



UPC_CFI_395/2023
Procedural Order
of the Court of First Instance of the Unified Patent Court
delivered on 11/10/2024

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RESPONDENT

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PATENT AT ISSUE

Patent no.

Proprietor

EP3831282

DexCom, Inc.

DECIDING JUDGE

Presiding judge & Judge-rapporteur

Camille Lignières

LANGUAGE OF PROCEEDINGS: English

ORDER

On 27 September 2024, ABBOTT filed an application pursuant to R. 263 RoP for leave to change claim or amend case.

ABBOTT claims the opportunity to be heard according to Rule 264 RoP following the release of version 4.12.0 of the LibreLinkUp application (the "LLU App") on September 26, 2024.

The applicant declares that Version 4.12.0 changes the functionality of the LLU App in a manner relevant to the discussion of infringement of EP 3 831 282 ("EP 282") in the present proceedings and Dexcom's injunction claims.

ABBOTT argues that it was not possible to make this amendment at an earlier stage of the proceedings, given that the launch of a new product is considered commercially sensitive information between competitors.

In its response filed of 7 October 2024, DEXCOM asks the Judge-rapporteur to dismiss ABBOTT's application for two reasons:

-First, ABBOTT could have amended their claims at a much earlier stage;

-Secondly, this application unreasonably hinders Claimant's conduct of its action.

DEXCOM considers that ABBOTT's misuse of Rule 263 RoP with the aim of depriving from a fair and equitable infringement debate is clearly abusive.

Legal framework

Rule 263 RoP– Leave to change claim or amend case

1. A party may at any stage of the proceedings apply to the Court for leave to change its claim or to amend its case, including adding a counterclaim. Any such application shall explain why such change or amendment was not included in the original pleading.

2. Subject to paragraph 3, leave shall not be granted if, all circumstances considered, the party seeking the amendment cannot satisfy the Court that:

(a) the amendment in question could not have been made with reasonable diligence at an earlier stage; and

(b) the amendment will not unreasonably hinder the other party in the conduct of its action.

3. Leave to limit a claim in an action unconditionally shall always be granted.

4. The Court may re-consider fees already paid in the light of an amendment.

Grounds in the present case

The Court shall examine whether the two conditions foreseen in Rule 263 RoP are met in the present case.

First condition: the amendment in question could not have been made with reasonable diligence at an earlier stage

ABBOTT made the request by the time of interim conference of 26 September 2024 and one month before the Oral hearing which is scheduled for 30 October 2024.

It is obvious, as DEXCOM mentioned in its response, that ABBOTT has known about the launch of the new app version before its launch on 26 September 2024. However, it was not a duty for ABBOTT to share this commercial information with its competitor DEXCOM since the beginning of the project. Hence it is justified that ABBOTT could not have disclosed the information on this new product much earlier in the proceedings than at the time of the Interim conference.

However, if the first condition is met in the present case, the Court notes that the provision of Rule 263 requires both conditions to be met in order for the application for leave to amend the claim or to amend the case to be granted.

Second condition: the amendment will not unreasonably hinder the other party in the conduct of its action

As DEXCOM rightly argues in its response, granting the present application would require the claimant to gather evidence on the defendants' new app version, analyse the features of the new app version and develop new infringement arguments on the new app version within a few days.

Given that the oral hearing is scheduled to take place in ten days' time, this would put DEXCOM in a situation where it would not be able to appropriately prepare for the oral hearing due to the new scope of the litigation.

Given that efficiency and celerity are among the main principles of the UPC (Preamble of the RoP, point 7), it is essential to respect the strict timeframe provided for in the Rules of procedure. (UPC_CFI 252/2023, CD Munich, 25 July 2024 : "The front-loaded character of UPC proceedings is aimed at ensuring that proceedings can normally be conducted in a way which allows the oral hearing to be conducted in within one year".)

In this case, the principles of equity and fairness (Preamble of the RoP, points 2 and 5) are not breached as ABBOTT still have the possibility of lodging an action before the UPC, distinct from the present case, for a declaration of non-infringement pursuant to Rule 61 RoP concerning its new product.

Given that DEXCOM's infringement claims are aimed at "offering the use of the *LibreLinkUp* remote analyte monitoring system, within the Relevant Territory, and any other system running a method implementing the subject-matter of claim 1, 5, 6, 7, 9, 10, 11, 12 and 13 of patent EP 3 831 282", ABBOTT may also be able to prove that its new version of the app does not infringe the patent at issue at the time of enforcement if infringement measures are ordered in the present case.

For all these reasons, ABBOTT's application pursuant to R. 263 RoP for leave to change claim or amend case shall be dismissed.

The Judge-rapporteur orders that:

-ABBOTT's application is dismissed in its entirety,

This order may be reviewed pursuant to R.333 RoP.

Delivered in Paris, on 11 October 2024.

Camille Lignieres, Presiding judge and Judge-rapporteur.

ORDER DETAILS

Order no. ORD_53788/2024 in ACTION NUMBER: ACT_583778/2023

UPC number: UPC_CFI_395/2023

Action type: Infringement Action

Related proceeding no. Application No.: 53731/2024

Application Type: Application for leave to change claim or amend case/pleading (RoP263)