signed by Ingo Rinken Date: 4 November 2026 14:14:19 +01'00'
Legally qualified judge Adocker as judge-rapporteur	Thomas Adocker Digitally signed by Thomas Adocker Date: 4 November 2026 12:03:59 +01'00'
On behalf of the Deputy-Registrar	Digitally signed Frank Hermann Moritz 4 November 2026 14:57:38 +0100 Unified Patent Court Einheitliches Patentgericht Juridiction unifiée du brevet

INFORMATION REGARDING THE APPEAL

The unsuccessful party may appeal against this order within 15 days of its service (Art. 73(2)(a), 62 UPC Agreement, R. 220.1(c), 224.2(b) RoP).

INFORMATION ON ENFORCEMENT (ART. 82 UPC Agreement, ART. 37(2) UPC, R. 118.8, 158.2, 354, 355.4 RoP):

A certified copy of the enforceable decision or the enforceable order shall be issued by the Deputy-Registrar on application by the enforcing party, Rule 69 of the Rules of Procedure.