

Order for proceedings
of the Court of First Instance of the Unified Patent Court Local Chamber
Düsseldorf
issued on 11 March 2024
concerning EP 2 697 391 B1

GUIDING PRINCIPLES:

1. Pursuant to Rule 262A.6 of the Rules of Procedure, the number of persons granted access to confidential information shall not exceed what is necessary to ensure the parties' right to an effective remedy and a fair hearing, whereby the group of persons granted access must include at least one natural person from each party and the respective lawyers or representatives.
2. In principle, it is incumbent upon the respective party to name the persons for whom it seeks access. If it complies with this requirement, the exclusion of a person cannot be justified solely on the grounds that the named person is active in the technical field related to the patent in question. It is precisely for this reason that the person concerned is often the only one in a position to provide their company and its representatives with the information necessary for effective legal action. The information classified as confidential is not unprotected despite such access. Even if the persons concerned have access to the information in question, they must comply with the confidentiality obligations imposed on them, which, if necessary, can be enforced by imposing penalty payments or enforced under national law.
4. Once the group of persons granted access to the (allegedly) confidential information must not exceed the scope necessary to comply with the right of the parties to the proceedings to an effective remedy and a fair trial, the group of persons authorised to access such information must always be subject to a case-by-case assessment 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; order for protection of secrets; urgent proceedings

APPLICANT:

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

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

Electronic delivery address: mueller-stoy@bardehle.de

OPPOSING PARTY:

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

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

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PATENT IN DISPUTE:

EUROPEAN PATENT NO. EP 2 697 391 B1

DECISION-MAKING BODY/CHAMBER:

Panel of the Local Chamber Düsseldorf

PARTICIPATING JUDGES:

This order was issued by Presiding Judge Thomas as 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 interim measures. In a written submission dated 15 February 2024, the respondent filed an application for protection of confidential information contained in the notice of opposition and its annexes.

In the respondent's opinion, access to the information it classifies as confidential should be restricted. This information is purely commercial and non-technical in nature, meaning that patent attorneys do not need access to it. The scope of the information classified as confidential by the respondent is limited. Furthermore, this information is limited, specific, highly sensitive from a business perspective and of such a nature that the applicant's employees do not need access to it. If an employee of the applicant is granted access, they must belong to the legal department and may not be involved in commercial decisions. In addition, the applicant must convince the court that it has

has procedures in place to ensure that access to the information classified as confidential by the respondent is restricted to the persons named. In order to ensure that the information in question is not used outside the present proceedings, the other legal representatives who, in addition to the legal representatives named in the previous proceedings, are granted access to the information in question must not be involved in pending EPG proceedings conducted by the applicant in the same field.

In a procedural order dated 16 February 2024, the Düsseldorf Local Chamber initially granted the legal representative named in the proceedings access to the unredacted version of the documents submitted and obliged them to maintain confidentiality, including vis-à-vis the applicant, under threat of penalty payments. At the same time, the Local Chamber gave the parties the opportunity to submit additional information on the group of persons to whom access should be granted until a final decision on the confidentiality request is made. By order of 23 February 2024, the Düsseldorf Local Chamber, after hearing the parties, extended the group of persons entitled to access to a total of four legal representatives, two legal assistants and one employee of the applicant, and at the same time gave the applicant the opportunity to comment on the respondent's confidentiality request.

APPLICATIONS BY THE PARTIES:

The respondent requests

1. that access to the text in red font in the confidential statement of opposition to the application for provisional measures and in the confidential affidavit of Mr Neil Kennedy (see confidential exhibit CR-3) be restricted to a total of no more than four named legal representatives of 10x personally, who undertake not to participate in any licence negotiations in the field of spatial transcriptomics for a period of five years; or
2. alternatively, to order that access to the text in red font in the confidential statement of opposition to the application for interim measures and in the confidential affidavit of Mr Neil Kennedy (see confidential Annex CR-3) be limited to:
 - i. a maximum of four named legal representatives of 10x personally; and
 - ii. one 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 participate in any licence agreement negotiations in the spatial transcriptomics industry for a period of 5 years.

The applicant requests that

Grant access to the information designated as confidential by the respondent at least to the group of persons specified in order 1 of the procedural order

of 23 February 2024.

In addition, the applicant requests the court to exercise its discretion to include the following persons in the group of persons already authorised to access the information in accordance with the procedural order of 23 February 2024:

Solicitor and representative before the EPG Dr Kerstin Galler,

PA, European Patent Attorney and representative before the EPG Dr Axel

Berger, European Patent Attorney Dr Wolfgang Flasche,

and two other reliable persons at the applicant's premises, namely Mr Eric

Whitaker, Chief Legal Officer of the applicant,

Zara Doddridge, Senior Director of Intellectual Property at the applicant.

REASONS FOR THE ORDER:

The application for the protection of trade secrets and other confidential information is admissible and successful to the extent stated in the operative part.

I.

There are no objections to the admissibility of the application.

1.

Article 9(1) and (2)(a) of Directive (EU) 2016/943 provides that, in court proceedings, access to documents submitted by the parties or third parties that contain trade secrets or alleged trade secrets may be restricted, in whole or in part, to a limited number of persons upon request. The protection of confidential information is provided for in Article 58 of the EPGÜ and implemented in Rule 262A of the Rules of Procedure of the Unified Patent Court (see UPC_CFI_54/2023 (LK Hamburg), order of 3 November 2023).

2.

The formal requirements specified in R. 262A.2 and .3 VerfO have been met. The representatives of the applicant were also heard prior to the issuance of the protective order, as required by R. 262A.4 VerfO. They made use of the opportunity granted to them to submit comments.

II.

The applicant did not dispute in detail that the information classified as confidential by the respondent constitutes trade secrets or at least other confidential information. It can therefore be assumed that the information in question is in need of protection. Access to the information in question was therefore to be restricted to certain persons in accordance with R. 262A.6 VerfO.

1.

In principle, it is incumbent on the respective party to name the persons whose access it requests. In order to take account of the special features of the summary proceedings, a restriction to four legal representatives (two partners and two associates to assist them

support), two patent attorney representatives and three representatives of the client (UPC_CFI_463/2023 (LK Düsseldorf), procedural order of 14 February 2024), whereby this group of persons may be expanded to include two paralegals if necessary (UPC_CFI_463/2024 (LK Düsseldorf), procedural order of 23 February 2024).

2.

If a party has exercised its right of proposal, the exclusion of a person cannot be justified solely on the grounds that they are active in the technical field related to the patent in question. It is precisely because of this proximity to the subject matter that the person in question is often the only one in a position to provide their company and its representatives with the information necessary for effective legal action. This does not mean that information classified as confidential is unprotected. Even if the person concerned has access to the information in question, they must comply with the confidentiality obligations imposed on them, which, if necessary, can be enforced by imposing penalty payments or enforced under national law (UPC_CFI_355/2023 (LK Düsseldorf), procedural order of 26 February 2024; see also Tilmann/Plassmann/v. Falck/Stoll, EPGVerfO R. 262A, margin note 19 et seq.).

3.

After the group of persons granted access to the (supposedly) confidential information has been determined in accordance with R. 262.6(1) VerfO, the group of persons granted access must not exceed the scope necessary to comply with the right of the parties to the proceedings to an effective remedy and a fair trial, the group of persons granted access must nevertheless always be subject to a case-by-case assessment and, if necessary and appropriate, adapted to the requirements of the respective proceedings (UPC_CFI_463/2023 (LK Düsseldorf), order of 23 February 2024).

a)

Applied to 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 information classified by the respondent as confidential is of a commercial and non-technical nature. Furthermore, taking into account the further submissions of both parties, it appears appropriate and necessary to continue to limit the number of employees with access rights to the minimum number provided for in both Directive (EU) 2016/943 and R. 262A.6 of the Rules of Procedure, i.e. to one natural person.

b)

Insofar as the applicant has suggested extending access to two further employees of the applicant, it has not addressed the concerns expressed by the respondent with regard to these employees. Nor has it provided detailed reasons why these employees should be granted access despite these concerns. Against this background, there is no reason to expand the group of persons authorised to access the data.

ORDER:

1. Access to the unredacted version of the statement of opposition dated 15 February 2024 and to the unredacted version of Annex CR-3 is restricted to the following persons on the applicant's side:

Lawyer and representative before the EPG Prof. Dr. Tilman Müller-

Stoy; Lawyer and representative before the EPG Dr. Martin Drews;

Solicitor and representative before the EPG Dr Tobias Wuttke; Solicitor
and representative before the EPG Monika Harten LL.M.; Legal assistant
Julia Schopper; Legal assistant Josephine Tewes;
Mr Randy Wu, Vice President of Intellectual Property at the applicant.

The aforementioned persons are also obliged to maintain confidentiality towards the applicant with regard to the information contained in the unredacted versions of the aforementioned documents.

2. The information designated as confidential by the respondent must be treated as confidential by the persons named in section 1. It may not be used or disclosed outside these court proceedings unless it has come to the attention of the receiving party outside these proceedings. However, this exception shall only apply if this information has been obtained by the receiving party on a non-confidential basis from a source other than the respondent or its affiliated companies, provided that this source is not itself bound by a confidentiality agreement with the respondent or its affiliated companies or by any other obligation of secrecy towards the respondent.
3. The applicant is ordered to take appropriate measures to ensure that the information obtained by Mr Wu and subject to this confidentiality order remains confidential and is not used outside these proceedings. In particular, the applicant shall ensure that the information subject to the confidentiality obligation is stored exclusively in secure electronic files at the applicant's premises to which only Mr Wu has access. Insofar as the information subject to the confidentiality obligation is printed by Mr Wu at the respondent's premises, appropriate measures shall be taken to ensure that only Mr Wu has access to these printouts.
4. In the event of a culpable violation of this order, the court may impose a penalty payment for each case of violation, to be assessed according to the circumstances of the individual case.
5. In all other respects, the respondent's application of 15 February 2024 for the protection of confidential information is rejected.

DETAILS OF THE ORDER:

App_8500/2024 to main file number ACT_590953/2023

UPC number: UPC_CFI_463/2023

Type of proceedings: Application for interim measures

Issued in Düsseldorf on 11 March 2024 NAMES

AND SIGNATURES

Presiding Judge Thomas

Ronn
Thoma
S



Digitally signed by
Ronny Thomas

Date: 11 March 2024
16:00:40