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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92066392
Party	Plaintiff Covidien LP
Correspondence Address	KATIE BUKRINSKY MCDERMOTT WILL & EMERY LLP 500 NORTH CAPITOL ST NW WASHINGTON, DC 20001-1531 UNITED STATES jdabney@mwe.com, mhallerman@mwe.com, ksandacz@mwe.com, dciplit@mwe.com 202-756-8000 X 8194
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Filer's Name	Katie Bukrinsky
Filer's email	kbukrinsky@mwe.com, jdabney@mwe.com, mhallerman@mwe.com, ksandacz@mwe.com, dciplit@mwe.com
Signature	/s/ Katie Bukrinsky
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COVIDIEN LP, Petitioner, v. ERBE ELEKTROMEDIZIN GMBH, Registrant.	Cancellation No. 92066392 Registration Nos. 4,236,231 and 4,686,396 Mark: SOFT COAG

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Dated: January 22, 2019

By:/Katie Bukrinsky/
John J. Dabney
Mary D. Hallerman
Katie Bukrinsky
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 2001
Telephone: (202)756-8000
Facsimile: (202) 756-8087
Email: jdabney@mwe.com;
mhallerman@mwe.comkbukrinsky@mwe.com

Attorneys for Petitioner Covidien LP

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Petitioner Covidien LP ("Petitioner") moves for summary judgment on the ground that Registrant Erbe Elektromedizin GmBH's ("Erbe's") alleged mark SOFT COAG is generic or merely descriptive without secondary meaning.

INTRODUCTION

Surgeons have performed a medical procedure known as "soft coagulation" for decades. Surgeons use electrosurgical generators to perform the procedure. Erbe uses the term "Soft Coag" as the name of a generator mode that enables a surgeon to perform soft coagulation. Petitioner's predecessor used "Soft Coag" as the name of a generator mode that enables a surgeon to perform soft coagulation more than a decade before Erbe. Today, Petitioner and more than a dozen other manufacturers use "Soft Coag" as the name of a generator mode that enables a surgeon to perform soft coagulation. Erbe's Section 2(f) registrations for Soft Coag must be cancelled because the evidence is undisputed that Soft Coag is generic for the goods or, at a minimum, highly descriptive and lacks secondary meaning.

STATEMENT OF UNDISPUTED MATERIAL FACTS ("SUMF")

I. PETITIONER AND ITS ELECTROSURGICAL GENERATORS SYSTEMS WITH A SOFT COAG MODE

1. Petitioner manufactures and sells electrosurgical generator systems used by surgeons to cut and coagulate tissue during surgery. Declaration of Steven Buysse ("Buysse Decl.") ¶¶ 3, 7-10.[1]

[1] Mr. Buysse was employed by Petitioner's predecessor-in-interest Valleylab beginning in 1986, and has continuously been employed at the same factory since that date, even as the factory changed ownership over years before being recently purchased by Medtronic. Buysse Decl. ¶ 2. Mr. Buysse has dedicated his entire career to designing, testing and manufacturing electrosurgical generators, including researching and developing new generator models. *Id.* ¶¶ 3-4. As part of his job, he regularly communicates with users and purchasers of electrosurgical generators including surgeons and hospital personnel about generators and reads clinical and professional literature in the fields of electro-surgery and electrosurgical generators. *Id.* ¶ 5. Mr. Buysse is highly knowledgeable about how users and purchasers of electrosurgical generators understand and use the terms "Soft Coag" and "Soft Coagulation." *Id.* Petitioner identified Mr. Buysse as a non-retained expert on these topics. *Id.* ¶ 6 and Buysse Ex. A.

2. An electrosurgical generator system features various "modes" or pre-programmed settings, which allow the surgeon to achieve coagulation at different voltages, intensities, and surface distributions resulting in different effects on the tissue. *Id.* ¶ 7.

3. Petitioner's generator systems typically feature several coagulation modes called "Spray Coag," "Fulgurate Coag," "Dessicate Coag" and/or "Soft Coag." *Id.* ¶ 8. "Coag" is a common abbreviation for "coagulation." *Id.* ¶ 9; Ex. 58 (Rule 30(b)(6) deposition of Erbe via John Day) 48:17-19.

4. The "Soft Coag" mode enables a surgeon to perform a common medical procedure or technique known as "soft coagulation" or "soft coag," which is where a surgeon softly or gently coagulates tissue and minimizes tissue damage. Buysse Decl. ¶¶ 10-11. *See also* Ex. 58 (Erbe Dep.) 36:18-23. Soft coagulation is a type of "contact coagulation," meaning that the surgeon brings the electrode in contact with the tissue. Buysse Decl. ¶ 10. Hundreds of surgeons and researchers in the United States perform the soft coagulation technique every year using Petitioner's generators, Erbe's generators and the generators of third parties. *Id.* ¶ 11.

5. Petitioner's predecessor-in-interest Valleylab and then Petitioner have used "Soft Coag" as the name of a generator mode that enabled a surgeon to perform the soft coagulation procedure for more than 35 years. *Id.* ¶¶ 13-17.

6. In 1983, Valleylab launched the "Valleylab SSE4" generator system, which featured a mode named "Soft Coag" that enabled a surgeon to perform soft coagulation, Buysse Decl. ¶ 13 & Ex. B (SSE4 1983 manual excerpts) and Ex. C (SSE4 1984 manual) thereto. Later, Valleylab began to sell the "Valleylab Force 4B" generator system, which also offered a mode called "Soft Coag," which enabled a surgeon to perform soft coagulation. Buysse Decl. ¶ 14 and Ex. D (Force 4B manual).

7. Valleylab sold generator systems with a "Soft Coag" mode until 2005. Declaration of Kamrin Helland Ex. A (confidential sales records).

8. Valleylab's generator systems with a "Soft Coag" mode were among the best-selling generator systems in the United States in the 1980's and 1990's. Buysse Decl. ¶ 15. Valleylab sold thousands of these generators and earned tens of millions of dollars from the sales. *Id.* The generators were built to last for at least 20 years. *Id.* Many Force 4B generators remain in use in the United States, and used units are still being sold in the United States. *Id.*

9. In 2011, Petitioner began to plan its next generation of generator systems, eventually named the "Valleylab FT10." *Id.* ¶ 16. Like prior Valleylab models, the FT10 offers a Soft Coag mode, which enables a surgeon to perform soft coagulation. *Id.* & Ex. E thereto (excerpts from FT10 manual)). Petitioner released the FT10 in 2015. Buysse Decl. ¶ 16.

10. Petitioner and Petitioner's predecessor (Valleylab) sold a substantial number of units of electrosurgical generators with a "Soft Coag" mode from 1996 through 2017 as disclosed in Helland Exhibit A. Valleylab sold many more units of these generators from 1983 to 1995 (*see* Buysse Decl. ¶ 15), but detailed sales records from that time period are no longer available. Helland Decl. ¶ 6.

II. ERBE AND ITS ELECTROSURGICAL GENERATOR SYSTEMS WITH A SOFT COAG MODE

11. Erbe, like Petitioner, manufactures and sells electrosurgical generator systems. *See* Bukrinsky Decl. Ex. 1[2] (Erbe's Resp. to Interrog. No. 21).

12. In 1994, a decade after Petitioner's predecessor had launched a generator system featuring a "Soft Coag" mode, Erbe began to sell an electrosurgical generator system which also offered a mode called "Soft Coag." *Id.*

[2] Numbered exhibits 1-58 are to the Declaration of Katie Bukrinsky submitted herewith. Confidential exhibits are filed under seal.

13. Erbe sells electrosurgical generator systems under the brands VIO and ICC. *Id.*; *see also* Ex. 2 (Erbe's sales records).

14. As Erbe admitted to the U.S. Patent and Trademark Office in prosecuting the "Soft Coag" marks that are the subject of this proceeding, Erbe "does not specifically mention the Soft Coag mode when it advertises its electrosurgical generators in magazines and other publications." Ex. 14 at p. 20 & Ex. 15 at p. 19 (Erbe's Responses to Office Action in connection with its two registrations); Ex. 58 (Erbe Dep.) 151:3-8 (admitting that "Erbe does not specifically mention the SOFT COAG mode when it advertises its electrosurgical generators in magazines and other publications"). Erbe never uses the alleged mark "Soft Coag" on signs or banners at trade shows or the like. Ex. 58 (Erbe Dep.) 154:14-20 (admitting that "Soft Coag" never appears on signs or banners at trade shows). Indeed, Erbe's advertising flyers often fail to mention "Soft Coag" at all. *See e.g*. Ex. 8.

15. Erbe's use of the alleged mark "Soft Coag" is limited to brochures, training materials, instruction manuals and the display screen on its generator and its web site. *See, e.g.,* Exs. 3-13 (brochures, flyers and training materials); Exs. 14-15 (Erbe's Responses to Office Actions with copies of brochures and flyers); Ex. 16 (printout from Erbe USA website); Ex. 17-18, 20, 25 (instruction manuals and excerpts thereof); Ex. 19 (VIOD 300 generator screen).

16. In Erbe's brochures and training materials, Erbe's uses the term "Soft Coag" only in a list of modes offered by its VIO and ICC-branded generators as shown below (Ex. 5):

Only mention of "Soft Coag"

17. As further example, in the Erbe brochure attached as Ex. 7, Erbe uses the term "Soft Coag" only on page 5 in a listing of "available modes." *Id.* at 4965-66.

18. The brochures and training materials that Erbe has produced in this case are attached as Exhibits 3 through 13, and are also found in Erbe's Responses to Office Actions, which are attached as Exhibits 14 and 15. In all of those materials, Erbe uses the term "Soft Coag" only in a list of available generator modes. *Id.* Erbe does not advertise or sell generators as "Soft Coag" generators. *Id.*

19. In Erbe's instruction manuals for its generators, Erbe uses the term "Soft Coag" only in the table of contents and in a section of the manual describing the available modes. *See, e.g.*, Ex. 17, 20 (ICC Manuals); Exs. 18, 25 (VIO manuals).

20. The screen on Erbe's electrosurgical generator displays the term "Soft Coag" only if a surgeon selects that "Mode." In contrast, the generator features the marks ERBE and VIO even when the screen is turned off (Ex. 19):

21. Erbe's website uses the term "Soft Coag" only in a list of available modes on its VIO-branded generators. Ex. 16 (search results for "Soft Coag" on Erbe USA's website).

22. Erbe admits that the purpose of the "Soft Coag" mode on its electrosurgical generators is to enable surgeons to perform soft coagulation. *See, e.g.*, Ex. 58 (Erbe Dep.) 103:23-104:4 (admitting that its manual (Ex. 17 at 2083) "refers to [what the SOFT COAG mode] does as 'soft coagulation'"); Ex. 20 at 2943-2944, 2959 (Erbe manual explains how to use the "Soft Coag" mode to perform "soft coagulation"); Ex. 21 (Erbe document refers to the "soft coagulation output" that results from use of "Soft Coag" mode).

23. Erbe informs customers that the "Soft Coag" mode on its generators enables a surgeon to perform "soft coagulation." Ex. 58 (Erbe Dep.) 103:23-104:4; Ex. 17 at 2083 and Ex. 20 at 2943-

44 and 2959 (Erbe's manuals). *See also* Ex. 22 (academic article edited by Erbe referring to the "snare tip soft coagulation (STSC) technique" which the surgeon conducted using Erbe's VIO generator in Soft Coag mode, and stating that "[s]oft coagulation through a snare tip is a readily available, effective, and safe hemostatic modality for intraprocedural bleeding.")[3].

24. Erbe uses the terms "Soft Coag" and "Soft Coagulation" interchangeably to refer to that mode on its generator. *See, e.g.*, Ex. 23 (letter to customer referring alternatively to "soft coagulation mode" and "soft coag" mode); Ex. 24 (same); Ex. 25 at 776 (Erbe manual using "soft coag" and "soft coagulation" interchangeably); Ex. 58 (Erbe Dep.) 35:6-20 (referring to Erbe's "Soft Coag" mode as the "Erbe soft coagulation mode").

25. Erbe also uses the terms "Soft Coag" and "Soft Coagulation" interchangeably to refer to a type of coagulation procedure that a surgeon is able to perform by using the "Soft Coag" or "Soft Coagulation" mode on its generator. Ex. 58 (Erbe Dep.) 103:23-104:4 (testifying about Ex. 17 at 2083); Ex. 26 at 6031-32 (demonstrating clinical applications of a "soft coagulation" procedure and abbreviating it as "Soft Coag" on the next page; Ex. 27 (Erbe's email to doctor describing the Soft Coagulation or Soft Coag "effect" while using the ENDO CUT setting of the generator which incorporates a "Soft Coag phase").

26. Erbe admits that the "Soft Coag" mode on electrosurgical generators sold by third parties enables a surgeon to perform soft coagulation. *See, e.g.*, Ex. 58 (Erbe Dep.) 77:6-9; *id.* 78:14-79:5 (testifying about Buysse Ex. F); Ex. 28 (Erbe's record of third parties that sell a generator with a "soft coag" or "soft coagulation" mode, including those that function in the same way as the "Soft Coag" mode on Erbe's generators); Ex. 29 at 702 (Olympus' soft coag mode "works nearly identically" to Erbe's soft coag mode).

[3] "Snare tip" refers to using the tip of a snare electrode. A snare electrode is a widely available electrosurgical accessory not sold as "Soft Coag." *See* Ex. 58 (Erbe Dep.) 35:21-24.

III. ERBE'S REGISTRATIONS FOR SOFT COAG

27. Erbe owns Registration No. 4,236,231 and 4,686,396 for SOFT COAG. Both registrations issued based on Erbe's claim of acquired distinctiveness under Section 1052(f).

28. Registration No. 4,236,231 issued on November 6, 2012 for "medical instruments, namely, electrosurgical coagulation component of an electrosurgical generator system that operates at constant voltage" in Class 10.

29. Registration No. 4,686,396 issued on February 17, 2015 for:

"Computer software for use in electrosurgical generator systems to maintain constant voltage during fluid coagulation; high-frequency apparatus and measuring instruments, namely, electrosurgical generator systems comprised of computer software used to maintain constant voltage for in vivo use; software-programmable microprocessors" in Class 09;

"Electrosurgical generator systems comprising surgical instruments and apparatus and components thereof that operate at constant voltage; electrosurgical generator systems comprising high frequency surgical apparatus and instruments for medical purposes" in Class 010 and

"Development, programming and implementation of software for use in electrosurgical generator systems to maintain constant voltage; technical support services, namely, troubleshooting of computer software problems in electrosurgical generator systems" in Class 042.

30. Erbe knows of no facts to support its claim that its alleged mark SOFT COAG has acquired distinctiveness. Ex. 58 (Erbe Dep.) 174:3-9.

31. Erbe is unaware of a survey or study that shows that its alleged mark SOFT COAG has acquired secondary meaning. Ex. 58 (Erbe Dep.) 104:5-105:4.

IV. INDUSTRY USE OF SOFT COAG TO REFER TO A GENERATOR MODE THAT ENABLES A SURGEON TO PERFORM A MEDICAL PROCEDURE KNOWN AS SOFT COAGULATION

32. The International Electrotechnical Commission ("IEC"), the leading standards organization in the world for the electrosurgical industry, defines "Soft Coagulation" as a "type" of coagulation procedure. Buysse Decl. ¶¶ 18-19 & Ex. F at 2565; Ex. 58 (Erbe Dep.)78:14-18

(admitting IEC standards document identifies "soft coagulation" as the "name of a coagulation type."). The excerpt is below:

201.3.210
COAGULATION
use of HF current to induce a thermal effect, e.g. to control or prevent bleeding, induce tissue destruction, or induce tissue shrinkage

Note 1 to entry: COAGULATION may take the form of contact or non-contact COAGULATION.

Note 2 to entry: FULGURATION, desiccation, spray, forced, swift, soft and argon beam (plasma) COAGULATION are all names of COAGULATION types.

33. Both Erbe and Petitioner have representatives on the IEC. Ex. 58 (Erbe Dep.) 44:2-24; Buysse Decl. ¶ 18.

34. Over the last decade, as Erbe admits, more than a dozen different manufacturers have used and continue to use the terms "Soft Coag" or "Soft Coagulation" as the name of an electrosurgical generator mode, including Olympus, Karl Storz, ConMed, Genii, Aaron Bovie Medical, Ackermann, Aesculap, Alsa Apparecchi, Eschmann, EMED, Geister, HEBU, Integra, Kavandish, KLS Martin, Lamidey Noury Medical, Valleylab, Soring, and Tekno. Ex. 30 (Erbe's response to Req. for Admission No. 7, admitting that third parties have a Soft Coag mode); Ex. 1 (Erbe's Response to Interrog. No. 53, stating that Petitioner, Karl Storz, Valleylab, ConMed, Olympus, and Genii have used the term Soft Coag in connection with a generator mode); Ex. 28 at pp. 8-21 (Erbe's record of competitors who use Soft Coag or Soft Coagulation, or Bipolar Soft Coag in connection with a mode); Ex. 58 (Erbe Dep.) 154:25-163:1 (testifying about Ex. 28). *See also* Ex. 31 (Aesculap/B Braun brochure listing "soft coag" mode); Ex. 32 (EMED generator series with "soft coagulation" mode); Ex. 33 (Olympus 2008 510k); Ex. 34 (Olympus 2010 510k); Ex. 35 at 2171 (Olympus brochure with "softcoag" mode); Ex. 29 at 10702 (Olympus' softcoag mode "works nearly identically" to Erbe's soft coag mode); Ex. 36 (brochure for Bovie icon GI generator with a "soft coag" mode); Ex. 37 (Genii 510k dated March 22, 2012 with a

"soft coag" mode).

35. For decades, manufacturers have used the term "Soft Coagulation" in medical device patents to identify a type of coagulation procedure, including: Medtronic (Ex. 38 at 2331 (Patent No. 6,096,037, filed 1997 and issued 2000) and Ex. 39 at 2370 (Patent No. 7,470,272, filed 2004 and issued 2008)); BOWA-electronic GmbH (Ex. 40 at 2378 (Patent No. 7,666,182, filed 2005 and issued 2010, referring to soft coagulation as a "specific coagulation effect[]")); Karl Storz GmbH (Ex. 41 at 2395 (Patent No. 9,668,801, filed 2011 and issued in 2017, noting that soft coagulation is "characterized in that the amplitude of the RF voltage required for this purpose is less than 200 Volts")); and Genii, Inc. (Ex. 42 at 2291 (Patent No. 8,287,530, filed 2011 and issued 2012)).

36. Medical publications regularly publish articles about surgeons using a "Soft Coagulation" electrosurgical generator mode to perform a soft coagulation procedure. *See, e.g.*, Ex. 43 (article titled "A Randomized Trial of Monopolar Soft-Mode Coagulation . . ." which compares "the hemostatic efficacy of soft coagulation with heater probe thermocoagulation"); Ex. 44 at 1091 (noting that a process called "soft coagulation has been developed to solve" the problem of tissue carbonization and adhesion, and testing the efficacy of the process in spinal surgery); Ex. 45 at 603 (soft coagulation procedure using the "soft coagulation setting" on an Olympus generator); Ex. 46 (describing a tissue area being "marked with soft coagulation"); Ex. 47 (abstract describing "soft-coagulation" procedure); Ex. 48 (abstract titled "Efficacy of Hemostasis by Soft Coagulation…" and discussing availability of "endoscopic high-frequency soft coagulation"); Ex. 49 (abstract titled Laparoscopic Liver Resection Using a Monopolar Soft-Coagulation Device…"); Ex. 50 (noting that "[i]t is well-known the soft coagulation is useful and safety [sic] for stopping of hemorrhage and leakage in lung, liver and pancreas surgery."); Ex. 51 (article

concluding that "endoscopic hemostasis by soft coagulation using hemostatic forceps has been widely applied for hemostasis in UGIB with validity and safety[.]"); Ex. 52 at 1102 (stating that "[s]oft coagulation is the purest form of coagulation in that there is no spark generated to initiate a cut."); Ex. 53 at 586-587 (article "elucidat[ing] the feasibility of the new closure method using soft coagulation . . .." using a "VIO soft coagulation system"); Ex. 54 at 999 (article describing "soft coagulation procedure" conducted using "soft-mode coagulation"); Ex. 55 (article titled "Evaluation of hemostasis with soft coagulation using endoscopic hemostatic forceps").

37. Physicians and hospital personnel use and understand the term "Soft Coag" to be an abbreviation for the term "Soft Coagulation." Buysse Decl. ¶ 20. "Soft Coagulation" is abbreviated as "Soft Coag" on a generator screen due to space constraints. *Id.* ¶ 21.

38. Physicians and hospital personnel use the terms "Soft Coag" and "Soft Coagulation" interchangeably to refer to a coagulation procedure performed by a surgeon using commercially available electrosurgical generators, including those manufactured by Petitioner, Erbe and third parties. *Id.* ¶¶ 11, 22. Physicians and hospital personnel also use the terms "Soft Coag" and "Soft Coagulation" interchangeably to refer to a mode offered by any number of commercially available electrosurgical generators (including Petitioner's generator) that enables a surgeon to perform a Soft Coag or Soft Coagulation procedure. *Id.* ¶ 22.

39. As early as 1998, the ECRI Institute, an independent non-profit institution that evaluates medical procedures and devices, stated that generator "modes intended for contact coagulation are typically labeled Dessicate, or Soft Coag." Ex. 57. "Contact coagulation" describes coagulation where the surgeon touches the tissue with the electrode. Buysse Decl. ¶ 10. "Dessicate Coagulation" and "Soft Coagulation" are different types of contact coagulation. *Id.*

40. Erbe admits that "soft coagulation" is a non-proprietary medical procedure. Ex. 58 (Erbe Dep.) 108:3-6.

41. Erbe admits that "Coag" is a "generally accepted" abbreviation for "coagulation." Ex. 58 (Erbe Dep.) 48:17-19.

42. *Merriam-Webster* medical dictionary defines "Coag" as an abbreviation of "coagulation." Ex. 57.

LEGAL STANDARD

Summary judgment should be granted if there is no genuine issue of material fact and Petitioner is entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). Once Petitioner makes a *prima facie* case that there is no genuine dispute that Soft Coag was generic or lacked acquired descriptiveness at the time the registrations issued, Erbe can avoid summary judgment only by "present[ing] sufficient evidence to show an evidentiary conflict as to one or more material facts in issue." *Cashflow Techs., Inc. v. NetDecide*, 2002 WL 1485332, at *7 (TTAB July 10, 2002). The Board regularly grants summary judgment on claims of genericness and lack of acquired distinctiveness. *See, e.g.*, *Marquez Bros. Int'l, Inc. v. Zucrum Foods, L.L.C.*, 2009 TTAB LEXIS 695, *21 (TTAB Dec. 11, 2009) (genericness); *Cashflow Techs.,* 2002 WL 1485332 at *5 (lack of acquired distinctiveness); *Equibal Inc. v. Clientele, Inc.*, 2018 WL 1890932, *5 (TTAB Apr. 6, 2018) (same); *Historic Hotels Int'l., Inc. v. Nat'l Trust for Historic Preservation*, 91168312, 2008 WL 3333840, at *2 (TTAB July 31, 2008) (same).

ARGUMENT

I. PETITIONER HAS STANDING

Petitioner uses "Soft Coag" as the name of a generator mode and thus has standing to assert claims for genericness and lack of acquired distinctiveness. SUMF ¶¶ 1, 3, 9-10. *See Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 U.S.P.Q.2d 1341, 1350 (TTAB 2013). *See generally Coach Services, Inc. v. Triumph Learning LLC*, 101 U.S.P.Q.2d 1713, 1727-28 (Fed. Cir. 2012) ("[O]nce an opposer meets the requirements for standing, it can rely on any of the statutory grounds for opposition set forth in 15 U.S.C. § 1052.").

II. SOFT COAG IS GENERIC

The Board uses the "primary significance" test to determine genericness. *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986). That test involves two questions, "First, what is the genus of goods or services at issue? Second, is the term sought to be registered … understood by the relevant public primarily to refer to that genus of goods or services?" *Id.* at 990. If a mark is generic for one of the goods in a particular class of the registration, then that class must be cancelled in its entirety. *Marquez Bros.*, 2009 TTAB LEXIS 695 at *6.

A. The Genus of Goods is Electrosurgical Generators

The "genus" of goods is defined by the goods in Erbe's registrations. *See, e.g., In re Reed Elsevier Prop. Inc.*, 77 U.S.P.Q.2d 1649, 1654 (TTAB 2005) ("We consider applicant's identification as largely defining the genus of services involved in this case"), *aff'd*, 82 U.S.P.Q.2d 1378 (Fed. Cir. 2007). Erbe's registrations for SOFT COAG cover electrosurgical generators. SUMF ¶¶ 28-29. The genus of goods here is electrosurgical generators. *See id.*

B. Soft Coag is Used and Understood to Mean a Generator Mode That Enables a Surgeon to Perform Soft Coagulation

"The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *H. Marvin Ginn*, 782 F.2d at 989-90. A term is generic if it refers to a purpose of the goods or a feature of the goods. *E.g., In re Cook Pacemaker Corp.*, 1999 TTAB LEXIS 450, *12 (TTAB Aug. 13, 1999) (LEAD EXTRACTION for kits used to extract lead was generic because a purpose of the goods was to remove lead); *In re Chronix Biomedical, Inc.*, 2018 TTAB LEXIS 248, *17 (TTAB July 10, 2018) (SECOND OPINION for diagnostic kits was generic because a purpose of the kits was to provide a second opinion as to necessity of medical procedures); *In re Central Sprinkler Co.,* 49 U.S.P.Q.2d 1194, 1199 (TTAB 1998) (ATTIC for sprinklers is generic because applicant's goods were intended to be used in the attic).

Evidence of use and understanding can come from "any competent source, including dictionaries, newspapers, magazines, trade journals and other publications." *Marquez*, 2009 TTAB LEXIS 695 at *9; *Coyne v. Dervaes Inst.*, 2017 TTAB LEXIS 121, *42 (TTAB Mar. 22, 2017) (granting summary judgment and cancelling registration for genericness).

As shown below, the evidence is undisputed that "soft coagulation" is a common type of medical procedure. The evidence is likewise undisputed that electrosurgical generators such as those sold by Erbe, Petitioner and more than a dozen other manufacturers offer a "Soft Coag" mode that enables a surgeon to perform the soft coagulation procedure. Finally, the evidence is undisputed that doctors, manufacturers, and Erbe itself use the terms "Soft Coag" and "Soft Coagulation" interchangeably to refer to a generator mode that enables a surgeon to perform soft coagulation. SUMF ¶¶ 34-35, 37-38. *See In re LG Elecs., Inc.*, 2017 TTAB LEXIS 396, *11

(TTAB Oct. 20, 2017) (an abbreviation that is "substantially synonymous" with the unabbreviated generic term, and "used interchangeably" with that term, is itself generic.); *Surgicenters of Am., Inc. v. Med. Dental Surgeries, Co.*, 601 F.2d 1011, 1018 (9th Cir. 1979) (mark SURGICENTER "obviously means surgical center" and is equally generic—summary judgment against registrant). Accordingly, Erbe's alleged mark "Soft Coag" is generic for a feature on electrosurgical generators that enables a surgeon to perform the soft coagulation procedure.

1. Soft Coag is Generic According to the Leading Industry Organization

"Opinions of leaders in the industry are particularly helpful . . . in determining the genericness of a term." *Classic Foods Int'l Corp. v. Kettle Foods, Inc.*, 468 F. Supp. 2d 1181, 1192 (C.D. Cal. 2007) (citing 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 12:13 (4th ed. 2013)). The IEC, the world's leading membership organization for the electrosurgical industry, defines "Soft Coagulation" as a "type" of coagulation procedure. SUMF ¶ 32. The evidence is undisputed that the "Soft Coag" mode found on the electrosurgical generators of Erbe, Petitioner and more than a dozen other manufacturers, enables a surgeon to perform the soft coagulation procedure. SUMF ¶¶ 4-6,9 22-23, 26, 34, 36, 38. This is substantial evidence that Soft Coag is generic for a feature on electrosurgical generators that enables a surgeon to perform soft coagulation. *See In re Noon Hour Food Prods.*, 2008 TTAB LEXIS 23, *5 (TTAB April 23, 2008) (genericness of BOND-OST for cheese shown by evidence that the USDA recognizes "bondost" as a type of cheese); *In re LG Elecs., Inc.*, 2017 TTAB LEXIS 396, *15 (TTAB October 20, 2017) (relying on technology industry publications to find QLED generic).

2. Erbe Uses Soft Coag Generically

"A party's own generic use of a term is strong evidence of genericness." *Coyne*, 2017 TTAB LEXIS 121 at *30 (summary judgment on genericness). Erbe uses the terms "Soft Coag" and "Soft Coagulation" interchangeably as the name of a generator mode that Erbe admits enables a surgeon to perform "Soft Coagulation." SUMF ¶¶ 22-26. Erbe also uses the term "Soft Coag" to refer to the mode available on generators manufactured by Petitioner and third parties that enable a surgeon to perform soft coagulation. *Id.* ¶ 26.

3. Manufacturers Use Soft Coag Generically

Generic use "by competitors and other persons in the trade weighs strongly in favor of genericness." *Pilates, Inc. v. Current Concepts, Inc.*, 57 U.S.P.Q.2d 1174, 1183 (S.D.N.Y. 2000). *See also Classic Foods Int'l*, 468 F. Supp. 2d at 1190 (same).

Petitioner's predecessor Valleylab used the term "Soft Coag" as the name of a generator mode that enabled a surgeon to perform soft coagulation a decade before Erbe began to use Soft Coag, and Valleylab continued to use the term "Soft Coag" in this manner for a decade after Erbe adopted the term. SUMF ¶¶ 5-8. In that time, Valleylab sold thousands of generators with a Soft Coag mode and earned tens of millions in revenues from such sales. *Id.*

In 2008—four years before Erbe filed its first application for SOFT COAG—Olympus began to sell a generator with a "SoftCoag" mode which enabled a surgeon to perform soft coagulation, and has done so continuously since then. SUMF ¶ 34 & Exs. 29, 33. *As of 2015, over a dozen manufacturers use the term "Soft Coag" as the name of a generator mode that enables a surgeon to perform soft coagulation*, including Aesculap, EMED, Ackermann, Bovie, Olympus, and HEBU. SUMF ¶ 34. This evidence proves that "Soft Coag" is generic for a feature of on electrosurgical generators that enables a surgeon to perform soft coagulation. *See Schwan's IP, LLC v. Kraft Pizza Co.*, 460 F.3d 971, 975 (8th Cir. 2006) (affirming summary judgment to

alleged infringer—three competitors using "brick oven" for frozen pizza meant "brick oven" was generic, even though those uses began after plaintiff's use); *Osho Friends Int'l v. Osho Int'l Found.*, 2009 TTAB LEXIS 49, *36 (TTAB January 13, 2009) (use by competitors demonstrated genericness); *Boston Duck Tours, LP v. Super Duck Tours*, *LLC,* 531 F.3d 1, 20 (1st Cir. 2008) (same).

4. Publications Use Soft Coag Generically

Generic use of a term in trade journals is strong evidence of genericness. *See, e.g., In re Cook Pacemaker Corp.*, 1999 TTAB LEXIS 450 at *12 (references in medical journals to techniques for "lead extraction" proved that LEAD EXTRACTION was generic for kits used to extract lead).

The undisputed evidence shows that researchers and doctors use the term soft coagulation in articles to refer to a medical procedure as well as a mode on any number of electrosurgical generators that enable a surgeon to perform the soft coagulation procedure. SUMF ¶ 36. Indeed, as early as 1998, the independent ECRI Institute stated that "modes intended for contact coagulation are typically labeled Dessicate, or Soft Coag." SUMF ¶ 39.

Even the articles involving Erbe's generator discuss "soft coagulation" as a procedure that may be performed using any electrosurgical generator with a "Soft Coag" mode. *See, e.g.*, Ex. 54 (article entitled "A Randomized Trial of Monopolar Soft-Mode Coagulation . . ." that discusses benefits of using a "soft coagulation" setting); Ex. 44 (article noting the availability of "soft coagulation systems" on generators "such as VIO"). For example, an article written with Erbe's cooperation observes "Soft coagulation through a snare tip is a readily available, effective, and safe hemostatic modality for intraprocedural bleeding." SUMF ¶ 23 & Ex. 22. "Snare tip" is a technique of using the tip of a snare electrode to carry out a procedure, regardless of generator used. *Id.* & Fn. 3. *See Osho Friends*, 2009 TTAB LEXIS at *27 (academic

references were evidence of genericness where the references "identif[y] OSHO as a religious and meditative movement and not as a trademark.").

5. Soft Coag is Used Generically in Patents

For decades, manufacturers such as Medtronic, Karl Storz, BOWA-electronic GmbH and Genii, Inc. have obtained patents for medical devices used in connection with the performance of the "soft coagulation" procedure. SUMF ¶ 35. This evidence shows that "Soft Coag" is generic for a feature on electrosurgical generators that enables a surgeon to perform soft coagulation. *See Roche Diagnostics GmbH v. Minipumps, LLC*, 2013 TTAB LEXIS 507 *12-13 (TTAB Sept. 9, 2013) (use of "micropump" in patents proved genericness as a matter of law).

* * *

The undisputed evidence shows that "Soft Coag" is generic for a feature found on an electrosurgical generator that enables a surgeon to perform a medical procedure known as soft coagulation. Manufacturers make electrosurgical generators with a mode called "Soft Coag" whose purpose is to enable a surgeon to perform soft coagulation. Scientific and trade publications use the term "Soft Coag" to refer to a mode on various electrosurgical generators that enables the surgeon to perform soft coagulation. The industry, including researchers, doctors, manufacturers, and Erbe itself use the terms "Soft Coag" and "Soft Coagulation" interchangeably to refer to a generator mode that enables a surgeon to perform the soft coagulation procedure.

III. SOFT COAG IS MERELY DESCRIPTIVE WITHOUT SECONDARY MEANING

Erbe registered "Soft Coag" under Section 1052(f) and thus the mark is merely descriptive of the goods as a matter of law. SUMF ¶ 27. Thus, to prevail on summary judgment on mere descriptiveness, Petitioner can show either that Erbe's use of "Soft Coag" has not been "substantially exclusive," *see, e.g., Miller v. Miller*, 105 U.S.P.Q.2d 1615, 1625 (TTAB 2013)

(refusing registration because applicant's use of merely descriptive mark was not "substantially exclusive") or that "Soft Coag" lacks secondary meaning, *see, e.g., Neopco Inc. v. Dana Corp.,* 12 U.S.P.Q.2d 1746, 1747 (TTAB 1998).

A. Erbe's Use of "Soft Coag" Was Never "Substantially Exclusive"

As the Federal Circuit has held,

> In respect of registration, there must be a trademark, *i.e.*, purchasers in the marketplace must be able to recognize that a term or device has or has acquired such distinctiveness that it may be relied on as indicating one source of quality control and thus one quality standard. When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful[.]

Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 1404-05 (Fed. Cir. 1984). In affirming summary judgment that the applied-for mark lacked acquired distinctiveness due to third party use, the Federal Circuit in *Levi Strauss* concluded that the undisputed evidence showed that applicant's use of the applied-for mark was "neither first nor exclusive." *Id.* at 1405.

Precisely the same is true here. The undisputed evidence is that Erbe's use of "Soft Coag" was not first and never "substantially exclusive." Beginning in 1983, Petitioner's predecessor Valleylab continuously sold electrosurgical generators in the United States featuring a "Soft Coag" mode, which was a full decade **before** Erbe began to use "Soft Coag" as the name of a mode on its electrosurgical generator in 1994. SUMF ¶¶ 6-8. The evidence is undisputed that Valleylab continued to sell these generators featuring a "Soft Coag" mode for more than a decade **after** Erbe began using the term "Soft Coag." *Id.* In fact, Valleylab's electrosurgical generators featuring the "Soft Coag" mode were among the best-selling generators in the United States in the 1980's and 1990's and Valleylab sold thousands of units and earned tens of millions of dollars in revenues from those sales. *Id.* Although Valleylab stopped selling the generators in 2005, they were intended to last twenty years and many are still being used by surgeons today.

Id. ¶ 8. Furthermore, the evidence is undisputed that Petitioner launched an electrosurgical generator in 2015 that uses "Soft Coag" as the name of a mode. SUMF ¶¶ 9-10. *See, e.g., Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 863 (C.C.P.A. 1962) (the Board's finding that petitioner used the mark two years before registrant proved registrant's use was not substantially exclusive and "alone should have been sufficient to support a finding of lack of 'distinctiveness.'").

Moreover, in 2008, Olympus began selling generators in the United States featuring a "SoftCoag" mode and those sales continue to date. SUMF ¶ 34 & Exs. 29, 33. As of 2015, more than a dozen different manufacturers sold electrosurgical generators featuring a mode called "Soft Coag" in the United States which mode enables surgeons to perform the soft coagulation procedure, including Olympus, Bovie, Karl Storz, ConMed, Ackermann, Aesculap, Alsa Apparecchi, EMED, HEBU, Integra, Kavandish, KLS Martin, Lamidey Noury, Valleylab, and Soring. SUMF ¶ 34. The Board can enter summary judgment for Petitioner and cancel Erbe's registrations for "Soft Coag" based on these undisputed facts alone. *See, e.g., Levi Strauss,* 742 F.2d at 1404-05.

B. <u>"Soft Coag" Lacks Acquired Distinctiveness</u>

To determine if SOFT COAG has acquired secondary meaning, the Board examines the following factors: "length of use of the mark, advertising expenditures, sales, survey evidence, and affidavits asserting source-indicating recognition." *In re Franklin County Historical Soc'y*, 104 U.S.P.Q.2d (BNA) 1085, 1089 (TTAB September 5, 2012).

Because the evidence discussed *supra* in Section II proves not only that "Soft Coag" is generic, but also that "Soft Coag" is "highly descriptive," *see In re ActiveVideo Networks, Inc.*, 2014 TTAB LEXIS 283, *68 (TTAB July 9, 2014) (same evidence established mark was generic and highly descriptive), Petitioner has a lower burden to prove lack of acquired distinctiveness.

See Alcatraz Media v. Chesapeake Marine Tours Inc., 107 U.S.P.Q.2d (BNA) 1750, 1766 (TTAB July 2, 2013). Regardless of the weight of the burden, consideration of the above factors proves that SOFT COAG lacks acquired distinctiveness.

1. Erbe's Alleged Advertising Is Not Evidence of Acquired Distinctiveness

"Where advertising always shows the mark accompanied by other trademarks, that advertising is insufficient to demonstrate acquired distinctiveness of the target mark." *In re Franklin County Historical Society*, 104 U.S.P.Q.2d at 1093.

The evidence is undisputed that Erbe does not use the mark "Soft Coag" in magazines or written publication or on signs or banners at trade shows. SUMF ¶ 14. Instead, Erbe's use of "Soft Coag" in what Erbe called "advertising" in its Section 2(f) Declarations is confined to brochures and user and instruction manuals. SUMF ¶¶ 15-18. Erbe admitted that up to 2015 it spent only $15,000 annually on such literature that references its "Soft Coag" generator mode. Ex. 14 at 19.

But even that *de minimus* amount of so-called advertising is not evidence of acquired distinctiveness. The only time that Erbe uses the term "Soft Coag" in its so-called "advertising" is in a list of available modes, in the context of discussing the goods that are branded VIO, ICC and/or ERBE. SUMF ¶¶ 16-19. Erbe does not use the mark "Soft Coag" by itself. *Id.* Use of "Soft Coag" under these circumstances says nothing about whether or not consumers associate "Soft Coag" exclusively with Erbe. *See In re Franklin County Historical Society*, 104 U.S.P.Q.2d at 1093 (advertising failed to show secondary meaning in COSI because mark CENTER OF SCIENCE AND INDUSTRY always appeared next to the mark COSI); *In re Mogen David Wine Corp.*, 372 F.2d 539, 54 C.C.P.A. 1086, 152 USPQ 593, 595-96 (CCPA 1967) (where advertising depicting the applied-for bottle design always featured the word mark MOGEN DAVID, the advertising did not show secondary meaning in the design); *N. Atl.*

Operating Co. v. DRL Enters., 2016 TTAB LEXIS 282, *102-103 (TTAB July 1, 2016) ("Because the decimal designations are always used with the JOB trademark, we cannot ascertain whether Defendant's sales success and advertising expenditures evidence that consumers recognize the decimal designations as source indicators.").

There is simply no evidence that Erbe's *de minimis* advertising efforts linked "Soft Coag" with Erbe. *See, e.g., Ayoub, Inc. v. ACS Ayoub Carpet Service*, 118 U.S.P.Q.2d 1392, 1403 (TTAB 2016) (advertising expenditures over 11 years did not demonstrate secondary meaning because no showing that the advertising was effective).

2. Erbe's Revenues Do Not Show Acquired Distinctiveness

Erbe's revenues from the sale of generators with a "Soft Coag" mode (which it claims in its Section 2(f) Declaration are $80 million dollars) are not evidence of acquired distinctiveness. As shown in the literature attached to those Declarations, as well as the materials produced by Erbe in this case, Erbe's generators are sold under the brands VIO and ICC and the house mark ERBE. SUMF ¶¶ 13, 16-19. Erbe never uses the mark "Soft Coag" by itself. *Id. See In re Bongrain International (American) Corp.*, 13 U.S.P.Q.2d 1727, 1729 (Fed. Cir. 1990) (sales data was not evidence of secondary meaning because the applied-for mark always appeared alongside another mark); *N. Atl. Operating Co. v. DRL Enters.*, 2016 TTAB LEXIS 282, *103 (TTAB July 1, 2016) ("[W]here [] a party's advertising and sales data is based on materials and packaging in which the mark at issue is almost always displayed with another mark, such data does not prove that the mark at issue possesses the requisite degree of consumer recognition.").

3. No Consumer Studies

Erbe has not offered a study or survey that shows that "Soft Coag" has acquired distinctiveness. SUMF ¶ 31. In fact, Erbe admitted that it is unaware of any evidence showing

that "Soft Coag" has acquired secondary meaning. SUMF ¶ 30. Thus, this factor favors Petitioner.

4. Length of Use Alone Does Not Prove Acquired Distinctiveness.

Erbe's length of use of "Soft Coag" does not create a genuine issue of fact that the mark has acquired distinctiveness. *See Historic Hotels*, 2008 WL 3333840, at *2 (sustaining opposition on summary judgment—19 years of use insufficient to show acquired distinctiveness of highly descriptive mark HISTORIC HOTELS for guidebooks); *E.T. Browne Drug Co. v. Cococare Prod., Inc.*, 538 F.3d 185, 199 (3d Cir. 2008) (20 years of use of COCOA BUTTER FORMULA insufficient to show acquired distinctiveness in the mark for skin care products—entering summary judgment).

* * *

The undisputed evidence proves that "Soft Coag" lacks secondary meaning. Erbe's use of "Soft Coag" was not first and has never been exclusive. That alone requires the entry of summary judgment in favor of Petitioner. Moreover, Erbe's so-called advertising and "sales" information that it relied upon in registering "Soft Coag" are not evidence of acquired distinctiveness because Erbe's generators are not sold under the "Soft Coag" mark – Erbe's only use of SOFT COAG is de-minimus and buried in a handful of brochures and instruction manuals.

IV. ERBE DOES NOT USE SOFT COAG AS A TRADEMARK

"Matter that is merely informational is not registrable as a mark." *In re AOP LLC*, 107 U.S.P.Q.2d 1644, 1654 (TTAB Jul 12, 2013). The Board focuses "on likely consumer perceptions" of the alleged mark as used by registrant to determine if it is merely informational and thus unregistrable. *In re T.S. Designs, Inc.*, 2010 TTAB LEXIS 220, *4 (TTAB June 9, 2010).

Erbe displays the term "Soft Coag" only in a list of available generator modes. *See* SUMF ¶¶ 16-19. *See in re AOP*, 107 U.S.P.Q.2d at 1644 ("Set in the midst of other clearly informational matter, and far from the mark naming the wine itself, this use of the term 'AOP' . . . convey[s] nothing more than information itself and would not likely be perceived as a mark."). Erbe does not use "Soft Coag" alone, but instead only in the context of other far more prominently used marks. *Id. See In re T.S. Designs,* 2010 TTAB LEXIS 220 at *6 (proponent's failure to promote the alleged mark independently of other more prominent marks demonstrates lack of trademark use). Nor is there any "evidence bearing on the purchasing public's reaction to [Erbe's] promotional efforts." SUMF ¶¶ 30-31. *In re Volvo Cars of N. Am., Inc.*, 1998 TTAB LEXIS 20, *20 (TTAB April 8, 1998) (phrase DRIVE SAFELY does not function as a trademark). "Soft Coag" conveys to the consumer that the generator has a "Soft Coag" mode that enables a surgeon to perform soft coagulation. It simply does not function as a trademark.

CONCLUSION

Each of the three reasons described above independently requires that Erbe's registrations for "Soft Coag" be cancelled as a matter of law.

Dated: January 22, 2019

By:/Katie Bukrinsky/
John J. Dabney
Mary D. Hallerman
Katie Bukrinsky
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 2001
Telephone: (202)756-8000
Facsimile: (202) 756-8087
Email: jdabney@mwe.com;
mhallerman@mwe.comkbukrinsky@mwe.com

Attorneys for Petitioner Covidien LP

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, a true and correct copy of the foregoing document was served on Registrant via email to Registrant's counsel of record at address below:

Philip G. Hampton, II
Haynes and Boone LLP
800 17th Street NW, Suite 500
Washington, D.C. 20006
Email: Philip.hampton@haynesboone.com;
Anjie.vichayanonda@haynesboone.com;
ipdocketing@haynesboone.com

/Katie Bukrinsky/
Katie Bukrinsky
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001
Telephone: (202) 756-8194
Facsimile: (202) 756-8087
Email: kbukrinsky@mwe.com

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COVIDIEN LP, Petitioner, v. ERBE ELEKTROMEDIZIN GMBH, Registrant.	Cancellation No. 92066392 Registration Nos. 4,236,231 and 4,686,396 Mark: SOFT COAG

DECLARATION OF STEVEN BUYSSE

I, Steven Buysse, do hereby declare under penalty of perjury as follows:

1. I am over twenty-one years of age and competent to make the following statements. I have personal knowledge of the facts set forth in this Declaration and, if called to testify as a witness, I can and will testify to these facts in a court of law or in an administrative agency, including the Trademark Trial and Appeal Board.

2. I was first employed by Covidien LP's predecessor Valleylab in 1986 and have stayed with the same factory for 33 years. Over the years the ownership changed and my current employer is Medtronic, Inc. In this declaration I refer to the company that employs me, including its predecessors Covidien and Valleylab, as "Medtronic."

3. My entire career at Medtronic has involved the testing, design and manufacture of electrosurgical generators. I began my career as an electronic technician 33 years ago. I tested and calibrated Valleylab-branded generators, including SSE4 and Force 4B generators with a Soft Coag mode. I then moved into a research and development role for generators, and was responsible for researching new products and complying with industry standards. Most recently, I was responsible for the development of the Valleylab FT10 generator.

4. I am knowledgeable about both Medtronic's and other manufacturers' generators and the modes available on those generators, including the Soft Coagulation mode which is regularly abbreviated as Soft Coag.

5. As part of my research and development duties I regularly interact with surgeons, nurses, technicians, researchers, and other purchasers and users of electrosurgical generators. I also regularly read clinical literature specific to the electrosurgical field. As a result, I am knowledgeable as to how customers and the industry in general understand and use the terms Soft Coag and Soft Coagulation.

6. I am a non-retained expert on manufacturers' use of the terms Soft Coag and Soft Coagulation in the electrosurgical industry, and on customers' understanding of these terms. My designation is attached as Exhibit A.

7. Electrosurgical generators are used to cut and coagulate tissue during surgery. An electrosurgical generator system features various "modes" or pre-programmed settings, which allow the surgeon to achieve coagulation at different voltages, intensities, and surface distributions resulting in different effects on the tissue.

8. Medtronic's generator systems typically feature coagulation modes called "Spray Coag," "Fulgurate Coag," "Dessicate Coag" and/or "Soft Coag."

9. "Coag" is a common abbreviation for "coagulation."

10. Dessicate and Soft Coag are two settings that allow a surgeon to perform contact coagulation. "Contact coagulation" describes coagulation where the surgeon touches the tissue with the electrode.

11. The Soft Coag mode of Medtronic's generators, like the Soft Coag modes of other manufacturers' generators, enable a surgeon to perform a common medical procedure or technique known as "soft coagulation," commonly abbreviated "Soft Coag," which is where a surgeon softly or gently coagulates tissue while minimizing tissue damage.

12. Hundreds of surgeons and researchers in the United States perform the Soft Coagulation technique every year using Medtronic's generators, Erbe's generators, and the generators of third parties.

13. Medtronic used the term Soft Coag to designate its Soft Coagulation mode since 1983, when it released its Valleylab SSE4 generator with a Soft Coag mode in the United States. Exhibits B and C are true and correct excerpts from manuals for the Valleylab SSE4 generator dated 1983 and 1984 showing a Soft Coag mode.

14. Medtronic then released the Force 4B generator, which also had a Soft Coag mode that enabled users to perform Soft Coagulation. Exhibit D is a true and correct copy of the Valleylab Force 4B manual, dated 1985.

15. The Valleylab SSE4 and Force 4B generators were among the best-selling generator systems in the United States in the 1980's and 1990's. Medtronic sold thousands of these generators and earned tens of millions of dollars from the sales. The generators were built to last for at least 20 years. Many Force 4B generators remain in use in the United States, and used units are still being sold in the United States.

16. Beginning in 2011 I was part of the team planning Medtronic's next generation of generators, which came to be named the Valleylab FT10. The Valleylab FT10 offers a Soft Coag mode which enables a surgeon to perform soft coagulation. Exhibit E is a true and correct copy of excerpts from the Valleylab FT10 User's Guide.

17. The FT10 was released in 2015.

18. Because my work for Medtronic involves ensuring compliance with industry standards, I am familiar with the standards set by the International Electrotechnical Commission ("IEC"). The IEC is the leading standards organization in the world for the electrosurgical industry. Medtronic, like most electrosurgical manufacturers, has a representative who serves on the IEC.

19. The IEC defines "Soft Coagulation" as a "type" of coagulation procedure that can be performed by a surgeon. A true and correct excerpt of the IEC standards is attached as Exhibit F to my declaration.

20. Doctors, surgeons, researchers, and other purchasers and users of electrosurgical generators understand Soft Coag to be an abbreviation of Soft Coagulation.

21. Space limitations on a generator screen require that Soft Coagulation be abbreviated as Soft Coag.

22. Doctors, surgeons, researchers, and other purchasers and users of electrosurgical generators use the terms Soft Coag and Soft Coagulation interchangeably to refer to the procedure of softly or gently coagulating tissue while minimizing tissue damage. They also use these terms interchangeably to refer to a mode on any manufacturer's generator, including Medtronic's FT10 generator, that allows the user to perform a Soft Coagulation procedure.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: January 22, 2019

Steven Buysse

STEVEN BUYSSE

Buysse Exhibit A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COVIDIEN LP, Petitioner, v. ERBE ELEKTROMEDIZIN GMBH, Registrant.	Cancellation No. 92066392 Registration Nos. 4,236,231 and 4,686,396 Mark: SOFT COAG

PETITIONER COVIDIEN LP'S NON-RETAINED EXPERT DISCLOSURE PURSUANT TO RULE 26(a)(2)(C)

Pursuant to Fed. R. Civ. P. 26(a)(2)(C), Petitioner Covidien LP ("Petitioner") provides the following expert disclosure. Petitioner intends to rely upon the testimony of Mr. Steven Buysse, Principal R&D Engineer, employed by Petitioner.

The subject matter of Mr. Buysse's testimony will be the use of the terms "soft coag" and "soft coagulation" in the electrosurgical industry.

Mr. Buysse has worked in the electrosurgical field for approximately 30 years. He regularly interacts with doctors, scientists, and technicians who utilize electrosurgical equipment and accessories. His work requires him to be knowledgeable about third party manufacturers' electrosurgical equipment, including the modes available on such equipment. Mr. Buysse furthermore regularly reads scientific and medical literature specific to the electrosurgical field, and is well-versed in this field of research. Mr. Buysse will testify that "soft coag" describes a mode, feature, or function of electrosurgical devices, instruments, and related software. "Soft coag" is a common abbreviation for "soft coagulation" in the electrosurgical field. The terms

"soft coag" and "soft coagulation" are commonly used by medical professionals, scientists and manufacturers in the electrosurgical field.

Dated: May 9, 2018

By: /Katie Bukrinsky/

John J. Dabney
Mary D. Hallerman
Katie Bukrinsky
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 2001
Telephone: (202)756-8000
Facsimile: (202) 756-8087
Email: jdabney@mwe.com;
mhallerman@mwe.com;
kbukrinsky@mwe.com

Attorneys for Petitioner Covidien LP

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, a true and correct copy of the foregoing PETITIONER COVIDIEN LP'S NON-RETAINED EXPERT DISCLOSURE PURSUANT TO RULE 26(a)(2)(C) was served on Registrant via email to Registrant's counsel of record at address below:

Philip G. Hampton, II
Haynes and Boone LLP
800 17th Street NW, Suite 500
Washington, D.C. 20006
Email: Philip.hampton@haynesboone.com;
Anjie.vichayanonda@haynesboone.com;
ipdocketing@haynesboone.com

/Katie Bukrinsky/
Katie Bukrinsky
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001
Telephone: (202) 756-8194
Facsimile: (202) 756-8087
Email: kbukrinsky@mwe.com

Buysse Exhibit B


Valleylab
SSE4
SERVICE
MANUAL

SSE4

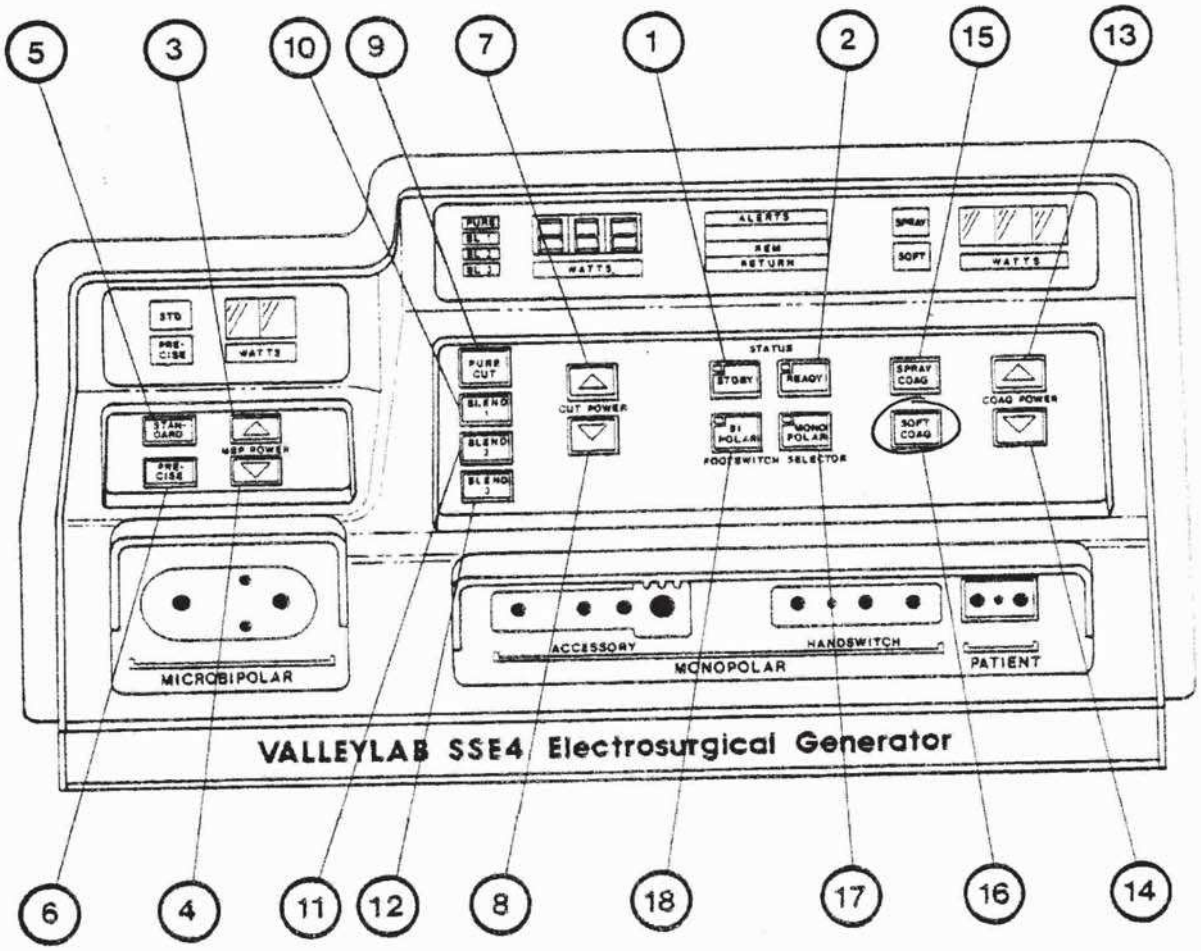
SERVICE MANUAL

110V

EFFECTIVE DATE: November 1, 1983

VALLEYLAB PART NUMBER A 945 100 042 A

PRINTED IN USA



3-6 *Bipolar Controls*
7-12 *Monopolar CUT controls*
1,2 *Standby, Ready Mode Selectors*
17,18 *Footswitch Keying Selectors*
13,16 *Monopolar COAG controls*

FIGURE 2

THE SSE4 CONTROL KEYBOARD ON THE FRONT PANEL

Electrosurgical
Generator

Service
Manual

Beacon
Laboratories 2150 W 6th Ave Unit P Broomfield, CO 80020
FAX 303-466-3042 800-955-2150

Valleylab

FORCE 4B

SERVICE MANUAL

Notice: This manual and the equipment it describes are for use only by qualified medical professionals.

EFFECTIVE DATE: JUNE, 1987

VALLEYLAB PART NUMBER A 945 100 083 A

PRINTED IN USA

VALLEYLAB, INC. 5920 LONGBOW DRIVE, P.O. BOX 9015 BOULDER, COLORADO 80301

(303) 530-2300 TWX 910-940-2514

SECTION 3

DESCRIPTION OF CONTROLS, INDICATORS, ALERTS AND RECEPTACLES

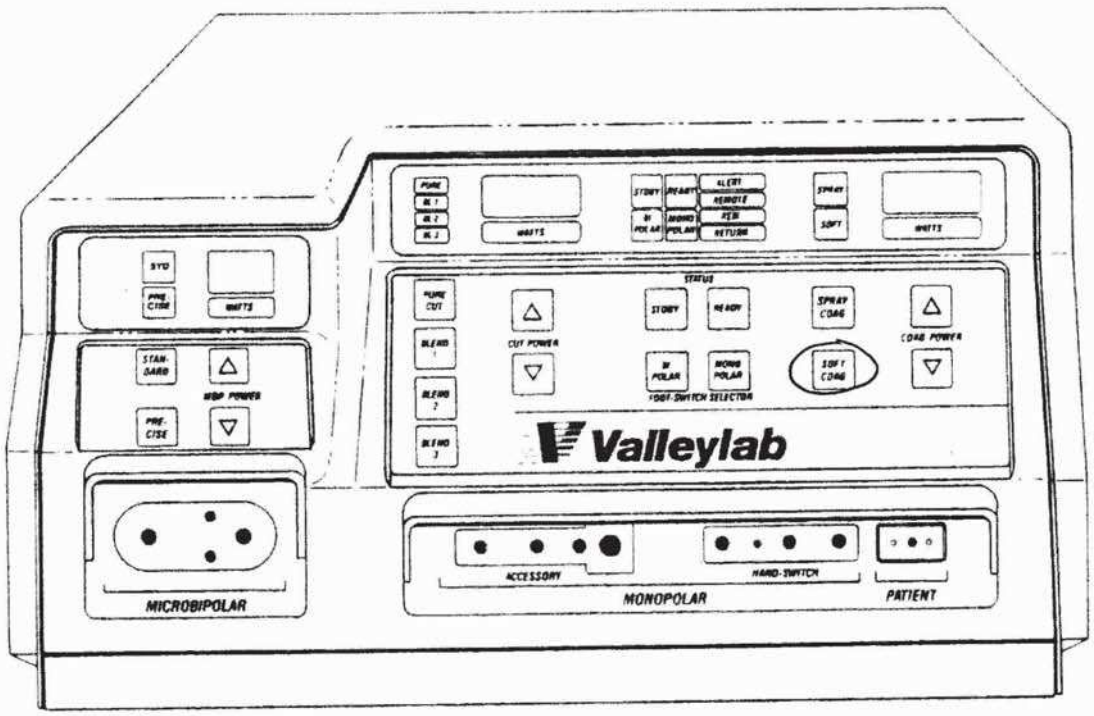


FIGURE 1

FORCE 4B FRONT PANEL

VL 888 Fig 4B 1987

CUT POWER

READY ▽

Remote Power Control Mode - The Remote Power Control feature does not have a dedicated button to access this mode. A two-step procedure is required. Refer to the Instruction Manual, Remote Power Changes.

SPRAY COAG

Spray - Selects coagulation current for general applications.

SOFT COAG

Soft - Selects coagulation mode for delicate applications.

COAG POWER

READY ▽

Low Voltage Coag - Low Voltage Coag does not have a dedicated button to access this mode. A two-step procedure is required. Refer to the Instruction Manual, Recommendations During Surgery.

STAN-DARD

Standard - Selects the standard Bipolar mode for desiccation.

PRE-CISE

Precise - Selects the precise mode for fine desiccation.

INDICATORS:

STDBY

Standby Indicator - Indicates generator is on, but cannot activate outputs.

READY

Ready Indicator - Indicates generator is ready for use.

PURE
BL 1
BL 2
BL 3

Mode Indicator Lamps - One of four CUT mode indicators is illuminated to show the selected Cut mode.

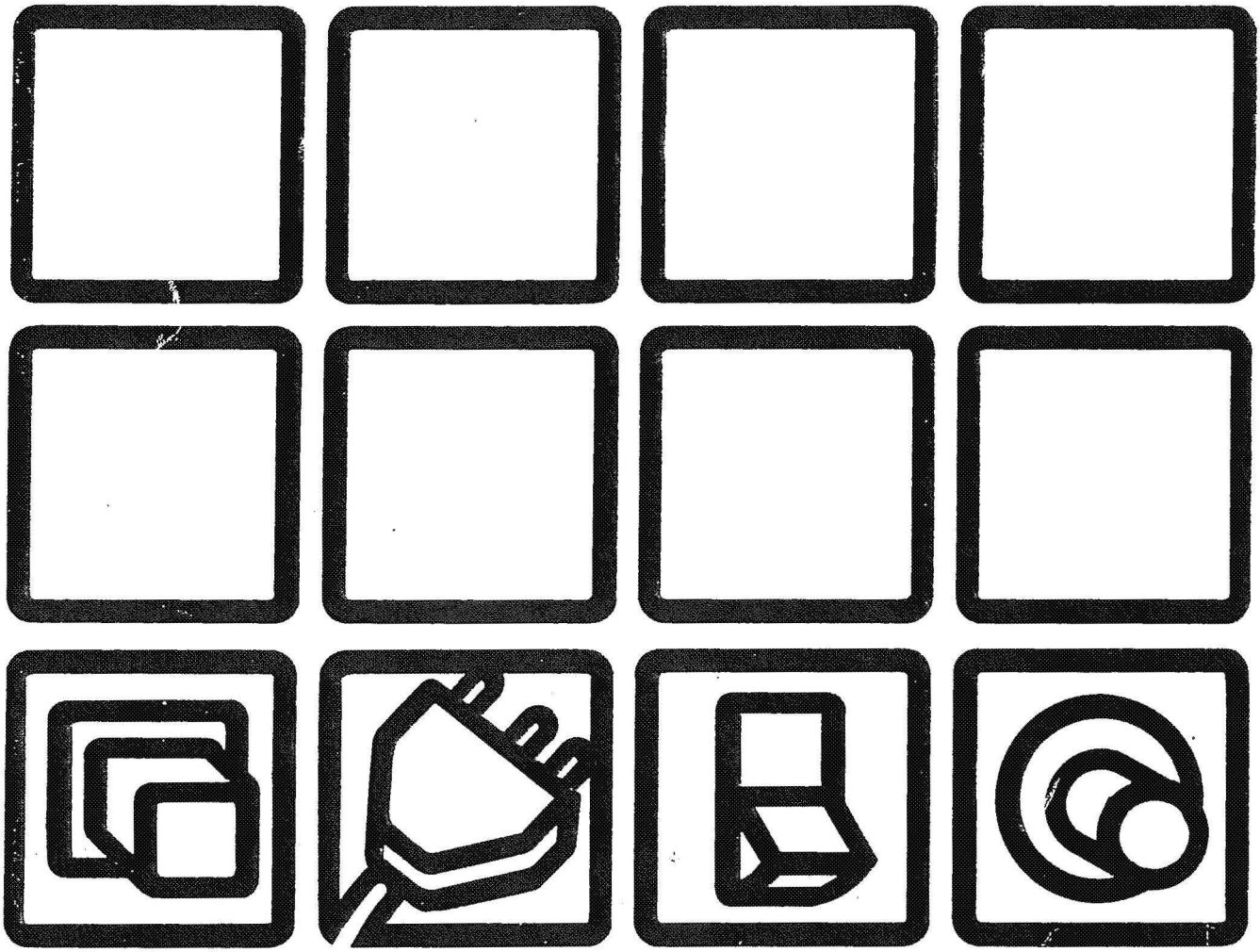
SPRAY
SOFT

One of the two COAG mode indicators is illuminated to show the selected Coag Mode. Note: Neither lamp is illuminated when the generator is in the Low Voltage Coag mode. See Instruction Manual.

STD
PRE-CISE

One of the two BIPOLAR mode indicators is illuminated to show the selected Bipolar mode. STANDARD is for "normal" and PRECISE is for delicate or microscopic procedures.

Buysse Exhibit C



Valleylab

SSE4

INSTRUCTION MANUAL

SSE4 INSTRUCTION MANUAL

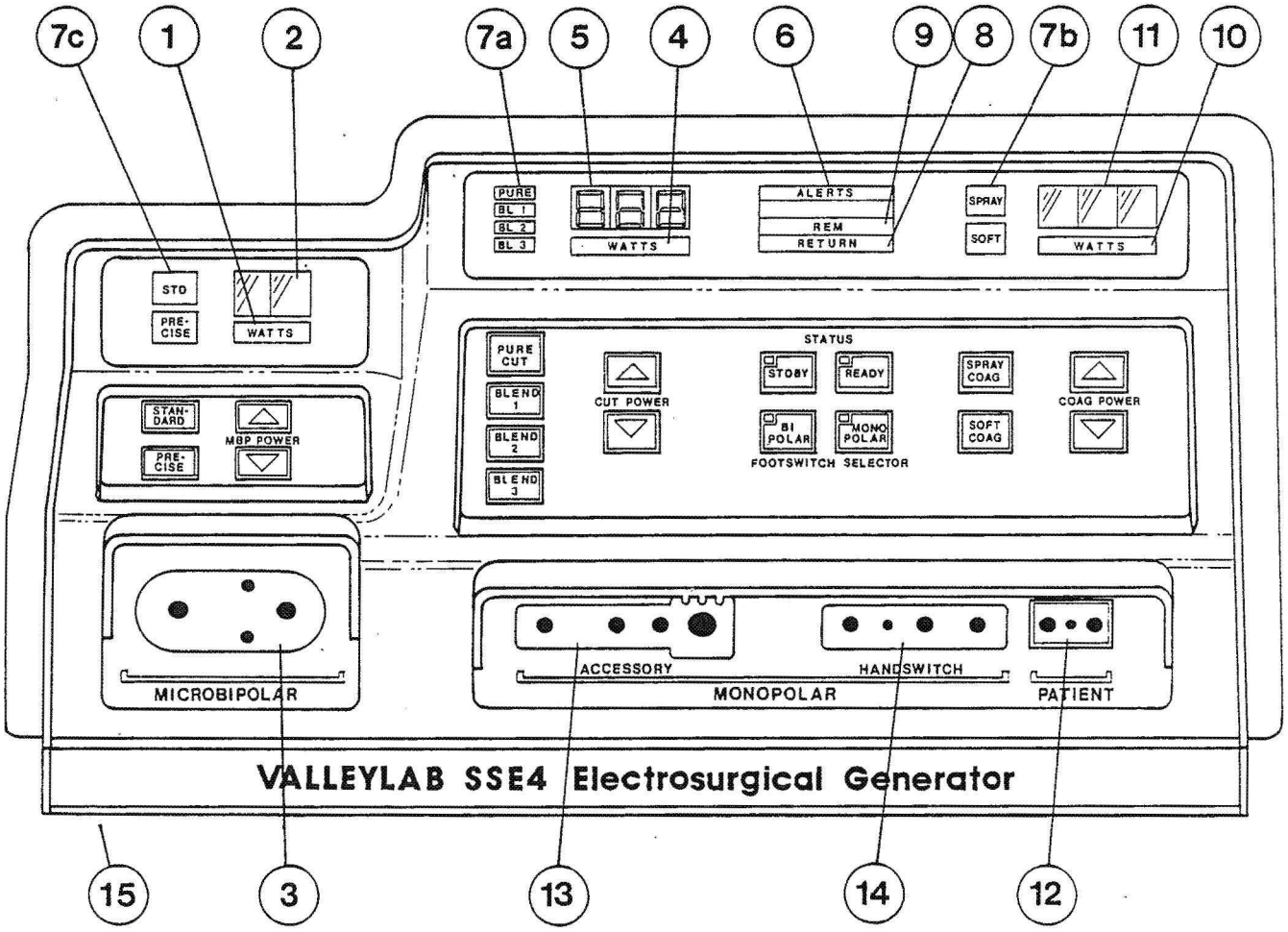
Effectivity Date: August 1, 1984

Valleylab P/N A 945 110 014 A

Printed in USA

SECTION 3

DESCRIPTION OF CONTROLS AND GENERATOR DESIGN



1,2 *Microbipolar Power*
4,5 *Monopolar Power - Cut*
6-9 *Alarm and Mode Indicators*
10,11 *Monopolar Power - Coag*
12 *REM connector*
13,14 *Monopolar Output Jacks*
3 *Bipolar Output Jacks*
15 *Audio Volume*

FIGURE 2

THE SSE4 INDICATORS AND OUTPUTS ON THE FRONT PANEL

FRONT PANEL INDICATORS AND OUTPUTS (SEE FIG. 2)

1. *BIPOLAR OUTPUT ACTIVE INDICATOR*

   The word 'WATTS' will be illuminated when useful output power is available at the Microbipolar Output Jack (3). Absence of illumination when the generator is keyed in the bipolar mode may indicate generator malfunction.

2. *BIPOLAR POWER READOUT*

   This digital LED display is visible when the generator is in the ready mode (2, Fig.3). The number displayed predicts the level of bipolar power, in watts, which will be delivered to a 100 ohm load when the generator is keyed in the bipolar mode.

3. *BIPOLAR ACTIVE RECEPTACLE*

   This receptacle will accept the three prong active bipolar accessories and will be keyed by the handswitch. It will also accept two prong active accessories and the bipolar generator is then keyed by the foot switch when the bipolar foot switch button, (18, Fig. 3), is pressed.

4. *MONOPOLAR CUT OUTPUT ACTIVE INDICATOR*

   The backlit word 'WATTS' will be visible when the generator is keyed in the cut mode and useful output power is available at either of the monopolar output jacks (13) and (14). Absence of illumination when the generator is keyed indicates a malfunction.

5. *MONOPOLAR CUT POWER READOUT*

   This digital LED display is visible when the generator is in the ready mode (2, Fig. 3). The number displayed predicts the level of monopolar cut power, in watts, which will be delivered to a 300 ohm load when the generator is keyed in the monopolar cut mode.

6. *ALERT INDICATOR*

   This LED lamp is on whenever the generator is disabled by an alarm condition. The audio alarm will sound twice when this lamp goes on.

7. *MODE INDICATOR LAMPS*

A. *One of four CUT mode indicators is illuminated to show the CUT power waveform. The mode may be changed by pressing one of the four mode selector push buttons (9,10,11,12; Fig. 3).*

Pure: 750 kHz sinusoid
Blend 1: 50% duty cycle 750 kHz sinusoid
Blend 2: 25% duty cycle 750 kHz sinusoid
Blend 3: 25% duty cycle 750 kHz sinusoid plus inductive discharge pulses.

B. *One of two COAG mode indicators is illuminated to show the COAG power waveform. Selection is done by pushing one of the mode selector push buttons (15,16; Fig. 3).*

SPRAY COAG: 31 kHz inductive discharge
SOFT COAG: 22 kHz inductive discharge

C. *One of two bipolar power mode indicators is illuminated to show the bipolar output power versus load impedance characteristics. Selection is by the push buttons (5,6; Fig. 3).*

STANDARD: Output power at 50 and 200 ohm loads is 1/2 of the power at a 100 ohm load.
PRECISE: Output power at a 200 ohm load is 1/4 of the 100 ohm output power.

8. *RETURN FAULT/GFI INDICATOR*

This LED illuminates if the SSE4 is keyed without a proper patient electrode connection, producing a situation where a significant proportion of the RF current returns to the generator by some path other than the patient connector (12). The SSE4 is disabled so long as the indicator is on. The audio alarm will sound three times when the alert is first detect- ed. The alarm can be cleared by releasing the hand or footswitch and then rekeying.

9. *REM FAULT INDICATOR (Return Electrode Monitor)*

This LED illuminates when the patient electrode contact monitor senses an alarm condition. For a single section (conventional) patient electrode the alarm condition is a resistance greater than 24 ohms between the pins of the patient electrode connector (12). For a Valleylab E7505/E7507 dual patient electrode the alarm condition is a resistance outside the range of 16 - 135 ohms or a 20% increase in resistance. The audio alarm will sound twice when the alarm is first detected. The alarm is cleared when the resistance is lowered and within the acceptance range.

10. *MONOPOLAR COAG OUTPUT ACTIVE INDICATOR*

The backlit word 'COAG' will be visible when the generator is keyed in the coagulation mode and useful output power is available at either of the monopolar output jacks (13) and (14). Absence of illumination when the generator is keyed may indicate a malfunction.

11. *MONOPOLAR COAGULATION POWER READOUT*

This digital LED display is visible when the generator is in the ready mode (2, Fig.3). The number displayed predicts the level of monopolar coagulation power, in watts, which will be delivered to a 300 ohm load when the generator is keyed in the monopolar coagulation mode.

12. *PATIENT RETURN ELECTRODE RECEPTACLE*

This 2 pin receptacle accepts the patient return electrode connector used in monopolar procedures. A pin on the patient electrode connector actuates a switch within the receptacle to indicate the use of the two section patient electrode used for contact area (REM) monitoring. (See Section 6, page 88.)

13. *MONOPOLAR ACTIVE RECEPTACLE - HAND OR FOOTSWITCH*

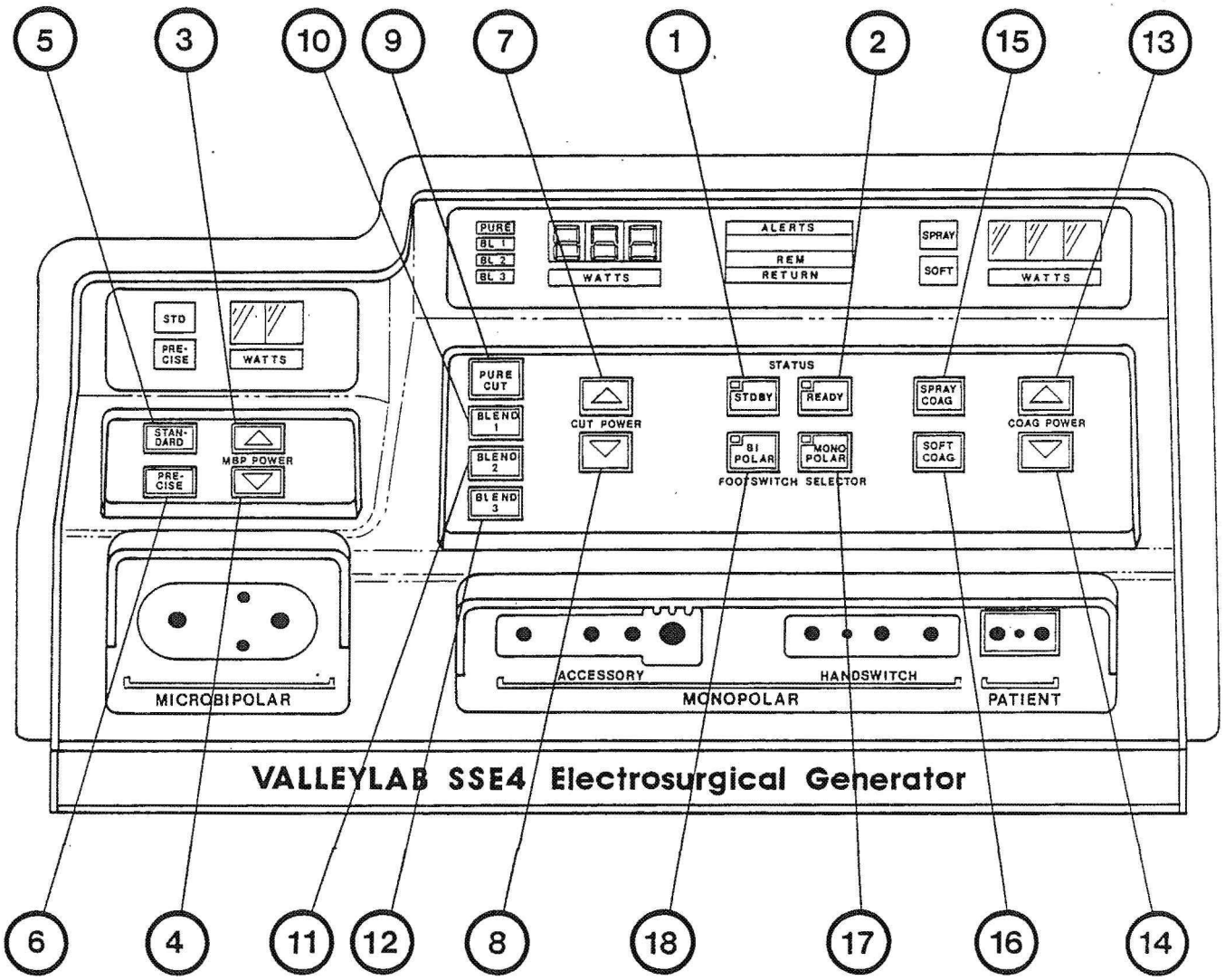
This receptacle will accept three prong handswitching active accessories (Valleylab E2502, E2508) or standard one prong active accessories (PL-55). This output can be activated by the footswitch when the monopolar footswitch button (17, Fig. 3) is pressed or by the handswitch accessory. Cut mode or coagulation mode power may be keyed at this receptacle.

14. *MONOPOLAR ACTIVE RECEPTACLE - HANDSWITCH*

This receptacle will accept the three prong handswitch active accessories (Valleylab E2502, E2508). This output is activated only by the handswitch and will have no power available if the generator is keyed by the footswitch. Cut mode or coagulation mode power may be keyed at this receptacle.

15. *AUDIO VOLUME CONTROL*

The volume of the cut and coag audio tones produced when the generator is keyed may be adjusted with this 4 position slide switch. Pull the switch forward to increase the volume, push it back to decrease the volume. The volume of the sound produced by alarm conditions is not adjustable.



3-6 *Bipolar Controls*
7-12 *Monopolar CUT controls*
1,2 *Standby, Ready Mode Selectors*
17,18 *Footswitch Keying Selectors*
13,16 *Monopolar COAG controls*

NOTE: On/Off switch is located on the back panel (See Figure 4).

FIGURE 3

THE SSE4 CONTROL KEYBOARD ON THE FRONT PANEL

FRONT PANEL KEYBOARD CONTROLS (SEE FIGURE 3)

1. *STANDBY MODE SELECTOR*

   In this mode the generator cannot be keyed and the audio alerts are suppressed. Prior power level settings are retained but the displays will be blank. The generator is in standby when power is first applied.

2. *READY MODE SELECTOR*

   Pressing this button places the generator in service with outputs and alarms fully active.

3. *BIPOLAR POWER INCREASE BUTTON*

   This button increases the bipolar power readout. A single push will raise the power by one watt. Holding the button down continuously will cause the display to increase continuously to 70 watts maximum.

4. *BIPOLAR POWER DECREASE BUTTON*

   Pressing this button decreases the bipolar power display by one watt per push, or continuously if the button is held down.

5. *STANDARD MODE SELECTOR*

   Pressing this button will select the Standard Microbipolar mode. See page 18 for the standard power versus impedance curve.

6. *PRECISE MODE SELECTOR*

   Pressing this button will select the Precise Microbipolar mode. See page 18 for the precise power versus impedance curve.

7. *MONOPOLAR CUT POWER INCREASE BUTTON*

   This button increases the monopolar cut power readout. A single push will increase the power by one watt, and holding the button down will increase the display to the mode maximum.

8. *MONOPOLAR CUT POWER DECREASE BUTTON*

   Pressing this button decreases the monopolar cut mode power display by one watt per push, or continuously if the button is held down.

9. *CUT MODE SELECTOR - PURE CUT*

Pressing this button will select a continuous sinewave cut waveform output.

10. *CUT MODE SELECTOR - BLEND 1*

Pressing this button will select a 50% duty cycle sinewave cut waveform output.

11. *CUT MODE SELECTOR - BLEND 2*

Pressing this button selects a cut mode waveform of 25% duty cycle sinewave for moderate hemostasis.

12. *CUT MODE SELECTOR - BLEND 3*

Pressing this button selects a cut mode output waveform of 25% sinewave plus inductive discharge. This is the cut waveform producing maximum hemostasis.

13. *MONOPOLAR COAGULATION POWER INCREASE BUTTON*

This button increases the monopolar coagulation power display. A single push will raise the power by one watt, and holding the button down will cause a continuous increase.

14. *MONOPOLAR COAGULATION POWER DECREASE BUTTON*

This button decreases the coagulation power display by one watt per push, or continuously when it is held down.

15. *COAG MODE SELECTOR - SPRAY COAG*

Pressing this button will select an inductive discharge with a 31 KHz repetition rate coagulation waveform.

16. *COAG MODE SELECTOR - SOFT COAG*

Pressing this button will select a coagulation waveform with inductive discharge at a lower repetition rate (22 KHz).

17. *FOOTSWITCH SELECTOR - MONOPOLAR*

Pressing this button places the monopolar output under footswitch keying control. (Footswitch Model E6008)

18. *FOOTSWITCH SELECTOR - BIPOLAR*

Pressing this button places the bipolar output under footswitch control. (Footswitch Model E6008)

SECTION 8

SSE4 TECHNICAL SPECIFICATIONS

OUTPUT WAVEFORM

CUT: 750 KHz sinusoid
BLEND 1 750 KHz bursts of sinusoid at 50% duty cycle recurring at 31 KHz.
BLEND 2 750 KHz bursts of sinusoid at 25% duty cycle recurring at 31 KHz.
BLEND 3 750 KHz bursts of sinusoid at 25% duty cycle plus inductive discharge damped sinusoid bursts, all bursts recurring at 31 KHz. Power is adjusted so that the sinusoidal bursts account for 75% of the power into a 300 ohm load and the damped sinusoid bursts account for the remainder.

SPRAY COAG: 750 KHz damped sinusoid bursts with a repetition frequency of 31 KHz.
SOFT COAG: 750 KHz damped sinusoid bursts with a repetition frequency of 22 KHz.
MICROBIPOLAR: 750 KHz sinusoid, unmodulated

OUTPUT CHARACTERISTICS

MODE	*MAXIMUM (OPEN CIRCUIT) P-P VOLTAGE*	*RATED LOAD (OHMS)*	*MAXIMUM POWER (AT RATED LOAD) WATTS*	*CREST FACTOR AT RATED LOAD + 20%*
CUT	*2500*	*300*	*300 ± 20*	*1.6 @ 100W*
BLEND 1	*2800*	*300*	*250 ± 20*	*2.6 @ 100W*
BLEND 2	*3000*	*300*	*200 ± 20*	*3.6 @ 100W*
BLEND 3	*3400*	*300*	*200 ± 20*	*4.4 @ 100W*
SPRAY COAG	*9000*	*300*	*120 ± 10*	*9.0 @ 50W*
SOFT COAG	*9000*	*300*	*60 ± 5*	*13.0 @ 30W*
MICROBIPOLAR	*400*	*100*	*70 ± 8*	*1.6 @ 40W*

Microbipolar has selectable output characteristics: power approximately proportional to $\frac{I}{R}$ *or* $\frac{I}{R^2}$ *(Standard and Precise).*

POWER READOUTS

Three L.E.D. displays (for coag, cut and microbipolar) indicate output power. Power readouts agree with actual power into rated load to within ± 15% or 5 watts whichever is greater.

LOW FREQUENCY LEAKAGE (50/60 HERTZ)

Source current, patient leads, all outputs tied together
Normal polarity, intact chassis ground, 2.0 uA
Normal polarity, ground open, 30uA
Reverse polarity, ground open, 30uA
Sink current, 140 volts applied, all inputs 150uA

Buysse Exhibit D

FORCE 4

SERVICE MANUAL

220V

EFFECTIVITY DATE: May 1, 1985

VALLEYLAB PART NUMBER A 945 100 055 A

PRINTED IN USA

5920 LONGBOW DRIVE, P.O. BOX 9015, BOULDER, COLORADO 80301

303 530-2300 TWX 910-940-2514

AF

26

Pure: *750 kHz sinusoid*
Blend 1: *50% duty cycle, 750 kHz sinusoid*
Blend 2: *25% duty cycle, 750 kHz sinusoid*
Blend 3: *25% duty cycle, 750 kHz sinusoid plus inductive discharge pulses.*

B. *One of two COAG mode indicators is illuminated to show the COAG power waveform. Select by pushing one of the mode selector push buttons (15,16; Fig. 3)*

SPRAY COAG: *31 kHz inductive discharge*
SOFT COAG: *22 kHz inductive discharge*

C. *One of two bipolar power mode indicators is illuminated to show the bipolar output power versus load impedance characteristics. Selection is by the push buttons (5,6; Fig. 2).*

STANDARD: *Output power at 50 and 200 ohm loads is 1/2 of the power at a 100 ohm load.*
PRECISE: *Output power at a 200 ohm load is 1/4 of the 100 ohm output power.*

8. *RETURN FAULT INDICATOR*

This LED illuminates if the FORCE 4 is keyed without a proper patient electrode connection, producing a situation where a significant proportion of the RF current returns to the generator by some path other than the patient connector (12). The FORCE 4 is disabled so long as the indicator is on. The audio alarm will sound twice when the alert is first detected. The alarm can be cleared by releasing the hand or footswitch and then rekeying the unit.

9. *REM FAULT INDICATOR (Return Electrode Monitor)*

This LED illuminates when the patient electrode contact monitor senses an alarm condition. For a single-section patient electrode the alarm condition is a resistance greater than 16 ohms between the pins of the patient electrode connector (12). For a dual-section patient electrode the alarm condition is a resistance outside the range of 5 - 135 ohms or a 30% increase in resistance. The audio alarm will sound twice when the alarm is first detected. The alarm is cleared when the resistance is lowered and is within the acceptance range.

10. *MONOPOLAR COAG OUTPUT ACTIVE INDICATOR*

The backlit word 'WATTS" will be visible when the generator is keyed in the coagulation mode and useful output power is available at either of the monopolar output jacks (13) and (14). Absence of illumination when the generator is keyed may indicate a malfunction.

10. *CUT MODE SELECTOR - BLEND 1*

Pressing this button will select a 50% duty cycle sinewave cut waveform output.

11. *CUT MODE SELECTOR - BLEND 2*

Pressing this button selects a cut mode waveform of 25% duty cycle sinewave for moderate hemostasis.

12. *CUT MODE SELECTOR - BLEND 3*

Pressing this button selects a cut mode output waveform of 25% sinewave plus inductive discharge. This is the cut waveform producing maximum hemostasis.

13. *MONOPOLAR COAGULATION POWER INCREASE BUTTON*

This button increases the monopolar coagulation power display. A single push will raise the power by one watt, and holding the button down will cause a continuous increase.

14. *MONOPOLAR COAGULATION POWER DECREASE BUTTON*

This button decreases the coagulation power display by one watt per push, or continuously when it is held down.

15. *COAG MODE SELECTOR - SPRAY COAG*

Pressing this button will select an inductive discharge with a 31 KHz repetition rate coagulation waveform.

16. *COAG MODE SELECTOR - SOFT COAG*

Pressing this button will select a coagulation waveform with inductive discharge at a lower repetition rate (22 KHz).

17. *FOOTSWITCH SELECTOR - MONOPOLAR*

Pressing this button places the monopolar output under footswitch keying control.

18. *FOOTSWITCH SELECTOR - BIPOLAR*

Pressing this button places the bipolar output under footswitch control.

SECTION 5

FORCE 4 TECHNICAL SPECIFICATIONS

OUTPUT WAVEFORM

CUT 750 kHz sinusoid

BLEND 1 750 kHz bursts of sinusoid at 50% duty cycle recurring at 31 kHz.

BLEND 2 750 kHz bursts of sinusoid at 25% duty cycle recurring at 31 kHz.

BLEND 3 750 kHz bursts of sinusoid at 25% duty cycle plus inductive discharge damped sinusoidal bursts, all bursts recurring at 31 kHz. Power is adjusted so that the sinusoid bursts account for 75% of the power into a 300 ohm load and the damped sinusoid bursts account for the remainder.

SPRAY COAG 750 kHz damped sinusoidal bursts with a repetition frequency of 31 kHz.

SOFT COAG 750 kHz damped sinusoidal bursts with a repetition frequency of 22 KHz.

MICROBIPOLAR 750 kHz sinusoid, unmodulated

OUTPUT CHARACTERISTICS

Mode	Maximum (open circuit) P-P Voltage	Rated Load (Ohms)	Maximum Power (at Rated Load) (Watts)	Crest Factor At Rated Load +10%
CUT	2500	300	300 ± 20	1.9 @ 100W
BLEND 1	2800	300	250 ± 20	2.6 @ 100W
BLEND 2	3000	300	200 ± 20	3.7 @ 100W
BLEND 3	3400	300	200 ± 20	4.4 @ 100W
SPRAY COAG	9000	300	120 ± 10	9.0 @ 50W
SOFT COAG	9000	300	60 ± 5	13.0 @ 30W
MICROBIPOLAR	400	100	70 ± 8	1.6 @ 40W

Microbipolar has selectable output characteristics: power approximately proportional to I/R or I/R^2 (Standard or Precise).

POWER READOUTS

Three L.E.D. displays (for coag, cut and microbipolar) indicate output power. Power readouts agree with actual power into rated load to within ± 10% or 5 watts, whichever is greater.

Buysse Exhibit E

COVIDIEN

User's Guide

Valleylab™ FT10

FT Series Energy Platform

Cov-SOFT00017

Modes & Settings

The VLFT10GEN provides the following modes and settings for a variety of surgical procedures:

Monopolar modes	Power-Setting Ranges	Peak Voltage
• CUT		
- PURE	Off, 1–300 W	1287 V
- BLEND	Off, 1–200 W	2178 V
• VALLEYLAB	5–85 W	2783 V
• COAG		
- SOFT	Off, 1–120 W	264 V
- FULGURATE	Off, 1–120 W	3449 V
- SPRAY	Off, 1–120 W	3933 V
Bipolar effects		
• LOW	Off, 1–15 W	133 V
• MEDIUM	16–40 W	214 V
• HIGH	45–95 W	462 V
LigaSure (tissue fusion)	No power settings	244 V
Bipolar Resection effect		
• CUT	1–6	742 V
• COAG	1–6	318 V

Monopolar Modes

The system produces six modes of monopolar power output.

Precaution

To provide expected functionality from a hand piece, proper insertion is required. Refer to the alignment dots below the receptacles for proper insertion orientation.

CUT Modes

PURE CUT provides a clean, precise cut in any tissue with little or no hemostasis.

BLEND CUT is a conventional blended waveform that provides slower cutting with simultaneous hemostasis.

VALLEYLAB Mode

VALLEYLAB mode is a unique combination of hemostasis and dissection that allows the user to slow down for more hemostasis and speed up for faster dissection. Thermal spread is equal to or less than CUT or BLEND modes.

COAG Modes

SOFT desiccates tissue at a relatively slower rate with deeper thermal penetration. It is typically performed with a ball electrode.

FULGURATE coagulates tissue by sparking from the active electrode, through air, to the patient tissue.

SPRAY delivers wider fulguration; penetration is shallower and the affected tissue area is larger than with the FULGURATE mode.

Compatible Monopolar Instruments & Devices

The following Covidien catalog numbers for monopolar surgical instruments, return electrodes, foot pedals, and adapters are fully compatible with the VLFT10GEN.

UFP-Receptacle Adapter (connect only to Monopolar 1)

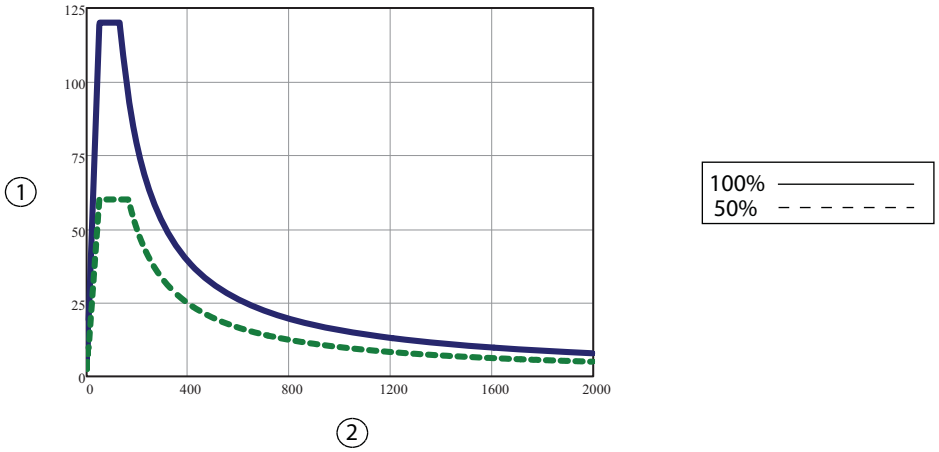
E05021 Monopolar Adapter
E050212 Monopolar Adapter

Instruments (connect only to Monopolar 2 receptacle)

FT3000DB Force TriVerse™ Electrosurgical Device
FT3000 Force TriVerse Electrosurgical Device

SOFT COAG

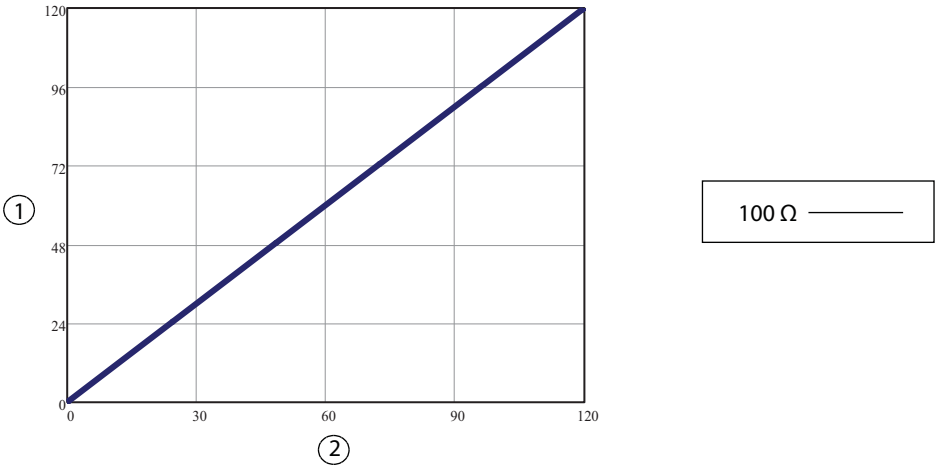
Output power versus impedance for SOFT COAG power



① Output power (watts)

② Load impedance (ohms)

Output power versus power setting for SOFT COAG power



① Output power (watts)

② Power setting

Rx ONLY

Consult instructions for use

ME20

0086

COVIDIEN

Part No. 1073652

Made in USA. Printed in USA.

Covidien llc, 15 Hampshire Street, Mansfield, MA 02048 USA.

EC REP Covidien Ireland Limited, IDA Business & Technology Park, Tullamore.

www.covidien.com

1-303-530-2300 [T]

1-800-255-8522 [T]

REV 01/2015

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COVIDIEN LP, Petitioner, v. ERBE ELEKTROMEDIZIN GMBH, Registrant.	Cancellation No. 92066392 Registration Nos. 4,236,231 and 4,686,396 Mark: SOFT COAG

DECLARATION OF KAMRIN HELLAND

I, Kamrin Helland, do hereby declare under penalty of perjury as follows:

1. I am over twenty-one years of age and competent to make the following statements. I have personal knowledge of the facts set forth in this Declaration and, if called to testify as a witness, I can and will testify to these facts in a court of law or in an administrative agency, including the Trademark Trial and Appeal Board.

2. I was an employee of Covidien LP before it was acquired by Medtronic Inc., and continue in the same role as an employee of Medtronic.

3. I am the director of Medtronic's Minimally Invasive Therapies Group's Energy Hardware portfolio. In that role I am responsible for the marketing and sales of electrosurgical generators including the Valleylab FT10. My department also maintains records of sales of our older generator models.

4. The Valleylab FT10 was released in November 2015.

5. The document attached as Exhibit A to my declaration is a true and correct excerpt of a business record showing units of certain Valleylab-branded electrosurgical generators sold in the United States each year since 1996. The green highlighting indicates those

generators that have a Soft Coag mode. The last two rows in the document show sales of the Valleylab FT10.

6. Records from earlier than 1996 are not readily available.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: January 16, 2019

KAMRIN HELLAND

CONFIDENTIAL
HELLAND
EXHIBIT A