

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 25 April 2025
request for access to written pleadings and evidence (R. 262.1 (b) RoP)

HEADNOTES:

- Written pleadings or evidence that were not yet in the casefile at the time when the request for access was made, but were added to the casefile before a party commented on the request, can be covered by a decision granting access, provided that the request made clear that such documents were encompassed. This reduces the need for further separate requests, while ensuring that the parties are consulted. The parties can comment on what is in the casefile at the time when they submit their comments.
- By contrast, blanket requests for access to written pleadings or evidence that may be added to the casefile after comments, or after the decision granting or denying access has been issued, are not admissible. The member of the public will have to make a new request for access to such documents.
- A request for access to written pleadings or evidence, insofar as such documents are not explicitly mentioned by the member of the public, although the request could potentially be understood to encompass unspecified documents in related proceedings, is not admissible.
- Immediate access to written pleadings and evidence has been granted based on a reasoned request by a member of the public who is party to concrete legal proceedings concerning the validity of the patent at issue, with a stated direct interest in the said validity.
- The Court may, for the purpose of appropriate protection of the integrity of proceedings, impose certain conditions on granting access. Since this is a matter of the general interest, it can be done on the Court's own motion (see CoA, 10 April 2024, UPC_CoA_404/2023, APL_584498/2023, *Ocado*, at para 54).
- The granting of immediate access to written pleadings or evidence has been accompanied by the condition that the member of the public is not allowed to file the written pleadings in question, or parts thereof, with other courts or judicial instances such as the EPO Boards of Appeal, or distribute them elsewhere, until the present appeal has been adjudicated or

otherwise closed. This does not prevent the member of the public from informing itself of the arguments brought forward in the case before the Court, including prior art, and if it chooses to, use the same arguments or prior art before the Boards of Appeal or elsewhere to support its own cases, or inform the Boards of Appeal that the arguments or prior art have been brought forward in the UPC proceedings.

KEYWORDS:

Access to written pleadings and evidence, admissibility, immediate access, imposition of conditions for access

APPLICANT

Nicoventures Trading Limited, London, UK
(hereinafter Nicoventures)

represented by: Connor McConchie, D Young & Co LLP, London, UK

APPELLANT (AND DEFENDANT BEFORE THE COURT OF FIRST INSTANCE)

Juul Labs International Inc., San Francisco, USA
(hereinafter Juul Labs)

represented by: European Patent Attorney Bernhard Thum, Thum & Partner, Thum Mötsch Weickert Patentanwälte, Munich, Germany, and other representatives from that firm, as well as by representatives from Bardehle Pagenberg, Munich, Germany

RESPONDENT (AND CLAIMANT BEFORE THE COURT OF FIRST INSTANCE)

NJOY Netherlands B.V., Amsterdam, The Netherlands
(hereinafter NJOY)

represented by: Attorney-at-law Dr Henrik Holzapfel, McDermott Will & Emery, Düsseldorf, Germany

PATENT AT ISSUE

EP 3 430 921

PANEL AND DECIDING JUDGE

Panel 2

This order has been adopted by Ingeborg Simonsson, legally qualified judge and judge-rapporteur

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

Central Division Paris, 17 January 2025, revocation action ACT_571808/2023, UPC_CFI_316/2023

LANGUAGE OF THE CASE

English

THE REQUEST

1. Nicoventures has requested immediate access to all written pleadings and evidence in APL_13193/2025 submitted by Juul Labs and NJOY. The request is for at least the following written pleadings and evidence (the documents are stated as named by the party submitting them):
 - EP921 - Statement of appeal_ ACT_571808_2023 - UPC_CFI 316_2023 - TuP_signed - Appeal pleading – English
 - EP921 - Response to Formal Request for Correction_signed - Formal response to the request for amendments – English

The request encompasses the specific documents listed above, and any additional documentation not listed but constituting written pleadings or evidence submitted by either NJOY or Juul Labs.

2. Moreover, Nicoventures has requested immediate access to all written pleadings and evidence submitted by both parties to APL_13193/2025, as are contained in the CMS at the point in time at which the order on the request is granted.

SUBMISSIONS OF THE PARTIES (IN SUMMARY AND INsofar AS RELEVANT)

Nicoventures

3. Nicoventures has submitted that that it is a party to concrete legal proceedings concerning the validity of the patent at issue, with a direct interest in the said validity. This is because it has opposed the grant of the patent before the EPO, resulting in revocation by the opposition division in a decision dated 10 September 2024 and appeal proceedings are currently pending before the EPO Boards of Appeal. The reason for requesting access to the written pleadings and evidence is to be able to submit these, at the earliest opportunity as required, in respect of the parallel EPO appeal proceedings against the same patent. Nicoventures has finally requested an opportunity to comment before any final order is issued, should either party object to its application being granted in any way.

Juul Labs and NJOY

4. Juul Labs and NJOY have been consulted on Nicoventures' request for access to written pleadings and evidence with reference to R. 262.1(b) RoP.
5. Juul Labs has requested that the request be rejected. Juul Labs has submitted that R. 262.1(b) RoP only relates to written pleadings and evidence that was lodged and recorded and thus not to pleadings and evidence which might be lodged and recorded in the future. Furthermore, it is to be expected or - at least - there remains a substantial likelihood that Nicoventures copy-pastes passages from the written pleadings and evidence lodged in the present proceedings before the Court of Appeal and reproduces these passages in the parallel EPO opposition appeal proceedings as quotations in the briefs filed with the EPO. Those briefs automatically become open to the public due to their unconditional publication in the online register of the EPO. According to Juul Labs, this would clearly contravene the interests of the parties to the present UPC proceedings and undermines the principle of the UPCA to keep the pleadings and evidence of the parties confidential.

6. NJOY has objected to the application as far as it goes beyond of what is currently on file, stating that the application is excessively broad and has no legal basis as far as it concerns future materials that are not on file and not even known yet, and could include documents on which the Court has not yet heard the parties as to their confidentiality interests.

REASONS

7. R.262.1(b) RoP provides that, without prejudice to several articles and rules that provide for the protection of confidential information mentioned in R.262.1 RoP, the redaction of personal data pursuant to Regulation (EU) 2016/679 (hereinafter referred to as protection of personal data) and redaction of confidential information according to R.262.2 RoP, written pleadings and evidence, lodged at the Court and recorded in the Registry, shall be available to the public upon reasoned request to the Registry; the decision is taken by the judge-rapporteur after consulting the parties.
8. The following principles apply insofar as is relevant here (see CoA, 10 April 2024, UPC_CoA_404/2023, APL_584498/2023, *Ocado*):
 - When a request for access is made, the interest of the member of the public to obtain access must be balanced against the general interests in Art. 45 of the Agreement on a Unified Patent Court; protection of confidential information and personal data, and of justice, including the protection of the integrity of proceedings, and public order.
 - These interests are usually properly balanced and duly weighed against each other, if access to written pleadings and evidence is given to a member of the public after the proceedings have come to an end by a decision of the court.
 - A member of the public may also have a more specific interest in the written pleadings and evidence of a particular case, than the general interest mentioned above. This is in particular so where he has a direct interest in the subject-matter of the proceedings, such as the validity of a patent that he is also concerned with as a competitor or licensee. When a member of the public has such a direct legitimate interest in the subject-matter of certain proceedings, this interest does not only arise after the proceedings have come to an end but may very well be immediately present.
9. Written pleadings or evidence that were not yet in the casefile at the time when the request for access was made, but were added to the casefile before a party commented on the request, can be covered by a decision granting access, provided that the request made clear that such documents were encompassed. This reduces the need for further separate requests, while ensuring that the parties are consulted. The parties can comment on what is in the casefile at the time when they submit their comments.
10. By contrast, blanket requests for access to written pleadings or evidence that may be added to the casefile after comments, or after the decision granting or denying access has been issued, are not admissible. The member of the public will have to make a new request for access to such documents.
11. As regards Nicoventures' request for any additional documentation not listed but constituting written pleadings or evidence submitted by either NJOY or Juul Labs, it is not clear what Nicoventures means by "not listed". If this request is to be understood as documents in related proceedings, it would put a great strain on the Court if such requests were admissible, since it would require searching in the extended casefile for documents that might be there, but have not been explicitly requested by the

member of the public. Similarly, the parties would be hard pressed to know what to comment on. The request is not admissible in this part.

12. Insofar as Nicoventures' request is admissible, what it has submitted about its interest in access fulfils the criteria for immediate access.
13. What Juul Labs has submitted does not lead to any other conclusion. However, Juul Labs has made a valid point about the risk that Nicoventures would, for example, include passages from the written pleadings and evidence lodged in the present proceedings before the Court of Appeal and reproduce these exact passages in the parallel proceedings before the Boards of Appeal. This risk can however be mitigated. The Court may, for the purpose of appropriate protection of the integrity of proceedings, impose certain conditions on granting access. Since this is a matter of the general interest, it can be done on the Court's own motion (see *Ocado*, at para 54).
14. In the present case, it is appropriate that the granting of access is accompanied by the condition that Nicoventures is not allowed to file the written pleadings in question, or parts thereof, with other courts or judicial instances such as the EPO Boards of Appeal, or distribute them elsewhere, until the present appeal has been adjudicated or otherwise closed. This does not prevent Nicoventures from informing itself of the arguments brought forward in the case before the Court of Appeal, including prior art, and if it chooses to, use the same arguments or prior art before the Boards of Appeal or elsewhere to support its own cases, or inform the Boards of Appeal that the arguments or prior art have been brought forward in the UPC proceedings. It will however restrict Nicoventures from filing the written pleadings (or parts of them) with other courts or judicial instances.
15. There is no reason to allow Nicoventures to comment on the submissions of Juul Labs and NJOY.
16. The documents shall be redacted of personal data prior to making them available to Nicoventures. The Registry shall see to this. There is no information available to the effect that there is any confidential information in the documents. No R. 262.2 RoP requests have been made by either of the parties in respect of the documents that Nicoventures requests access to.

DECISION

1. The following written pleadings shall be made available to Nicoventures after redaction of personal data:
 - EP921 - Statement of appeal_ ACT_571808_2023 - UPC_CFI 316_2023 - TuP_signed - Appeal pleading – English
 - EP921 - Response to Formal Request for Correction_signed - Formal response to the request for amendments – English
2. Access pursuant to paragraph 1 above is granted with the following conditions: Nicoventures shall not be allowed to file the written pleadings, or parts thereof, with other courts or judicial instances such as the EPO Boards of Appeal, or distribute them elsewhere, until the present appeal has been adjudicated or otherwise closed.

3. The remainder of Nicoventures' request is dismissed.

4. This decision closes the application.

Issued on 25 April 2025

Ingeborg Simonsson, legally qualified judge and judge-rapporteur