



Paris local division

UPC_CFI_230/2023

Order
of the Court of First Instance of the Unified Patent Court
delivered on 19-12-2023

APPLICANTS (Defendants in the main proceedings)

- 1) Abbott Diabetes Care Inc. Represented by Gisbert
1360 South Loop Road, Alameda, California Hohagen
94502, USA, represented by its president Jared
Watkin
- 2) Abbott Laboratories, 100 Abbott Park Road, Represented by Christian
Abbott Park, Illinois 60064-6400, USA, Dekoninck
represented by its board of directors which is
represented by the CEO Robert Ford
- 3) Abbott France, incorporated as a S.A.S. Represented by François
(Société par Actions Simplifiée) under no. 602 Pochart
950 206 at the Business Register of Créteil, of
40/48 rue d'Arcueil, 94593 Rungis, France,
represented by its president Philippe Emery
- 4) Abbott (N.V.), incorporated as a S.A. (Société Represented by Christian
Anonyme) under no. 0403.044.007, of Avenue Dekoninck
Einstein 14, B1300 Wavre, Belgium, represented
by its directors Hendrikus Lueb, Hasna Nadir,
and Bradley Slater
- 5) Abbott B.V., registered under KvK no. Represented by Eelco
33179692, of Wegalaan 9, 2132 JD Hoofddorp, Bergsma
the Netherlands, represented by its directors
Hendrikus Lueb and Bradley Slater
- 6) Abbott s.r.l., Viale Giorgio Ribotta 9, 00144 Represented by Thomas
Rome, Italy, represented by the chairman of its Adocker
boards of directors Massimiliano Bindi
- 7) Abbott Scandinavia Aktiebolag, Represented by Patricia

Hemvärnsgatan 9, 171 54 Sonla, Sweden, Cappuyns
represented by its board of directors which is
represented by the chair of the board Karl
Almroth

8) Abbott GmbH, registered under no. HRB 31478, of Max-Planck-Ring 2, 65205 Wiesbaden, Germany, represented by its managing directors Robert Funck, Konstantinos Varlas and Christian Grapow
Represented by Christian Lederer

9) Abbott Diagnostics GmbH, registered under no. HRB 9606, of Max-Planck-Ring 2, 65205 Wiesbaden, Germany, represented by its managing directors Robert Funck, Konstantinos Varlas and Christian Grapow
Represented by Dietrich Burkhard Kamlah

10) Abbott Logistics B.V., registered under KvK no. 05026851, of Meeuwenlaan 4, 8011BZ Zwolle, the Netherlands, represented by its directors Hendrikus Lueb, Hasna Nadir, and Bradley Slater
Represented by Wim Maas

RESPONDENT (Claimant in the main proceedings)

DexCom, Inc.
6340 Sequence Drive - 92121 - San Diego, CA –
US

Represented by Anne-Charlotte Le Bihan

PATENT AT ISSUE

<i>Patent no.</i>	<i>Proprietor</i>
EP3435866	DexCom, Inc.

DECIDING JUDGE

Judge-rapporteur Camille Lignieres

LANGUAGE OF PROCEEDINGS: English

ORDER

Summary of procedure and facts

On 13 and 14 November 2023, Abbott (hereinafter the "Applicant", Defendant in the main proceedings) on behalf of all the defendants lodged a confidentiality Application under R. 262A and R. 262.2 RoP related to some information mentioned in their Statement of Defence (hereinafter "SoD") dated of 14 November 2023 in the infringement main proceedings (ACT_546446/2023) initiated by DexCom (hereinafter the "Respondent", Claimant in the main proceedings).

By preliminary orders delivered on 27 and 28 November 2023, the Judge rapporteur invited the Respondent to provide written comments on the Applicant's confidentiality request.

On 5 December 2023, the Respondent lodged its written comments.

Parties' arguments

The Applicant seeks that:

- under R. 262-2 RoP: the information, which is redacted in the Defendants' Redacted Statement of Defence shall be kept confidential and shall not be disclosed in the public register.

-under R. 262A RoP:

1)The access to the information, which is redacted in the Defendants' Redacted Statement is restricted on Claimant's side to the Claimant's attorneys of record as identified in the Statement of Claim and no more than two natural persons from the Claimant, who shall be named to the Court and the Defendants in writing, in the alternative, a respective group of persons, the size of which is to be determined by the Court, who are to be named by the Claimant to the Court and the Defendants in writing.

2) Until a final confidentiality order is issued by the Court, access to the Confidential Information is limited to the Claimant's attorneys of record as identified in the Statement of Claim personally.

3) The persons referred to in 1. above shall treat the Confidential Information strictly confidential, also within their own firm / company, and shall not disclose the Confidential Information to any third parties. The Confidential Information must not be used or disclosed outside these proceedings. These restrictions shall continue to apply also after the final termination of these proceedings.

4) The restrictions in 1. and 2. above shall not apply if and to the extent that the obligated party has obtained knowledge of the Confidential Information independently of the disclosure in these proceedings. Furthermore, the orders in 1. and 2. above shall no longer apply, if and to the extent they are declared void or inapplicable in a final and binding decision of a competent court.

5) In the event of a breach of the above orders, the Court may, at the request of the Defendants, impose a fine of up to € 250,000 in each single case of a breach.

In reply to the five preliminary orders issued by the Judge Rapporteur pursuant to Rule 262.5 and Rule 262A.4 RoP inviting the Respondent to comment on these Applications, the Respondent submits:

-He does not object to the Applicant's request (under R. 262.2 RoP) not to disclose the redacted information in the public register,

-The Respondent contests the request under R. 262A RoP as regards to the extent of the restricted access, arguing that the access to the outside counsels must be extended to the law firms level, taking into account that these proceedings are part of a global dispute which require coordination between Respondent's law firms.

The Respondent asks also for an authorization to access:

- to experts and witnesses involved in these proceedings;
- and to three natural persons from the Respondent's side, namely:

- [REDACTED]
- [REDACTED]
- [REDACTED]

The Respondent notes that these three above persons were also part of the confidentiality club which was set up in the UK on 19 April 2022.

Finally, the Respondent requires the revision of the fine to the amount of 10.000 Euros in case of breach of the confidentiality obligation.

Legal grounds

EU Directive 2016/943 on Trade secret provides in its Article 9.3: "When deciding on the measures referred to in paragraph 2 and assessing their proportionality, the competent judicial authorities shall take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures."

Article 58 UPCA foresees that: "To protect the trade secrets, personal data or other confidential information of a party to the proceedings or of a third party, or to prevent an abuse of evidence, the Court may order that the collection and use of evidence in proceedings before it be restricted or prohibited or that access to such evidence be restricted to specific persons."

Rule 262A.6 RoP on Protection of Confidential Information states that: "The number of persons referred to in paragraph 1 shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings."

Grounds in the present case

I. The request for confidentiality under R. 262.2 RoP

The Applicant requests that its Statement of Defence not be disclosed in the public register. The Applicant provides as specific reasons for such confidentiality the fact that some of the information

contained in the Statement of Defence is highly sensitive internal information not available neither to the public nor to individual persons outside the Applicants' organization.

This request is not contested by the Respondent.

Therefore, considering that the Applicant's Statement of Defence contains information regarding notably sales figures and revenues, which are indeed sensitive information, the Court considers that there are sufficient reasons not to disclose the Confidential information in the public register pursuant to R. 262.2 RoP.

II. The request for confidentiality under R.262A RoP

The Respondent accepts in principle the restriction of access to the information contained in the Statement of Defence pursuant to R.262A RoP, although it notes that part of the information which is the subject-matter of the present Application has already been disclosed before three German national proceedings (see exhibits R01, R02 and R03), without any confidentiality obligation. That said, considering the competitive relationship between the parties, the Respondent accepts the principle of a Redacted SoD, provided that the access to the information offered to the Respondent is broad enough to ensure a fair trial.

For that reason, the Respondent contests the modalities of the access to information designated as confidential by the Applicants, in particular the modalities regarding the number of persons allowed to have access to the Unredacted SoD, and the amount of the applicable fine in case of a breach.

The Respondent legitimately considers that the following elements have to be taken into account:

-in the main proceedings (infringement action initiated by the Respondent), the Respondent has only two representatives of record in the Statement of claim whereas the defendants have 11 representatives identified in their Statement of defence.

Pursuant to Article 9.3 of the EU Directive on Trade Secrets, the Court, when deciding on the measures to protect confidential information, shall take into account the need to ensure a fair trial and any potential harm for either of the parties resulting from the granting or refusal of such measures.

Therefore, considering on the one hand the disproportionate number of representatives on each of the parties' side, i.e. two against eleven representatives and on the other hand the fact that other attorneys that might work on the Respondent's defence are bound by strict professional obligations to protect confidential information, it would be unfair to restraint the access to only the representatives identified in the Statement of claim.

Also, the proceedings at hand are part of a global dispute, involving parallel proceedings before the UPC, concerning the same product, namely "Free Style Libre 2" and "Free Style Libre 3" which require coordination between the Respondent's law firms, i.e. Bird&Bird AARPI France and Quinn Emmanuel Urquhart & Sullivan LLP, Germany. More precisely, in order to ensure the right to an effective remedy and to a fair trial, within the UPC divisions, a coordination of responses, between the teams is needed when they refer to the same product.

Moreover, considering that proceedings within the UPC require assistance from employees such as administrative and IT, it would be necessary and appropriate to authorize access to the “Legal team” as designated in the CMS provided that they sign a Non-Disclosure Agreement.

Lastly, while it is necessary and appropriate to extend access to parallel pending proceedings within the UPC, allowing the extension of access to the Respondent’s law firm involved in national proceedings in Europe (i.e. Bird&Bird Spain, UK, Quinn Emmanuel Germany), and in the US would weaken the efficiency of the confidentiality measure. Hence, to ensure a fair trial, access to the Confidential Information shall be extended to:

- The representatives of the Respondent as identified in the Statement of claim and their “Legal team” as designated in the CMS in charge of the proceedings at hand;
- The representatives of the Respondent as identified in the Statement of claim and their “Legal team” as designated in the CMS in charge of the UPC parallel proceedings involved in another action pending before the Paris LD (n° 583778/2023) and the pending proceedings before the Munich LD (n° 583791/2023 and 547520/2023),
- the witnesses and experts that the Respondent will involve in the present case in order to reply to the Applicant’s counterclaims, provided that they sign a Non-Disclosure Agreement (NDA), and
- the three natural persons named by the Respondent in their written comments as members who are already part of the confidentiality club set up in the UK on 19 April 2022 (see exhibit 12 from the Respondent’s written comments).

This extension of access is in accordance with the proportionality principle, as the group of persons determined above is appropriate in the case at hand and sufficient to preserve efficient protection of the confidential information mentioned in the Applicant’s SoD.

Finally, to ensure the efficiency of the confidentiality order, the Respondent accepts that a breach of confidentiality should be subject to a fine. However, the Respondent considers the amount required, i.e. up to 250 000 euros for each single case of breach, to be disproportionate, since a significant part of the information has already been disclosed in the previous national proceedings in Germany (see exhibits R01, R02, R03).

In the view of the Court, considering that part of the Confidential Information has already been disclosed without a confidentiality restriction, a lower amount for the fine would sufficiently protect the legitimate interest of the parties in case of a breach.

Therefore, a fine of 50.000 euros is reasonable in case of a breach of this confidentiality Order.

Given that this order is a final order on the confidentiality request, a preliminary order as requested in point 2 of the Respondent’s Application is not necessary.

FOR ALL THESE REASONS,

THE COURT OF FIRST INSTANCE – PARIS LOCAL DIVISION

orders that:

1. The information, which is redacted in the Applicants’ Statement of Defence, shall be kept confidential and excluded from public access.

2. The access to the information that is redacted in the Applicants' Redacted Statement of Defence according to Annex 1 to this application ("Confidential Information") is restricted on the Respondent's side to the representatives of the Respondent as identified in the Statement of claim and their "Legal team" as designated in the CMS in charge of these proceedings (further to them having signed a Non-Disclosure Agreement to comply with this confidentiality order), the representatives of the Respondent as identified in the Statement of claim and their "Legal team" as designated in the CMS in charge of the UPC parallel proceedings involved in another action pending before the Paris LD (n° 583778/2023) and the pending proceedings before the Munich LD (n° 583791/2023 and 547520/2023) (further to them having signed a NDA to comply with this confidentiality order), the three natural persons named by the Claimant, that is to say [REDACTED]

[REDACTED] as well as experts and witnesses (further to them having signed a Non-Disclosure Agreement to comply with this confidentiality order).

3. The natural persons named by the Respondent shall treat the Confidential Information as strictly confidential within their own company.

4. The persons referred to in 2. shall not disclose the Confidential Information to any third parties. The Confidential Information must not be used or disclosed outside these proceedings nor the parallel UPC proceedings n° 583778/2023 (Paris LD), and n° 583791/2023 and 547520/2023 (Munich LD). These restrictions shall continue to apply after these proceedings have ended.

5. The restrictions in 2. to 3. above shall not apply if and to the extent that the obligated party has obtained knowledge of the Confidential Information independently of the disclosure in these proceedings. Furthermore, the orders in 2. to 3. above shall no longer apply, if and to the extent they are declared void or inapplicable in a final and binding decision of a competent court.

6. In the event of a breach of the above orders, the Court may, at the request of the Applicants, impose a fine of up to € 50.000 for each single case of a breach.

7. The present Order may be appealable according to R. 220.2 RoP, or may be reviewed by the panel according to R. 333 RoP.

Delivered in Paris, on 19 December 2023.

C. Lignieres, Judge-rapporteur.

ORDER DETAILS

Final order in ACTION NUMBER: ACT_546446/2023

UPC number: UPC_CFI_230/2023

Action type: Infringement Action

Related proceeding no. Application No.: 586956/2023, 586985/2023, 586986/2023, 586987/2023, 587001/2023

Application Type: APPLICATION_ROP262A