

EIP

Jozef Frans Nelissen v OrthoApnea S.L. Order of 21 September 2023

The UPC has published its third decision to preserve evidence (following the related Orders of 13 and 14 June 2023 in Oerlikon Textile GMBH & CO KG v Himson Engineering Private Limited and v Bhagat Group).

In this case, the Defendant, OrthoApena S.L. is a Spanish company which produces devices for the treatment of apnea. OrthoApena was a gold sponsor of a symposium then due to be held in Belgium, and was expected to promote one of its products, the “NOA” at this symposium.

The Applicant (whose name was redacted in the Order, but appears in the “Decisions and Orders” list in which the Order is posted, and is the publicly listed patent owner) is the proprietor of a patent which is in force in Belgium, Germany, France, Luxembourg and the Netherlands, although notably not Spain. The Applicant claimed that NOA infringed this patent and sought an ex parte order from the Brussels local division of the UPC, enabling the seizure of NOA devices, and the associated promotional and technical documentation, for evidentiary purposes.

The Applicant was able to establish that it was plausible that it holds a valid patent which the Defendant threatened to infringe with the NOA product. The Applicant’s petition is stated as being attached to, and forming part of, the Order; however, at the time of writing, the petition is not available on the CMS so that it is not clear to what lengths the Applicant went to render this plausible.

The Applicant’s request was also urgent, given that the petition was filed on 20 September, with the symposium taking place on 22 and 23 September. The standing judge (who decided the application pursuant to Rule 194(4) RoP in view of its extreme

urgency) noted that it was “unfortunate” that the request was made at the last possible moment, given the Applicant had known about the Defendant’s expected attendance since 30 June 2023; nevertheless, this did not count against the Applicant in the court’s assessment sufficient to refuse the requested Order.

Finally, the court was convinced that it was appropriate to grant the order without hearing the Defendant. This was to avoid irreparable harm occurring, as if the Defendant had advance notice of the order, it may decide not to exhibit its NOA product, so that evidence for a future litigation would not be available.

Consequently, the court ordered that the goods and associated materials could be seized. An expert was to accompany the bailiff in seizing the goods, and would then have seven days to produce a report setting out the details of the products and materials seized. That report may then (only) be used in future proceedings for patent infringement.

[2023-09-21-ld-brussels-upc-cfi-329-2023-ord_57590-2023-act_574133-2023-decision-preserving-evidence-anonymized.pdf \(unified-patent-court.org\)](#) (in Dutch)