

ORDER

of the Court of Appeal of the Unified Patent Court
issued on 28 March 2024

concerning a request to restrict access to information or evidence to specific persons

HEADNOTE:

- *A non-appealed order by the Court of First Instance pursuant to R.262A RoP that restricts access to certain information or evidence to specific persons, unless otherwise stated in the order, continues to apply after the proceedings, and therefore applies also to the appeal proceedings.*

KEYWORDS:

- *R. 262A RoP – Protection of Confidential Information*

APPLICANT (AND DEFENDANT IN THE MAIN PROCEEDINGS BEFORE THE CFI):

Curio Bioscience Inc.

represented by European patent attorney Cameron Marshall and attorney Agathe Michel-de Cazotte (Carpmaels & Ransford)

RESPONDENT (AND CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE CFI):

10x Genomics, Inc.

represented by Attorney Prof. Dr. Tilman Müller-Stoy (Bardehle Pagenberg)

PATENT AT ISSUE

EP 2 697 391

PANEL AND DECIDING JUDGES:

This order has been issued by the second panel of the Court of Appeal consisting of:

Rian Kalden, Presiding judge

Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Rombach, legally qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Date: 26 February 2024
- Case number of the Court of First Instance: UPC_CFI_463/2023; ACT_5164/2024

INDICATION OF PARTIES' REQUESTS

The applicant requests a restriction of access to confidential information or evidence to certain persons pursuant to R.262A of the Rules of Procedure.

SUMMARY OF FACTS AND POINTS AT ISSUE

1. The parties are currently involved in proceedings before the Court of First Instance, Düsseldorf Local Division, where 10xGenomics has filed an application for provisional measures against Curio Bioscience (ACT_590953/2023, UPC_CFI_463/2023).
2. On 30 January 2024, Curio Bioscience requested a change of the language of the proceedings from German to English. This application was dismissed on 26 February 2024 by the President of the Court of First Instance (App_5164/2024, UPC_CFI_463/2023). Curio Bioscience appealed this order and the appeal is pending as APL_12116/2024, UPC_CoA_101/2024.
3. Meanwhile, as a result of an application by Curio Bioscience, the Düsseldorf Local Division took measures to protect information pursuant to R.262A.4 RoP, and adopted a preliminary order on 23 February and a final order on 11 March 2024 (App_8500/2024, UPC_CFI_463/2023). The final order, similar to the preliminary order, establishes that access to the unredacted version of a document named CR-3 be restricted to certain persons on 10x Genomics' side. The persons were also obliged to maintain the confidentiality of the information contained in the unredacted versions of the above-mentioned documents vis-à-vis 10x Genomics. The final order has not been appealed.
4. Nevertheless, when lodging the appeal against the order where a change of language of proceedings was denied, Curio Bioscience submitted a redacted version of CR-3, called CR-1, to the Court of Appeal and requested that access to certain information be restricted to the persons named in paragraph 1 of the order of the Düsseldorf Local Division.
5. 10x Genomics has been heard about the request for confidentiality and has requested that access to the information designated as confidential by Curio Bioscience be ordered at least for the group of persons named by Curio Bioscience and pursuant to the final order of the

Düsseldorf Local Division. 10x Genomics has added that it leaves it to the discretion of the Court of Appeal to add certain additional persons to the list.

6. At the interim conference on 18 March 2024, the judge-rapporteur voiced the preliminary view that the order issued by the Düsseldorf Local Division also applied to the information to which the request for protection of confidential information relates, so that no order from the appeal court was needed, and asked the parties for their views.
7. Curio Bioscience expressed the view that the order of the Düsseldorf Local Division applies, but explained that the confidentiality request had been submitted to the Court of Appeal out of an abundance of caution. 10x Genomics, on the other hand, was of the opinion that confidentiality proceedings are a separate form of proceedings, and that, in addition, a request to change the language of proceedings can be seen as a stand-alone proceeding, separate from the main proceedings.
8. The parties agreed during the interim conference to let the judge-rapporteur decide the matter. The judge-rapporteur has referred the matter to the panel for a decision (R.102 RoP).

GROUNDS FOR THE ORDER

9. Article 9(1) second sentence of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, makes clear that an obligation of non-disclosure shall remain in force after "the legal proceedings" have ended. Against this background, any limitation of a non-disclosure obligation must be explicit.
10. The Court of Appeal is of the opinion that if the information is already protected by the order of 11 March 2024 of the Düsseldorf Local Division, there is no need for an additional order in the present appeal proceedings.
11. Paragraph 2 of the order of 11 March 2024 reads: "Sie dürfen nicht außerhalb dieses Gerichtsverfahrens verwendet werden,...". In paragraph 3 it reads: "...und nicht außerhalb dieses Verfahrens verwendet werden".
12. These wordings make it clear that the information in the unredacted CR-3 must not be used outside the proceedings before the Unified Patent Court. The prohibition therefore also encompasses appeal proceedings such as the present one, and not only the proceedings before the Düsseldorf Local Division.
13. By consequence, the confidentiality obligation ordered by the Court of First Instance, Düsseldorf Local Division, already applies to the information subject to the R.262A RoP request. The information is therefore already protected and Curio Bioscience's request is

superfluous and therefore there is no need for legal protection. Documents and evidence submitted in the First Instance that require confidentiality should therefore not be submitted again in the appeal proceedings. In this respect, it is sufficient to refer to these documents and evidence.

14. As explained, 10x Genomics is indicating that a longer list of persons than the ones named in the Düsseldorf Local Division order of 11 March 2024 could be included, but the said order has not been appealed and is not subject to adjudication here. The ambit of procedure before the Court of Appeal when it comes to the confidentiality request is set by the request made by Curio Bioscience. Curio Biosciences' request is redundant for the reasons set out above.

ORDER

1. The request for confidentiality is dismissed without being tried in substance.
2. The Registry of the Court of Appeal is instructed to grant access to the partially redacted version of Exhibit CR-1 uploaded to the CMS only to the persons named in the Düsseldorf order of 11 March 2024, who are subject to the duty of confidentiality.

Issued on 28 March 2024

Judges

Rian Kalden, Presiding judge

Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Rombach, legally qualified judge