



Procedural order
of the Court of First Instance of the Unified Patent Court local division
Düsseldorf
issued on 23 February 2024
concerning EP 2 697 391 B1

LEADERSHIPS:

1. Pursuant to R. 262A.4 VerfO, the representative of the other parties must be requested to submit a written statement before a secrecy order is issued. However, in the interests of effective protection of secrecy, the requirement to be heard prior to issuing the order only applies to the final secrecy order and access restriction. In the interest of effective protection of secrecy in accordance with Directive (EU) 2016/943, however, access can be further restricted until a final order is issued, namely to the person representing the plaintiff. Discussion of the confidentiality application with the party is possible with the redacted versions of the documents concerned (connection to UPC_CFI_22/2023 (Hamburg local division), order of 2 December 2023).
2. In order to take into account the special features of summary proceedings, the group of persons required for fair proceedings (R. 262A.6 VerfO) must be selected in such a way that the party affected by the provisional secrecy protection order is fully capable of working and in a position to comment on the merits of each point raised by the opposing party, taking into account the confidentiality interests of the opposing party. Therefore, as a rule, a provisional restriction to four legal representatives (two partners and two associates to support them), two patent attorney representatives and three representatives of the client appears appropriate (UPC_CFI_463/2023 (LK Düsseldorf), order of 14 February 2024), whereby this group of persons can be extended by two paralegals if necessary.
3. Since the group of persons who are granted access to the (allegedly) confidential information may not exceed the scope necessary for compliance with the right of the parties to an effective legal remedy and a fair trial in accordance with R. 262.6 sentence 1 of the Code of Procedure, the group of persons entitled to access must always be examined on a case-by-case basis, taking into account the above considerations, and, if necessary and appropriate, adapted to the requirements of the respective proceedings.

KEYWORDS:

Protection of secrets; application for protection of secrets; trade secrets; 262A application; preliminary order; right to be heard; summary proceedings; preliminary order for protection of secrets

APPLICANT:

10x Genomics, Inc, 6230 Stoneridge Mall Road, 94588-3260 Pleasanton, CA, USA, legally represented by the Board of Directors, which is represented by the CEO ..., *ibid*,

represented by: Lawyer Prof. Dr. Tilman Müller-Stoy,
Attorney at Law
Dr. Martin Drews, Patent Attorney Dr. Axel Berger,
Prinzregentenplatz 7, 81675 Munich,

Electronic delivery address: ...

APPLICANT:

Curio Bioscience Inc, 4030 Fabian Way, Palo Alto, CA 94303, USA, represented by its CEO ..., *ibid*,

represented by: Lawyer Agathe Michel-de Cazotte, European
Patent Attorney Cameron Marschall, 1 Southampton Row WC1B
5HA London, United Kingdom,

electronic delivery address: ...

PUBLISHING PATENT:

EUROPEAN PATENT NO. EP 2 697 391 B1

DECISION-MAKING BODY/CHAMBER:

Judges of the Düsseldorf local division:

This order was issued by presiding judge Thomas as judge-rapporteur.

LANGUAGE OF THE PROCEEDINGS: German

SUBJECT: R. 262A VerfO - Protection of confidential information

BRIEF DESCRIPTION OF THE FACTS:

The parties are currently involved in proceedings for an order for provisional measures. In a document dated 15 February 2024, the defendant filed an application for the protection of confidential information contained in the notice of opposition and annexes.

In the opinion of the defendant, access to the information classified by it as confidential should be restricted. This information is of a purely commercial and non-technical nature, so that patent attorneys do not need access to this information. The scope of the information classified as confidential by the defendant is small. This information is also limited, specific, highly commercially sensitive and of such a nature that employees of the applicant do not need access. If an employee of the applicant is granted access, this employee must belong to the legal department and must not be involved in commercial decisions. Furthermore, the applicant would have to convince the court of this,

that it has procedures in place to ensure that access to the information classified as confidential by the defendant is limited to the named persons. In order to ensure that the information in question is not used outside the present proceedings, the other legal representatives who are given access to the information in question in addition to the legal representatives named in the previous proceedings should not be involved in pending UPC proceedings conducted by the applicant in the same field.

In a procedural order dated 16 February 2024, the Düsseldorf local division initially granted access to the unredacted version of the documents submitted to the authorised representatives previously named in the proceedings and obliged them to maintain confidentiality - also vis-à-vis the applicant - under threat of a penalty payment. At the same time, the local division gave the parties the opportunity to make additional submissions on the group of persons to be granted access until the final decision on the application for confidentiality.

Taking these comments into account, the local division announced the procedural order that has now been issued by way of a provisional procedural order dated 20 February 2024 and gave the defendant the opportunity to make a final statement on this within a short period of time. The defendant made use of this opportunity.

APPLICATIONS BY THE PARTIES:

The defendant requests that, pursuant to Article 58 UPCA

1. order that access to the text in red in the confidential notice of opposition to the application for interim measures and in the confidential affidavit of Mr ... (see confidential annex CR- 3) be restricted to a total of no more than four named legal representatives of 10x in person, who undertake not to participate in any licensing negotiations in the field of spatial transcriptomics for 5 years; or
2. in the alternative, order that access to the text in red in the confidential notice of opposition to the application for interim measures and in the confidential affidavit of Mr ... (see confidential annex CR-3) be restricted to:
 - i. a maximum total of four named legal representatives of 10x in person; and
 - ii. a named employee of 10x from the legal department who is also not involved in any business decisions; and
 - iii. in both of the above cases to persons who undertake not to take part in any licence agreement negotiations in the spatial transcriptomics sector for 5 years.

The applicant requests,

1. provisional access to the alleged confidential information to be designated by the defendant for the lawyers of BARDEHLE PAGENBERG Partnerschaft mbB and for two reliable persons until a final decision on the application for protection of confidential information is issued

to the applicant, namely Mr ..., Chief Legal Officer of the applicant and Mr ..., Vice President Intellectual Property of the applicant.

2. pending a final decision on the application to protect the defendant's confidential information, to grant provisional access to the alleged confidential information to be designated by the defendant to the lawyers of BARDEHLE PAGENBERG Partnerschaft mbB who are in charge of the proceedings, namely

RA and representative before the
UPC ..., RA and representative
before the UPC ..., RA and
representative before the UPC ...,
Lawyer and representative before
the UPC ..., lawyer and
representative before the UPC ...,
paralegal ...,
Paralegal ...

and two reliable persons at the applicant, namely Mr ..., Chief Legal
Officer of the applicant,
Mr ..., Vice President Intellectual Property of the applicant.

REASONS FOR THE ORDER:

Article 9(1) and (2)(a) of Directive (EU) 2016/943 provides that, in judicial proceedings, access to documents submitted by the parties or third parties containing trade secrets or alleged trade secrets may, on application, be restricted in whole or in part to a limited number of persons. The protection of confidential information is provided for in the UPCA in Article 58 and implemented in the Rules of Procedure of the Unified Patent Court in Rule 262A.

Pursuant to R. 262A.4 VerfO, the representative of the other parties must be invited to submit a written statement before an order is issued. However, in the interests of effective protection of secrecy, the requirement to be heard *before issuing an order* only applies to the final secrecy order and access restriction. In the interest of effective protection of secrecy in accordance with Directive (EU) 2016/943, however, access can be further restricted until a final order is issued, namely to the person representing the plaintiff. Discussion of the confidentiality application with the party is possible with the redacted versions of the documents concerned (UPC_CFI_22/2023 (Hamburg local division), order of 2 December 2023).

Even if these considerations also apply in principle in proceedings for orders for provisional measures, the special features of such proceedings must not be disregarded.

remain. As in the main proceedings, the deadlines for the parties to submit their comments are not affected by an application for the protection of secrets. However, extensions of time limits are generally ruled out due to the urgent nature of such proceedings. In addition, the date for the oral hearing is often scheduled at short notice. Against this background, the party affected by a provisional secrecy protection order is forced, despite the restrictions naturally associated with such an order, to prepare its submissions on the merits and, if necessary, to respond to the document containing (allegedly) confidential information. As statements in such proceedings usually have to be submitted within short deadlines under a strict time limit regime and the oral hearing also has to be prepared at short notice, the group of persons required for a fair procedure (R. 262A.6 VerfO) must be selected in such a way that the party affected by the provisional secrecy protection order is fully capable of working and able to comment on the merits of each point raised by the opposing party, taking into account the other party's interest in confidentiality. In order to take into account the special features of summary proceedings, a provisional restriction to four legal representatives (two partners and two associates to support them), two patent attorney representatives and three representatives of the client therefore appears appropriate as a rule (UPC_CFI_463/2023 (LK Düsseldorf), order of 14 February 2024), whereby this group of persons can be expanded by two paralegals if necessary.

Since the group of persons who are granted access to the (allegedly) confidential information may not exceed the scope necessary for compliance with the right of the parties to an effective legal remedy and a fair trial in accordance with R. 262.6 sentence 1 of the Code of Procedure, the group of persons entitled to access must always be examined on a case-by-case basis, taking into account the above considerations, and, if necessary and appropriate, adapted to the requirements of the respective proceedings.

In the present case, this means that patent attorneys do not need access to the unredacted version of the notice of opposition and its annexes. All of the information categorised by the applicant as confidential is of a commercial and non-technical nature. There are no objections to the applicant's request to extend access to three partners on the lawyers' side and to only one associate as compensation. In addition, taking into account the submissions of both parties, it appears appropriate and necessary to limit the number of employees authorised to access to the minimum number provided for in both Directive (EU) 2016/943 and R. 262A.6 of the Rules of Procedure and thus to one natural person until the final decision on the application for secrecy protection. The local division has decided to grant access to the person who, according to the applicant, significantly coordinates its patent litigation, is significantly involved in the coordination of the documents of the present proceedings as well as the legal and business strategy and who is the central internal person in the day-to-day management of the applicant's litigation. The mere abstract possibility that this person may be involved in the applicant's commercial decisions does not justify denying her access to the information in question. The respondent's interest in confidentiality is sufficiently taken into account by the confidentiality order associated with the threat of a penalty payment. For this reason, the local division also sees no reason to require the applicant to provide evidence of an internal confidentiality regime implemented by it. The obligation demanded by the respondent of the employee in question not to participate in any licence negotiations in the spatial transcriptomics sector for five years interferes disproportionately with his right to exercise his profession and is therefore out of the question.

Insofar as the respondent wishes to deny all of the applicant's employees access to the (allegedly) confidential information, this request cannot be reconciled with either Art. 9 of Directive (EU) 2016/943 or with R. 262A.6 of the Code. Even if the number of persons entitled to access is to be limited to what is necessary, both standards clearly state that the group of persons entitled to access must include at least one natural person from each party. This is intended to take account of the right to a fair hearing (see Münchner Kommentar zum Lauterkeitsrecht, 3rd ed. 2020, Geheimnisschutz-RL Art. 9, para. 18). The fact that Art. 58 UPCA does not recognise such a minimum number of natural persons cannot change this finding. Like any national court, the Unified Patent Court must observe the unconditional primacy of Union law (Art. 20 UPCA). Therefore, the provisions of the UPCA must be interpreted in conformity with the Directive (Kircher in Bopp/Kircher, Handbuch Europäischer Patentprozess, 2nd edition, § 1 para. 23). When i n t e r p r e t i n g Art. 58 UPCA, Art. 9 (2) of Directive (EU) 2016/943 must therefore be taken into account. According to this, the group of persons entitled to access must also include at least one natural person from each party. If Art. 58 UPCA therefore provides for the possibility of restricting access to evidence to certain persons, this must be interpreted in conformity with the Directive in the sense of the necessity of granting access to at least one natural person from each party. In line with this, such a minimum number is also provided for in R. 262A.6 of the Implementing Regulation, which concretises Art. 58 UPCA.

The restriction of the applicant's legal representatives to those who are not involved in pending proceedings relating to the same field of law before the Unified Patent Court, as further demanded by the respondent, unreasonably restricts the applicant in the choice of her legal representatives. In addition, the applicant's legal representatives would also be massively hindered in the exercise of their professional activities by such an order, without this being justified by overriding interests on the defendant's side. The defendant is sufficiently protected by the confidentiality order contained in the order and backed up by the threat of coercive measures.

ORDER:

1. Access to the unredacted version of the statement of opposition of 15 February 2024 and to the unredacted version of Annex CR-3 is restricted to the following persons until a final decision on the defendant's application for the protection of confidential information has been made on the applicant's side:

Attorney and representative before the UPC ...; Attorney

and representative before the UPC ...; Attorney and

representative before the UPC ...; Attorney and

representative before the UPC ...; Paralegal ...; Paralegal

...;

Mr ..., Vice President Intellectual Property of the applicant.

Until a final decision is made on the defendant's application for secrecy protection, the above-mentioned persons are also obliged to maintain secrecy vis-à-vis the applicant with regard to the information contained in the unredacted versions of the above-mentioned documents.

2. The information designated as confidential by the defendant must be treated as confidential by the persons named in section 1 until further notice. It may not be used or disclosed outside these court proceedings unless it has come to the knowledge of the receiving party outside these proceedings. However, this exception only applies if this information was obtained by the receiving party on a non-confidential basis from a source other than the defendant or its affiliated companies, provided that this source is not itself bound by a confidentiality agreement with the defendant or its affiliated companies or by any other confidentiality obligation towards them.
3. The applicant is ordered to take appropriate measures to ensure that the information obtained from Mr ... which is subject to this confidentiality order remains confidential and is not used outside these proceedings. In particular, the applicant must ensure that the information subject to the confidentiality obligation is only contained in secure electronic files at the applicant to which only Mr ... has access. Insofar as the information subject to the confidentiality obligation is printed by Mr ... on the business premises of the respondent, suitable measures must be taken to ensure that only Mr ... has access to these printouts.
4. In the event of culpable non-compliance with this order, the court may impose a penalty payment to be determined according to the circumstances of the individual case for each case of non-compliance.
5. The Sub-Registry of the Düsseldorf local division is instructed to release the unredacted version of the documents designated as confidential by the defendant in the Case Management System (CMS) to the representatives of the application named in section 1 above who are subject to the duty of confidentiality.
6. The applicant will be given the opportunity to comment on the defendant's application for confidentiality **by 1 March 2024**. The defendant will then be given the opportunity to respond to the applicant's statement.

DETAILS OF THE ORDER:

App_8500/2024 for the main file reference

ACT_590953/2023 UPC number: UPC_CFI_463/2023

Type of proceedings: Application for an order for provisional measures

Issued in Düsseldorf on 23 February 2024 NAMES

AND SIGNATURES

Presiding judge Thomas