



Action n°: UPC 75/2023

Revocation action

Order
of the Court of First Instance of the Unified Patent Court
Central Division (Section Munich)
issued on 4 November 2024

APPLICANT

- 1) **Mathys & Squire LLP**
(‘Applicant’) - The Shard, 32 London Bridge
Street - SE1 9SG - London - GB

Represented by Nicolas Fox, Alexander Robinson and Andreas Wietzke of Mathys & Squire

PARTIES TO THE MAIN PROCEEDINGS

- 1) **ASTELLAS INSTITUTE FOR REGENERATIVE MEDICINE**, 9 Technology Drive - MA 01581 -
Westborough - USA
(‘Claimant’)

represented by Mark Didmon of Potter Clarkson.

- 2) **Healios K.K.**, 7-1, Yuraku-cho 1-chome Chiyoda-ku - 100-0006 - Tokyo - JP
- 3) **Riken**, 2-1, Hirosawa Wako-shi - 351-0198 - Saitama - JP
- 4) **Osaka University**, 1-1 Yamadaoka Suita-shi - 565-0871 - Osaka - JP
(‘the Defendants’)

represented by James Nicholls and Pamela Tuxworth of JA Kemp.

PATENT AT ISSUE

Patent no.

Proprietors

EP3056563

Healios K.K, Riken, Osaka University

PANEL/DIVISION

Panel 1 of the Central Division (Section Munich) ('CD').

DECIDING JUDGES

This Order is issued by Ulrike Voß (legally qualified judge and presiding judge), András Kupecz (legally qualified judge and judge-rapporteur) and Paolo Gerli (technically qualified judge).

LANGUAGE OF THE PROCEEDINGS:

English.

SUBJECT-MATTER OF THE PROCEEDINGS

Rule 262.3 RoP request.

BACKGROUND AND REQUEST

By order dated 22 August 2024 (ORD_591107/2023), the Court granted Mathys & Squire LLP (the 'Applicant') access to the written pleadings and evidence concerning action no. ACT_464985/2023 (UPC_CFI_75/2023) (the 'Main Proceedings') on the basis of Rule 262.1(b) of the Rules of Procedure ('RoP') of the Unified Patent Court ('UPC').

In the context of the Applicant's request for access to the written pleadings and evidence, the Claimant requested, on the basis of Rule 262.2 RoP that certain information within the written pleadings be kept confidential stating that the information in question related to the timeline for the Claimant's product pipeline and was submitted in order to support its position in relation to the valuation of the claim. Disclosure of this information to third parties would risk causing commercial damage, particularly when taking into account that the Applicant may well act for competitors of the Claimant or other interested parties. The Claimant argued that preserving the confidentiality of this information was even more pertinent following the confidential settlement agreed between the parties. Accordingly, in the same order, the Court ordered that the specific information contained in the Claimant's Reply to the Defence to Revocation dated 29 November 2023 and the Defendants' Rejoinder to the Reply to the Defence to Revocation dated 29 December 2023 ('the Documents') was to be kept confidential for the parts indicated by the Claimant in the redacted versions of said documents provided ('the Information'). Only the redacted versions of the Documents as provided by the Claimant were made available to the Applicant by the Registry.

On 1 October 2024, the Applicant lodged an application under Rule 262.3 RoP.

The Applicant submitted that the reasons for redaction of the Information provided by the Claimant were insufficient to justify continued non-disclosure of the information which has been redacted. Further, the Applicant argued that the information which has been redacted appears *prima facie* to be available to the public elsewhere. Hence the redacted information is not confidential, and no purpose is served by maintaining the redaction of that information in the pleadings provided to the Applicant.

The Applicant stated that access to the allegedly confidential information is sought because there is a general public interest in having access in full to any pleadings and evidence submitted in proceedings before the Court, and such access should be granted unless there are good reasons not to do so. Regarding the purpose of the application, the disclosure of pleadings and evidence enables the public to be better informed as to merits of cases which are brought before the court and to form their own opinions on the merits of such cases even if (as in the present case) they are settled before a final determination is made by the Court. Further, the Applicant referred to specific professional reasons for requesting access to the allegedly confidential information which has been redacted, which is said to relate to the Claimant's position in relation to the valuation of the claim. The concept of a "value of an action" in proceedings before the UPC, and in particular the concept that parties to a dispute may put forward competing valuations with a final value to be determined by the Court, is something which has no parallel in the domestic legal systems of many UPC Contracting States or third countries. Accordingly, the Applicant (being an intellectual property law firm) has both a general interest and a specific professional interest in understanding how the concept of a "value of an action" might operate in proceedings before the UPC.

On the above basis, Applicant requests that that the Documents be made available to the Applicant in unredacted form or alternatively with redactions limited to those strictly necessary to protect information which might be established by the parties to the Main Proceedings to be confidential.

By preliminary order dated 8 October 2024, pursuant to Rule 262.5 RoP, the parties to the Main Proceedings were invited to comment on the Application. The Defendant did not provide any comments. The Claimant informed the Court that it did not wish to submit any further comments (over and above those previously provided to the Court).

GROUNDS

The Application is admissible and is well-founded.

Admissibility

In accordance with Rule 262.3 RoP a member of the public may lodge an Application with the Court for an order that any information excluded from public access pursuant to Rule 262.2 RoP may be made available to the applicant.

Rule 262.4 RoP requires that the application contains:

- a) details of the information alleged to be confidential, so far as possible;
- b) the grounds upon which the applicant believes the reasons for confidentiality should not be accepted; and
- c) the purpose for which the information is needed.

In the Application, the Applicant – who is a member of the public – has made it sufficiently clear to the Court to which pleadings and within those pleadings precisely to which information, which was kept confidential pursuant to Rule 262.2 RoP, the Application pertains (see above, the Information contained in the Documents). The Applicant has also provided grounds (arguments and facts) why access should be granted to the Information and why the information should not be kept confidential. Finally, the Applicant has specified the purpose for which it requires access to the Information. With this, the formal requirements for an application under Rule 262.3 RoP are met. The Application is therefore admissible.

On the merits

The Court of Appeal ('CoA') held in its order of 10 April 2024, APL_584498 (*Ocado/Autostore*) that, distinguishing a Rule 262.3 RoP application from a request under Rule 262.1(b) RoP, which requires a balancing of interests of a member of the public seeking access to written pleadings or evidence against all the interests mentioned in Art. 45 of the Agreement on a Unified Patent Court ('UPCA'), the Court faced with an application under Rule 262.3 RoP must balance the interest of the member of the public in accessing the information (only) against the legitimate interest of the party by keeping it confidential (par. 45-46 *Ocado/Autostore*).

Rule 262.3 RoP read in conjunction with Rule 262.4 RoP makes clear that the burden of substantiation and proof why the reasons for confidentiality should not be accepted is on the member of the public making such a request, but that – once the reasons and facts in the request have been presented in a credible manner and so far as possible – it is up to the party concerned for the confidentiality of certain information to challenge these reasons and facts and in a substantiated manner, especially since facts and evidence supporting the need for confidentiality will normally be known to that party (by analogy CoA order of 17 September 2024, UPC_CoA_217/2024, par. 7 concerning security for costs). This is also in line with Rule 262.6 RoP in accordance with which the Court *shall* allow the Application (in accordance with Rule 262.3 RoP, CD) *unless* legitimate reasons given by the party concerned for the confidentiality of the information outweigh the interest of the applicant to access such information.

In the absence of any submissions from the parties to the Main Proceedings, the Court has no reasons to doubt the details of the information as provided in the Application and the purpose for and interest in seeking access to it as stated by the Applicant.

As the most far-reaching ground for making available the Information contained in the redacted versions of the Documents, the Applicant has brought forward that, as the Court understands this line of argument, the Claimant has not provided legitimate reasons for keeping the Information confidential. In support, the Applicant argued that the Information is not (or is no longer) confidential, as it has been made available to the Applicant, either because the Information is merely a summary of submissions made by the Defendant in pleadings which were already provided to the Applicant or because it was already publicly available due to public orders or other public information. The Applicant in part "B" of the Application has supported its arguments by concrete references to court orders, submissions made by the parties to the main proceedings and by referring to publicly available sources. The Claimant has not provided any comments in response to the detailed submissions made by the Applicant. The comments previously provided to the Court by the Claimant are not relevant in this respect. Accordingly, the Claimant has not contested (in any event not in a sufficiently substantiated manner) the Applicant's assertion that the Information is not (or is no longer) confidential. The Court consequently accepts that the Information is not confidential, at least not as regards the Applicant. It follows that the Claimant


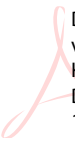

has not given legitimate reasons to withhold access to the Information by keeping the Information confidential vis-à-vis the Applicant. In the absence of such reasons, and given the established interest of the Applicant in having access to the Information, the balance of interests between the Applicant in obtaining access to the information and the Claimant in keeping the information confidential is in favour of the Applicant. The Application shall be allowed accordingly (cf. Rule 262.6 RoP, first sentence).

For these reasons, the Application is allowed and access to the unredacted versions of the Documents is granted to the Applicant.

ORDER

The Applicant is granted access to the Documents in unredacted form.

Issued on 4 November 2024

| NAMES AND SIGNATURES | |
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| Judges | |
| Legally qualified judge and presiding judge: Ulrike Voß | |
| Ulrike Voß  Digital unterschrieben von Ulrike Voß Datum: 2024.10.31 09:31:41 +01'00' | |
| Legally qualified judge and judge-rapporteur: András Kupecz | |
| András Ferenc Kupecz  Digital unterschrieben von András Ferenc Kupecz Datum: 2024.10.30 18:56:58 +01'00' | |
| Technically qualified judge: Paolo Gerli | |
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INSTRUCTIONS TO THE REGISTRY

The Registry is instructed to make available the unredacted versions of the Documents to the Applicant.