



Higher Regional Court Düsseldorf

Decision

I-2 U 31/16

In the dispute

[XXX]

the 2nd Civil Senate of the Higher Regional Court Düsseldorf, represented by Presiding Judge Dr. Kühnen and the Judges Fricke and Thomas on January 17, 2017,

d e c i d e d

- I. In partial amendment of the Senate's decision of December 14, 2016 it is ordered with regard to the intervener supporting Plaintiff, that the [XXX]-contracts and the [xxx] statement of [XX.XX.XXXX] marked as STRICTLY CONFIDENTIAL as well as the passages of Plaintiff's Statement of response to the appeal of October 14, 2016, Part 2/2, that relate to the content of the aforementioned documents and that are designated as STRICTLY CONFIDENTIAL in the document header, are exclusively brought to the attention of Intervener's external attorneys. Intervener's external attorneys are for their part bound to maintain the aforementioned contents confidential towards everyone, including the intervening party they represent as well as Intervener's employees.

- II. With regard to Defendant the Senate deems the following NDA appropriate:
 1. Defendant commits to Plaintiff, that it uses the [XXX]-contracts and the [xxx] of [XX.XX.XXXX] marked as STRICTLY CONFIDENTIAL as well as the passages of Plaintiff's Statement of response to the appeal of October 14, 2016, Part 2/2, that relate to the content of the aforementioned documents and that are designated as STRICTLY CONFIDENTIAL in the document header, exclusively for the purpose of the present litigation. Besides that, Defendant commits to Plaintiff that it will maintain the aforementioned contents confidential towards everyone. Within its company, Defendant will forward the aforementioned confidential information only to a maximum of four of its staff members which need to be designated and identified according to their function in the company. Furthermore, Defendant is allowed to make the confidential documents accessible to external experts, which are supporting it in the litigation, if such experts are identified according to their name and address.



2. Defendant safeguards in an appropriate manner, that those employees and those experts, to whom it has forwarded confidential information, will maintain confidentiality for their part. With regard to Defendant's employees, this obligation also applies for the time after their departure from the company.
3. For each breach of confidentiality committed by one of its inducted employees or experts Defendant is liable under Clause 4 as if it had breached confidentiality itself.
4. Defendant commits to pay a penalty of EUR 1 Million to Plaintiff for each breach of confidentiality.
5. Information is excluded from the confidentiality obligation if
 - a. it was already known by Defendant before Plaintiff introduced the information into the present litigation (Statement of response to the appeal, Part 2/2),
 - b. it was made accessible to Defendant subsequently by a third party and if Defendant itself has not breached confidentiality when obtaining the information,
 - c. it was made accessible to Defendant subsequently from public sources.
In the cases of b. and c. the confidentiality obligation ceases at the moment in which the respective information is made accessible to Defendant.
6. Defendant carries the full burden of proof for the exemptions identified above in Clause no. 5 ("objection of knowledge from elsewhere").

With this objection of knowledge from elsewhere, Defendant will only be heard if

- a. in the cases identified in Clause 5 a.: Defendant discloses the specific piece of information for which prior knowledge is claimed, including its source, towards the Court within a period of 3 weeks, starting with the service of the Statement of response to the appeal, Part 2/2; and
- b. in the cases identified in Clauses 5 b. and 5c.: Defendant discloses the specific piece of information for which subsequent knowledge is claimed, including its source and the time at which it became aware of the specific piece of information, towards the Court within a period of 3 weeks, starting with the time of awareness of the specific piece of information.



KATHER · AUGENSTEIN
RECHTSANWÄLTE

The requirement to file such notification with the Court remains in place even after the litigation has already come to an end.

- III. Defendant is set a term of 3 weeks in which it can submit such offer for an NDA to Plaintiff.
Subsequently, Plaintiff is set a term of 2 weeks to accept the offered NDA.

[Signatures of the Judges]

Courtesy translation by Kather Augenstein

<http://www.katheraugenstein.com>