

ORDER
of the Court of First Instance of the Unified Patent Court
Local division The Hague
delivered on 15 May 2024
regarding R.262A

Headnotes:

Keywords: R. 262A RoP; confidential information; confidentiality club

APPLICANT

- | | | |
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| 1) | Arkyne Technologies S.L.
(Defendant in the main proceedings),
Barcelona - ES | Represented by Joran Spauwen |
|----|---|------------------------------|

DEFENDANTS

- | | | |
|----|---|-------------------------------|
| 1) | Plant-e B.V.
(Claimant in the main proceedings)
Renkum – the Netherlands | Represented by Oscar
Lamme |
| 2) | Plant-e Knowledge B.V.
(Claimant in the main proceedings)
Renkum - the Netherlands | Represented by Oscar Lamme |

PATENT AT ISSUE

Patent no.

Proprietor

EP2137782

Plant-e Knowledge B.V.

DECIDING JUDGE

Judge-rapporteur (JR) – Margot Kokke

LANGUAGE OF PROCEEDINGS

English

REQUEST AND BACKGROUND

1. Applicant, hereinafter “Bioo”, filed the present application for the protection of confidential information together with its rejoinder in the infringement action/reply in the counterclaim action on 22 March 2024 (“the Application”). The Application relates to Exhibits GP36 and GP39 and related passages in paragraphs 6.41, 6.42, 6.43, and 6.45 of Bioo’s rejoinder. Redacted and unredacted versions of the relevant documents were uploaded in the CMS. In the redacted versions the allegedly confidential information, hereinafter the “**Redacted Information**”, is ‘blacked-out’.
2. Bioo requests the court:
 1. to order confidentiality of the Redacted Information specified in para. 1.4 of its Application, with a confidentiality regime as specified in para. 1.7 of its Application and
 2. to order Plant-e Knowledge B.V. and Plant-e B.V. jointly and severally to pay recurring penalty payments of EUR 100,000 in case the case of each breach of the order under 1.In para. 1.7 the following is mentioned regarding the confidentiality regime:
 - a) the [Redacted Information] is only to be used by Plant-e in the main [infringement] proceedings and for no other purposes (including not in the counterclaim action);
 - (b) only one natural person in Plant-e who has a legitimate interest in thereto gains access to the Redacted Information.
3. According to the Application, the redacted information concerns experimental data of the allegedly infringing *Bioo Panels* with and without plants in an experimental pilot crop field of a third party (whose name is confidential and therefore redacted in para. 6.41), with specific data regarding the tracked energy production of the *Bioo Panels* over a considerable period of time in the pilot, which, inter alia, shows graphics of the actual measurements and findings. It also concerns the results of an experiment with three different settings of the *Bioo Panels* which (a) applied a plant in daylight, (b) applied a plant in the dark and (c) did not apply a plant at all.
4. The redacted version of the relevant paragraphs of the rejoinder are copied below, as well as paragraph 5.6 in which Exhibit 36 is introduced:

5.6. Bioo submits as **Exhibit GP36** a confidential comparative research of (a) the *Bioo Panel* (i) with a plant which is exposed to natural solar light, (ii) with a plant which is kept in complete darkness, and (iii) without a plant, and (b) two *Bioo Panels* in an underground installation (i.e., without plants) located in an experimental field for period exceeding 600 days. GP36 shows no noteworthy difference in power production among the different setups, showing that photosynthesis does not have a measurable effect on the *Bioo Panel*, and that a transfer of nutrients or microorganisms from a living plant or part thereof from the upper compartment to the lower compartment does not occur.

6.41. Dr. [REDACTED] referred to the experimental pilot crop field of [REDACTED] with *Bioo Panels* in Sevilla, Spain, which *Bioo Panels*, for the record, do not apply plants (see **GP10**), and have been in operation continuously since June and September 2022 (cf. para. 7.6 Defense + CC Bioo).

6.42. In support thereof, Bioo submits the **confidential** research report of this pilot of October 2023 ("*In Field Validation Bioosensor Brenes (Seville) Report*") as **Exhibit GP39**. This report tracked the energy production of the *Bioo Panels* in the pilot, which showed [REDACTED] ([the remainder of the paragraph is blacked-out, JR]).

6.43. This research is confirmed by the analysis of [REDACTED] p.9, which shows that "*once the stabilization stage is reached (..), there is a continuous generation of power that lasts over time, which is affected by the variation of climatic conditions and at certain days as a consequence of deficiencies (cuts) in the irrigation of the biobattery, which after being irrigated, returned to the usual values*": [REDACTED] [the remainder of the paragraph is blacked-out, JR].

6.44. This also confirms the opinions of Dr. [REDACTED] and Dr. [REDACTED] that substrate of the *Bioo Panels* provides sufficient nutrients for a prolonged period of time, without need of replenishment.

6.45. Further, an experimental setup of *Bioo Panels* with plants kept in the dark (i.e. without the benefit of photosynthesis), with plants exposed to sunlight, and without plants shows no difference in power (**GP36**, p. 5 and 6)18: [REDACTED] [the remainder of the paragraph is blacked-out, JR]

In the redacted versions of Exhibits 36 and 39 virtually all text is blacked out, i.e. not only the results, but also e.g. the objectives and the set-up of the experiments.

5. Bioo asserts that the exhibits GP36 and GP39 and the mentioned redacted passages provide information, which is not publicly available, while all information in connection with the experimental pilot crop field is also subject to a strict written non-disclosure agreement and a collaboration agreement between Bioo and its counterpart, the third party. This information is protected as a trade secret as meant in Article 2(1) Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets), according to Bioo.
6. Claimants in the main proceedings/defendants in this Application ("Plant-e") were given the opportunity to respond to the Application, which it did by submission of 5 April 2024. Plant-e requests that the court reject the Application. It argues that the information is not confidential because *Bioo Panels* are sold to the general public and that the data in the research report can be reproduced without difficulty by anybody having access to one of these products. Alternatively, in case the Application is granted, it requests three natural persons from Plant-e named in its reply be included in the confidentiality club, as well as its representatives and its external expert, to ensure that enough technical knowledge is available to review the information submitted by Bioo.
7. Bioo was given the opportunity to react to this; it uploaded its reply on 12 April, 2024. Therein, it argues that the Redacted Information pertains to *Bio Sensors* rather than *Bio Panels*, maintaining that the Redacted Information is confidential. Plant-e submitted its 'rejoinder' regarding the Application on 16 April 2024.

GROUNDS

8. Art. 58 UPCA provides that 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 to protect 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. According to R. 262A.1 RoP a party may make an application to the court for an order that certain information contained in its pleadings or the collection and use of evidence in proceedings may be restricted or prohibited or that access to such information or evidence be restricted to specific persons.

Redacted Information confidential?

9. In the present case, Plant-e contests that the Redacted Information is confidential information. Therefore, the JR shall first address whether the information can be considered confidential as meant in Art. 58 UPCA and R.262A.1 RoP, as Bioo asserts.
10. According to Plant-e the Redacted Information cannot be confidential because *Bioo Benches* (which incorporate *Bioo Panels*) have been sold and installed, and the owners of such *Bioo Panels* can retrieve the same information as the Redacted Information (para. 2.5 Reply Plant-e) which makes it part of the public domain.
11. For the court to be able to assess whether it may limit a party's access to the file, the party applying for confidentiality must provide concrete arguments which make it sufficiently plausible that the facts which are sought to be protected are confidential in nature. Thereby, in the context of this procedural protective order sought, it is adequate – except for situations of exceptional character – for the court to determine with a sufficient degree of certainty that the information is confidential.
12. In this case, the fact that the majority of the Redacted Information is stated to be confidential pursuant to a non-disclosure agreement (the NDA) with a third party, the information is therefore not in the public domain and has not been shared with the public or competitors, is considered sufficient to consider the Redacted Information confidential in the context of this Application. It is not deemed necessary for Bioo to submit the NDA in this case. The mere fact that the *Bioo Panels* as such are in the public domain does not mean that the results of tests conducted on those panels are public as well, as Plant-e asserts. Furthermore, Plant-e's argument that the information cannot qualify as trade secrets because it has no commercial value (which is contested by Bioo), fails. The information held by Bioo is clearly of commercial value as the test results are over a considerable period. Also, the name of the third party potentially has commercial value.
13. Should the information become publicly available by, e.g. reproduction of the research data by someone who has access to an allegedly infringing product, the information shall no longer be considered confidential. This is, however, not the case yet.
14. The conclusion of the above is that the Redacted Information is considered confidential in the context of this Application.

15. When deciding the application of the defendants to grant protection for confidential information by limiting the access thereto, the court must weigh the right of a party to have unlimited access to the documents contained in the file, including the Redacted Information, which guarantees its fundamental right to be heard, against the interest of the opposing party to have its confidential information protected. Both fundamental principles must be balanced against each other considering the particular facts and circumstances of a case. In deciding on the granting of an application for limiting the access to confidential information, the court must consider that the grounds relied upon by the applicant for the order significantly outweigh the interest of the other party to have full access to the information and evidence in question (R. 262A.5 RoP).
16. The court thus must assess whether, and to which extent, the claimant should be given access to the Redacted Information, taking into account the adequate level of protection of the confidential Redacted Information and the right of the claimant to have sufficient access to the information in order to exercise its right to be heard, in view of the specific circumstances of this case.
17. In the present case, the Redacted Information is crucial for the main infringement action as it is the basis/substantiation of Bioo's non-infringement arguments. It is hence necessary that the claimant have proper access to the Redacted Information to be able to defend itself against Bioo's non-infringement arguments. Bioo does not oppose to this, but it requests access to be limited in two ways.
18. Firstly, it requests that the use of the Redacted Information be restricted to the main infringement action and not used for the counterclaim. As Plant-e does not object thereto, this request can be granted for as long as the Redacted Information remains confidential information. In case the Redacted Information also proves to be relevant for the counterclaim, an application to amend this order can be submitted.
19. Secondly, Bioo request that access be limited to only one natural person of Plant-e, whereas Plant-e requests access for at least three natural persons.
20. The Rules of Procedure provide that, where access to confidential information or evidence is restricted to specific persons, the number of persons granted access 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 (R. 262A.6 RoP).
21. The Redacted Information in this case concerns technical information that seems essential for deciding the (non-)infringement by Plant-e with its Bio Panels and related allegedly infringing products. As Plant-e pointed out, Bioo submitted the Redacted Information late in the written proceedings, namely with its rejoinder, that is its last written submission in the written phase of the in the main infringement action. There is no fixed date for Plant-e to respond to this submission. The interim conference is scheduled for **5 June 2024** and one of the topics to be discussed will be the way in which Plant-e can respond to these late-filed confidential experimental data. To be able to assess the Redacted - for non-infringement apparently crucial - information, in a timely and proper manner, the JR agrees with Plant-e

that the full legal team of Plant-e will need to have access as well as all three natural persons of Plant-e requested, all with a different expertise. It also makes no sense to exclude Plant-e's party expert, [REDACTED], from the confidentiality club, as he is specifically engaged for his expertise on these technical issues. Bioo's arguments that this expert is not impartial, are, especially after the rebuttal by Plant-e, not convincing. The fear that he will make the information public, is eliminated by the fact that also he will be bound by this confidentiality order and by the penalty to be ordered for the breach thereof. To limit access to the technical non-infringement information in any other way, would in this case impede a fair trial. This outweighs the interest of Bioo to limit access to the Redacted Information to only one natural person.

Penalty

22. Bioo requests the court to order a recurring penalty payment of EUR 100,000, or any other amount as deemed appropriate by the Court, payable to the Court for each breach of the confidentiality order will be ordered.
23. Plant-e primarily requests that the request for penalty payments is rejected. If the court is of the opinion that penalty payments are warranted Plant-e request:
 - (A) Primarily that potential penalty payments payable to the court will be assessed according to the circumstances of the individual case.
 - (B) In the alternative that the recurring penalty payment payable to the court be limited to EUR 1,000 per breach which amount is reasonable in view of the actual value of the dispute, or any other amount as deemed appropriate by the court; and
 - (C) To cap the total of all potential penalty payments to a maximum of EUR 20,000 or any other amount as deemed appropriate by the court.
24. The court's orders may provide for periodic penalty payments payable to the court in the event that a party fails to comply with the terms of the order (Art.82(4) UPCA and R. 354 (3) RoP). To ensure that an individual penalty shall be proportionate to the importance of the order and of the breach, it is ordered that the penalty for each violation shall be determined having regard to the circumstances of the individual breach upon an application thereto to the court up to a maximum per violation as specified below.

ORDER

On these grounds and after hearing the parties on all aspects relevant, it is ordered that:

1. The Redacted Information defined in paragraph 1 of this order, qualifies as confidential within the meaning of article 58 UPCA and R. 262A.1 RoP;
2. Access for Plant-e to the Redacted Information, that is to the unredacted versions of the rejoinder and Exhibits 36 and 39, is restricted:

A. to the following persons:

- Plant-e's legal representatives, including registered patent attorneys, and their assistants;
 - Plant-e's party expert [REDACTED] and other technical expert to be engaged
 - the following employees of Plant-e: [REDACTED]
- and

B. for use in the main infringement proceedings only and for no other purposes.

3. Plant-e's representatives and their assistants, any party experts and the employees referred to in paragraph 2. shall treat the Redacted Information as confidential. This obligation shall also apply to Plant-e (as a legal entity). Such information shall not be used or disclosed outside of these court proceedings (the main infringement action), except to the extent that it has come to the knowledge of the receiving party outside of these proceedings, provided that the receiving party has obtained it on a non-confidential basis from a source other than Bioo or its affiliates, provided that such source is not bound by a confidentiality agreement with or other obligation of secrecy with Bioo or its affiliates, or the Redacted Information has become publicly available in another way. This obligation of confidentiality shall continue to apply after the termination of these proceedings.
4. For any breach of this confidentiality order, the court may, at the request of the applicant, impose a penalty payment of up to EUR 100,000 (one hundred thousand euros) for each violation, which is payable to the court.
5. The costs of the 262A-Application shall be addressed together with the costs in the main proceedings.

INSTRUCTIONS TO THE REGISTRY

6. The registry shall as soon as practicable take all necessary steps to give Plant-e access to the Redacted Information, as ordered above (R.262A (7) RoP).

Judge-rapporteur:

Margot
Elsa KOKKE

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Margot Elsa KOKKE
Date: 2024.05.15
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ORDER DETAILS

App_15573/2024

UPC number: UPC_CFI_239/2023 (ACT_549536/2023)

Action type: Infringement Action

On behalf of the Registry:

Nikki
Swinkels

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Nikki Swinkels
Datum: 2024.05.15
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