

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4
5 10X GENOMICS, INC.,

6 Petitioner,

7 vs.

8
9 NANOSTRING TECHNOLOGIES, INC.,

10 Patent Owner.

11
12
13 Case IPR2023-01298

14 Patent 11,377,689 B2

15
16 Conference Call

17 Friday, December 8, 2023

18 1:32 p.m.

19
20
21 Reported by: Renee J. Ogden, CSR-3455, RPR

22 Job #518373

1 APPEARANCES:

2

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1 Friday, December 8, 2023

2 1:32 p.m.

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4 JUDGE NEWMAN: The panel received an
5 email yesterday requesting an opportunity to be
6 heard on this issue.

7 Generally, we -- we request that the
8 panels do call and arrange a conference call rather
9 than unnecessarily sending an email, so that's why
10 we're here today on the conference call.

11 I'd like to allow Petitioner to begin.

12 And, Petitioner, could you please -- in
13 your -- your -- your discussion here today, can you
14 please focus on the issue of why it is that you
15 believe that the arguments that were made are
16 incorrect on both legally and factually, and why
17 you think they could not have been reasonably
18 anticipated?

19 Thank you.

20 ATTORNEY HOLMAN: Sure, Your Honor. And
21 thank you for -- for having the call today.

22 As we explained in the email, Petitioner

1 is seeking a short pre-institutional reply to
2 address two -- two issues raised in the Patent
3 Owner's preliminary response pertinent to the
4 Petitioner's Ground 4.

5 And the Ground 4, as I'm sure you know,
6 is the petition raises a priority challenge for the
7 '689 Patent and explains that the challenge claims
8 don't have written description support, which
9 severs priority claim for the '689 Patent and
10 brings in an intervening prior art reference, the
11 Cello (phonetic) reference.

12 And so the Patent Owner's preliminary
13 response raises two primary issues related to the
14 written description challenge of the '689 Patent
15 and Ground 4.

16 The first is the POPR's, or the
17 preliminary responses, characterization of facts in
18 evidence regarding disclosures in the
19 487 Application, the parent priority application
20 that's Exhibit 1012. And this is in POPR pages 37
21 to 42, mischaracterization of facts in evidence.

22 Specific examples relate to the

1 characterization of disclosures in the 487
2 application's paragraph 252 and 261, where Patent
3 Owner argues that these disclosures relate to -- or
4 these disclosures describe, for purposes of written
5 description, collecting whole probes as claimed in
6 the '689 Patent. Specifically, this is in the POPR
7 pages 37 to 39.

8 But this -- this argument that this is a
9 description of whole probes is incorrect and is a
10 misreading of the disclosures in the
11 487 Application.

12 The disclosures in paragraph 252
13 actually relate to removal of background noise,
14 which is a -- sort of a clean-up step, not the
15 collecting steps of the claimed method.

16 And Petitioner could not have
17 anticipated that Patent Owner was going to rely on
18 this disclosure in 252, paragraph 252 of the
19 487 Application because, frankly, they're not part
20 of the claimed method.

21 So, you know, Petitioner seeks an
22 opportunity to address this disclosure in the

1 487 Application.

2 Relatedly, the POPR misapplied the facts
3 pertaining to the Goldberg reference. This is
4 Exhibit 2001 submitted by the Patent Owner. This
5 is in the POPR pages 40 to 42.

6 And the Patent Owner's argument, while
7 being for a written description in the priority
8 application, the POPR argues that references
9 included with the 487 Application contain
10 descriptions of ligation reaction, including
11 ligations occurring while on analyte.

12 But, you know, the POPR refers to this
13 Goldberg reference in 2001 as an example of this
14 description.

15 But there's a misapplication of both
16 facts and the law because Goldberg's not part of
17 the 487 patent's written description. It's a
18 reference that Patent Owner submitted in the
19 information disclosure statement, and so the Patent
20 Owner can't rely on the Goldberg reference to fill
21 a gap within the description.

22 This is another issue that could not

1 have been anticipated by Petitioner because Patent
2 Owner's reliance on Goldberg for written
3 description, as I mentioned, is a -- is a -- is an
4 IDS reference, not part of the specification.

5 So, finally, the -- the second issue
6 Petitioner wishes to address is -- relates to the
7 Patent Owner's characterization of the written
8 description standard as it pertains to the '689
9 patent's priority benefit claim.

10 So here -- this is in the same section
11 of the POPR.

12 JUDGE NEWMAN: Yeah. Counsel, can I
13 interrupt you for just a moment? We -- we have a
14 question on -- on the point you just made about
15 Goldberg.

16 You're saying that Goldberg is not
17 incorporated by reference in the 487, because it's
18 just a reference that's incorporated on -- that is
19 listed on the IDS; is that correct?

20 [Simultaneous speaking.]

21 ATTORNEY HOLMAN: Yeah, that's correct,
22 Your Honor. It's -- it's not part of the

1 specification in the four corners of the
2 specification description.

3 JUDGE NEWMAN: And is it your position
4 that Patent Owner is trying to say that it is part
5 of the written description?

6 Because it seems to me that Patent Owner
7 is just citing it, but you're saying that they're
8 actually trying to say that it's included with it
9 as -- and part of the specifications?

10 ATTORNEY HOLMAN: Well, those are the --
11 those are the Patent Owner's words, Your Honor.

12 Patent Owner uses the words -- this is
13 on page 41 of the POPR: "References included with
14 the 487 Application contain descriptions of
15 ligation reactions, including ligations occurring
16 while on analyte."

17 And so --

18 JUDGE NEWMAN: I see that.

19 ATTORNEY HOLMAN: And so, yeah, that --
20 I mean that -- Patent Owner doesn't say explicitly;
21 this is incorporated by reference. But it -- it
22 comes across that way, and that's why I wanted to

1 bring that to the Board's attention and add some
2 additional briefing to give -- throw some context
3 on what -- where this Goldberg reference came from
4 and why it's not pertinent to a written
5 description.

6 Okay. And just briefly --

7 [Simultaneous speaking.]

8 ATTORNEY HOLMAN: I'm sorry.

9 JUDGE NEWMAN: Yes. Please proceed.

10 ATTORNEY HOLMAN: Okay. So just
11 briefly, the second issue Petitioner wishes to
12 address is the Patent Owner's characterization of
13 written description and how it's applied in
14 these -- on this priority benefit discussion.

15 So throughout this section of the
16 POPR -- again, this is pages 37 to 42 of the
17 brief -- Patent Owner attempts to wedge what is
18 keenly an obviousness standard -- and to satisfy a
19 written description.

20 So, for example, on page 41 of the
21 brief, Patent Owner argues that, quote, "Ligation
22 was a well-known technique at the time of the

1 invention."

2 On Page 42 of the brief, Patent Owner
3 argues that, quote, "A POSA would have been aware
4 that similarly targeted application of reagents for
5 ligation could have been applied," end quote.

6 And then, again, as we mentioned, the
7 Patent Owner refers to references outside of the
8 specification to allegedly demonstrate possession
9 of this claimed method.

10 Now, here, the Patent Owner doesn't --
11 doesn't use the word "obviousness" in its
12 arguments, but it's clear from these -- these
13 arguments and the way they've -- they've structured
14 it that -- that these are obviousness arguments.

15 And even if something might have been
16 obvious, that's not enough to satisfy a written
17 description.

18 So Petitioner thinks it would be
19 beneficial for some short additional briefing on --
20 on these two primary issues, at best, potentially
21 dispositive to -- to Ground 4.

22 JUDGE NEWMAN: Thank you, Petitioner.

1 Counsel for Patent Owner, please
2 respond.

3 ATTORNEY WALTER: Thank you, Your Honor.

4 So none of the issues that Mr. Holman
5 have identified warrant a reply. And they all seem
6 to be topics that Petitioner should have been well
7 aware of.

8 And let's start with the disclosure of
9 the 487 specification. That's the specification
10 that is the priority document for the patent that's
11 at issue.

12 So they had to know that we would rely
13 upon that for written description when they filed
14 their petition. And they had to know what was in
15 it.

16 And the issue they're contending that
17 they need additional briefing on is this question
18 of whether or not there is analysis of full probes.
19 And the specification expressly discloses impact
20 probes.

21 Okay. So it's kind of hard to
22 understand how they could have missed that and how

1 it's unexpected and unanticipated that we would
2 have addressed this particular issue in our Patent
3 Owner's preliminary response.

4 Frankly, you know, they should have been
5 aware of the entire disclosure in that 487
6 specification and have been able to address pretty
7 much every key point, particularly one that
8 addresses intact probes.

9 The second issue that they basically
10 raised at length is this question of trying to
11 wedge an obviousness argument into our response on
12 written description.

13 I don't think that warrants a reply
14 either. I believe that the Board knows what the
15 law is.

16 And what the Board, I'm sure,
17 understands is that the written description
18 requirement is, indeed, addressed from the
19 viewpoint of the skilled artisan.

20 And the skilled artisan would be well
21 aware of ligation techniques that they claim are
22 not disclosed in the patent.

1 But I think the Board is well aware,
2 probably from its work on many, many cases in this
3 area, ligation is a standard, well-known technique.

4 And whether you do it at one point in
5 time or another point in time, that would have been
6 disclosed.

7 The way in which we relied upon the
8 prior art references that we've cited, such as
9 Goldberg, also nothing unusual about that. This is
10 evidence of what one of skill in the art would have
11 been aware of related to the use of ligation, and
12 it's perfectly appropriate to rely upon that kind
13 of evidence to help explain what the skilled
14 artisan would have known. Again, nothing
15 surprising, nothing unusual.

16 And, frankly, under analysis on written
17 description, it should've anticipated that the
18 written description issue is, indeed, analyzed from
19 the viewpoint of a skilled artisan, and they could
20 have anticipated that and addressed that.

21 So, you know, nothing here. It's
22 just -- it seems to us what they want to do is they

1 just want to have a reply brief to augment their
2 petition regarding issues that, frankly, that they
3 should've been aware of and should have addressed
4 from the outset.

5 So it doesn't seem like a reply is
6 necessary, but if there is going to be a reply, we
7 would want to have equal page surrebuttal.

8 JUDGE NEWMAN: Yes, I understand then.
9 Okay. I have one more question that I wanted to
10 ask of Patent Owner's counsel.

11 Paragraphs 251 and 252 that are at issue
12 with respect to the description of full probe
13 collection, can you respond specifically to the
14 issue of whether that has been mischaracterized and
15 relates instead to a noise reduction process?

16 ATTORNEY WALTER: You know, so, frankly,
17 I don't think that's fair. They talked about -- it
18 talks about collecting entirely intact probes. You
19 know, this notion that it's only about noise
20 collection, frankly, it's surprising. That's
21 something new. It's something they've never raised
22 with us before.

1 But whether it's a -- you know, I think
2 this whole patent is about being able to make
3 measurements regarding a spatial analysis. So
4 whether it's for noise reduction -- well, they
5 characterized it as being for noise reduction. You
6 know, if it's something that improves your signal
7 and allows you to detect the spatial position,
8 that's relevant to the claim.

9 It's in the patent. If it's in the
10 patent, it's a little bit hard to say that it's not
11 relevant to the claimed methods. If it's in the
12 patent, then it discloses the technique that you
13 can use with the invention.

14 ATTORNEY HOLMAN: Your Honor, can I
15 briefly address that?

16 JUDGE NEWMAN: Yes.

17 ATTORNEY HOLMAN: Yeah, just real
18 briefly, it says "the noise reduction." I mean,
19 that language comes from the application itself.
20 It talks about background noise in these two
21 paragraphs. And I just want to point out that it
22 refers to negative purification of the intact

1 probe.

2 So it's negative purification. It's
3 getting rid of the intact probe, so it's not --
4 it's not the same as the collecting step. It's not
5 a description of the collecting step as claimed.

6 Thank you.

7 JUDGE NEWMAN: And Patent Owner, any
8 response on that?

9 ATTORNEY WALTER: Yes, I think that --
10 again, you know, this is addressed fully in our
11 brief.

12 We're clear. We describe this. Our
13 argument is that this identified nucleotide and the
14 target being collected together. And we explain
15 why that's addressed.

16 And, you know, again, it's the intact
17 probe embodiment, and based off that, wasn't
18 relevant. It's something that they should have
19 addressed from the outset. I mean, it's talking
20 about intact probes. That's what this whole issue
21 is about, is whole probes versus partial probes.

22 JUDGE NEWMAN: All right. Can you give

1 us just a moment? We're going to confer amongst
2 ourselves on the panel, and we'll respond in just a
3 moment.

4 Counsel, this is Judge Newman again. We
5 agree with Patent Owner that we do not need any
6 further briefing on Issues 2 or 3, the Goldberg
7 issue, or the issue of whether obviousness was
8 incorporated into the standard for this
9 anticipation challenge.

10 However, we agree that briefing from
11 Petitioner on Issue Number 1 related to the written
12 description support would be helpful.

13 Petitioner, you have asked for a
14 five-page reply on these issues, but I believe a
15 three-page reply is all that would be needed.

16 You have indicated that you could file
17 that within five days, if I'm remembering
18 correctly. So looking at the calendar, can we
19 agree that that would be filed by the 15th of
20 January?

21 ATTORNEY HOLMAN: Yes -- 15th of
22 December?

1 JUDGE NEWMAN: I'm sorry. 15th of
2 December, yes.

3 ATTORNEY HOLMAN: Yes.

4 JUDGE NEWMAN: And, Patent Owner, would
5 you be able to file a responsive three-page reply
6 no later than the 22nd?

7 ATTORNEY WALTER: Yes, Judge.

8 JUDGE NEWMAN: All right. Thank you.

9 We will issue an order confirming that,
10 and we appreciate your time today.

11 Any further issues?

12 ATTORNEY HOLMAN: None from Petitioner.
13 Thank you.

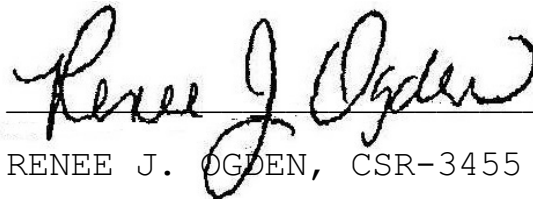
14 ATTORNEY WALTER: None from Patent
15 Owner.

16 JUDGE NEWMAN: Thank you very much.

17 (Proceedings concluded at 1:52 p.m.)
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CERTIFICATE OF NOTARY

I, RENEE J. OGDEN, certify that the foregoing was recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

A handwritten signature in cursive script, reading "Renee J. Ogden", is written over a horizontal line.

RENEE J. OGDEN, CSR-3455

Notary Public,

Wayne County, Michigan

My Commission expires: June 21, 2025

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