

ORDER
of the Court of First Instance of the Unified Patent Court
Local Division The Hague
issued on 4 March 2024
concerning confidentiality

Headnote: Application under R. 262A RoP by the claimants for a confidentiality order regarding financial information provided with their reply to an Application under R. 158 RoP. Application granted. Access to confidential information limited to counsel only with the consent of the parties.

Keywords: R.262A confidentiality. Access limited to counsel.

APPLICANTS

- | | | |
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| 1) | Plant-e Knowledge B.V.
(Claimant in the main proceedings)
Renkum – the Netherlands | Represented by Oscar Lamme |
| 2) | Plant-e B.V.
(Claimant in the main proceedings)
Renkum – the Netherlands | Represented by Oscar Lamme |

RESPONDENT

- | | | |
|----|--|------------------------------|
| 1) | Arkyne Technologies S.L.
(Defendant in the main proceedings)
Barcelona – ES | Represented by Joran Spauwen |
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PATENT AT ISSUE

Patent no.

Proprietor(s)

EP2137782

Plant-e Knowledge B.V.

DECIDING JUDGE

The full panel in the main proceedings is composed as follows:

Presiding judge - Edger Brinkman

Legally qualified judge - Samuel Granata

Legally qualified judge/Judge-Rapporteur - Margot Kokke

Technically qualified judge - Simon Walker

This order has been issued by the Judge-Rapporteur (JR).

LANGUAGE OF PROCEEDINGS

English

SUBJECT-MATTER OF THE APPLICATION AND POINTS AT ISSUE

1. The present application for the protection of confidential information pursuant to R. 262A of the Rules of Procedure (“RoP”) was made by the claimants (hereinafter collectively “Plant-e”). This application is referred to hereinafter as “the 262A-Application”. It was not filed in (and is not relevant for) the main proceedings but with Plant-e’s reply to a R. 158 application filed by the defendant (hereinafter “Bioo”) as application # 586761/2023 (“the 158-Application” and “the 158-Reply”). The 262A-Application was submitted on 28 November 2023, on the same date as the 158-Reply.
2. Plant-e requests that the Court order that certain information (see below) be treated confidentially, in accordance with the confidentiality regime specified in the 262A-Application. Plant-e has provided redacted and unredacted versions of documents containing such information. Redacted confidential information is addressed in paragraph 2.24 of the 158-Reply (not paragraph 2.28 as erroneously mentioned in the 262A-Application) and in Exhibit 17. The redacted parts are hereinafter collectively referred to as “the Redacted Information”. According to the 262A-Application, the redacted information concerns the investments made in Plant-e by investors and the relevant amount of said investments. It also concerns information on the sales funnel of Plant-e and projected sales in the near future., provide more information concerning the financial situation of Plant-e than is publicly available.
3. Plant-e furthermore requests that Bioo be ordered to pay recurring penalty payments for each breach of the confidentiality order. It also requests to order a confidentiality regime in which the Redacted Information is only to be used by Bioo for the 158-Application and no other purposes. Plant-e also originally requested that only one natural person in Bioo may be granted access to the Redacted Information and that said person may not be involved in sales, procurement of grants and discussions with existing or potential investors, or hold a financial position within Bioo.
4. Bioo was given the opportunity to provide their opinion. It filed a reply to the 262A-Application on 13 December 2023.

Preliminary Order, further submissions and amended 262A-Application

5. On 26 January 2024 the JR issued a Preliminary Order giving the parties the opportunity to provide further comments and giving Plant-e the opportunity to withdraw its 262A-

Application. The considerations from the Preliminary Order are, where relevant, repeated in the grounds set out below.

6. Both parties responded on 8 February 2024, whereby Plant-e maintained its 262A-Application, stating that the Redacted Information had already been submitted and shared with Bioo's representatives and that the information might become relevant if an appeal is filed against the Order in the R.158 Application. Bioo's primary position remains the dismissal of the 262A-Application. However, if the 262A-Application is granted, the parties' representatives have agreed to establish an "*attorneys' eyes only*" restricted-access group in such a way that only Bioo's legal representatives (A.P. Meijboom, J.R. Spauwen, M.L. Rondhuis and X. Fábrega) will be allowed access to the Redacted Information submitted in the 158-Reply. The parties have also agreed that no penalty shall be imposed.
7. Plant-e amended its 262A-Application accordingly.

GROUNDS FOR THE ORDER

Legal framework

8. In the Agreement on a Unified Patent Court ("UPCA"), the protection of trade secrets, personal data or other confidential information in proceedings before the UPC is provided for in Art. 58 UPCA which has been implemented in R. 262A RoP. The wording of Art. 58 UPCA is as follows:

Protection of confidential information

To protect the trade secrets, personal data or other confidential information of a party to the proceedings or of a third party, or to prevent an abuse of evidence, the Court may order that the collection and use of evidence in proceedings before it be restricted or prohibited or that access to such evidence be restricted to specific persons.

9. The wording of R.262A.1 and 6 RoP is as follows:

Protection of Confidential Information

1. Without prejudice to Article 60(1) of the Agreement and Rules 190.1, 194.5, 196.1, 197.4, 199.1, 207.7, 209.4, 315.2 and 365.2 a party may make an Application to the Court for an order that certain information contained in its pleadings or the collection and use of evidence in proceedings may be restricted or prohibited or that access to such information or evidence be restricted to specific persons.
(...)
6. The number of persons referred to in paragraph 1 shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.

Considerations

10. The present Order pertains to the 262A-Application and thus exclusively to the confidentiality issue. The Redacted Information is not relevant for the main proceedings. Plant-e wishes to rely on the Redacted Information solely to contradict Bioo's primary contention in support of its 158-Application that Plant-e's financial position does not allow it to cover Bioo's legal costs in case the Court would order Plant-e to bear those costs.
11. The Redacted Information that Plant-e wishes to protect, qualifies as (other) confidential information, as asserted by Plant-e. This type of information, i.e. financial information that is not in the public domain concerning the sales funnel and (confirmed or prospective) investments that have not yet been made public, is information that is generally considered to be confidential, especially vis-à-vis a competitor as is the case here. Bioo's response fails

to provide convincing arguments to counter this assertion. Unprotected disclosure of the Redacted Information to (employees of) Bioo is likely to negatively impact Plant-e. Given the circumstances of these proceedings, involving competing small companies with limited staff and sensitive financial information that is not publicly available, the JR concludes, taking into account the interests of both parties, that in this case giving a natural person of Bioo access to the Redacted Information is likely to distort competition, which should be prevented (Art. 42.2 UPCA) and hence access should not be granted. This is particularly applicable because withholding the Redacted Information from a natural person of Bioo does not affect Bioo's position in the main action. It also does not hinder Bioo's position in the 158-Application, as sufficient additional information was available for the Court to take a decision without considering the Redacted Information. Allowing Bioo access to such information would in this case thus be contrary to the principles of proportionality, fairness and equity that the court has to take into account when applying the Rules of Procedure.

12. However, it is not entirely clear whether denying access for at least one natural person of the party, is in line with the applicable legal framework of the UPC. The wording of R.262A.6, that is identical to the wording used in Art. 9 (2), last paragraph of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information ('trade secrets'), seems clear. However, it is not entirely clear if this rule always applies, or whether it is limited to cases wherein "*access to such evidence be restricted*". The wording of R.262A.1 and also Art.58 UPCA seem to allow for a reading that, in addition to limiting access to specific persons, it is also possible in proceedings before the UPC to rule that access to 'confidential information' (which is defined broader than trade secrets: "*trade secrets, personal data or other confidential information of a party*", Art. 58 UPCA) be prohibited completely. This follows from the use of the wording "*restricted or prohibited or (...) restricted to specific persons*" (emphasis added, JR). Considering the principles of fair trial, this could in some circumstances result in allowing access to a party's counsel only. In interpreting the legal framework, it is relevant that in different Contracting Member States Directive (EU) 2016/943 is implemented in different ways. For instance, in Germany and Belgium, the provisions of the Directive have been extended to apply to all types of cases in which confidential information is concerned (even as just a side issue), including the rule that at least, one natural person from each party should be granted access to the trade secrets. In The Netherlands, the Directive is limited to proceedings concerning (the enforcement of) trade secrets only, and a different regime applies where confidential information (including trade secrets) is at issue in other proceedings (such as in patent cases), whereby access to such information can be limited to attorneys only where appropriate and in line with a fair trial. This leaves room for more flexibility to align access with the circumstances of a case and the type of confidential information concerned. Also, justification for this may be found in the logic that the principle of fair trial is more likely to be impaired when the essence of the case is the trade secret and no natural person of a party would get access to the confidential information, as compared to a case wherein this information is a side issue (like in the case at hand).
13. In any case, also if the relevant provisions should be interpreted in such a way that R. 262A.6 RoP also applies to the current situation, the JR considers that it is possible for the parties to

exclude access by a natural persons by mutual agreement or by the party concerned forfeiting its right to access by a natural person, provided that fair trial is not affected.

Decision of the JR

14. The 262A-Application is granted for the reasons set out above and as agreed upon and requested by the parties with limited access to the Redacted Information.
15. Plant-e and Bioo do not agree on the use of the Redacted Information. Plant-e argues that the use should be limited to the context of the 158-Application only. Bioo contends that the use of the Redacted Information should be permitted for the entirety of the proceedings pending between the parties, including both the main proceedings and the counterclaim. As mentioned above, the Redacted Information does not concern the main proceedings and is solely relevant to, and was exclusively introduced in, Plant-e's 158-Reply regarding the 158-Application. The JR will thus limit its use to the latter application. For completeness' sake: the 158-Application was dismissed by an Order of the panel, with the Redacted Information not being considered by the court (ORD_586761/2023 of 13 February 2024).

FINAL ORDER

On these grounds and after hearing the parties on all aspects relevant to the following order, it is ordered that:

1. the Redacted Information qualify as confidential information in accordance with Art. 58 UPCA and R. 262A RoP;
2. only Bioo's legal representatives (A.P. Meijboom, J.R. Spauwen, M.L. Rondhuis and X. Fábrega) shall have access to the Redacted Information;
3. the Redacted Information may only be used by Bioo for the R.158 Application and no other purposes;
4. the costs of the 262A-Application shall be addressed together with the costs in the main proceedings.

DETAILS OF THE ORDER

App_589842/2023

UPC case number: UPC_CFI_239/2023

main proceeding CMS nos.: ACT_549536/2023 (claim) and CC_588768/2023 (counterclaim)

Related Application No.: 586761/2023 (R.158-Application)

Issued on 4 March 2024