

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4
5 10X GENOMICS, INC.

6 Petitioner,

7 v.

8 PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

9 Patent Owner.

10
11 Case IPR2023-01299

12 U.S. Patent No. 11,098,303 B2

13
14 Board Conference Call

15 Friday, January 19, 2024

16 1:00 p.m. Eastern Time Zone

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22 Reported By: Dawn M. Hart, RPR/RMR/CRR

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A P P E A R A N C E S

PANEL:

Judge Hulse

Judge Braden

ON BEHALF OF THE PETITIONER:

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1 P R O C E E D I N G S

2 MR. HOLMAN: Good afternoon, Your Honor.
3 This is David Holman from Sterne Kessler Goldstein
4 & Fox on behalf of Petitioner, 10X Genomics. And
5 with me on the line today is my colleague Pratibha
6 Khanduri, also from Sterne Kessler.

7 JUDGE HULSE: And for Patent Owner?

8 MR. GROSSMAN: Good afternoon, or good
9 morning, Your Honor, depending on where you are,
10 Dov Grossman from Williams & Connolly on behalf of
11 Patent Owner, President and Fellows of Harvard
12 College. And with me today is my colleague from
13 Williams & Connolly, David Riskin.

14 JUDGE HULSE: Okay, everyone. Has
15 anyone retained a Court Reporter for this call?
16 Petitioner?

17 MR. HOLMAN: Yes, Your Honor, this is
18 David Holman for Petitioner. We have retained a
19 Court Reporter, and it sounds like she's on the
20 line.

21 JUDGE HULSE: So if you could please
22 file the transcript as an Exhibit when you get a

1 chance, that would be great.

2 MR. HOLMAN: Yes.

3 JUDGE HULSE: So, thank you.

4 We understand this call is for
5 Petitioner, at Petitioner's request for
6 authorization to file a reply to Patent Owner's
7 preliminary response to just two arguments made in
8 the preliminary response. So we'll start with
9 Petitioner.

10 Without getting too deep into the merits
11 of the argument, could you please explain why you
12 believe good cause exists.

13 MR. HOLMAN: Yes, Your Honor, thank you.
14 So as we mentioned, there's two issues in the POPR
15 that Petitioner wants to address. One issue
16 relates to Patent Owner's mischaracterization of
17 Petitioner's arguments regarding the removing step
18 in the challenge claims in view of disclosures of
19 the Fan reference. And the other issue relates to
20 Patent Owner's mischaracterization of Petitioner's
21 claim construction position and what's required
22 under Rule 104(b)(3).

1 Regarding the issue related to the
2 removing step, here Patent Owner mischaracterized
3 the Petitioner's argument by wrongly limiting it,
4 by narrowing it to Fan's disclosure of washing
5 away unhybridized probes rather than removing the
6 hybridized probes.

7 The Patent Owner alleges that the
8 Petitioner relies only on this disclosure of
9 washing away unhybridized probes to meet the
10 removal step limitation rather than removing
11 hybridized probes, but this is not true. It's a
12 mischaracterization of what was argued in the
13 petition and what was discussed in Fan.

14 So just briefly, for example, on the
15 petition, page 27, when discussing the removal
16 step limitation of claim 1, Petitioner quotes Fan,
17 Exhibit 1005, column 2, lines 56 to 58. And if
18 you look at Fan, column 2, lines 56 to 58, Fan
19 quite clearly says some aspects of the above
20 embodiments, the first labeled decoder probe is
21 removed prior to hybridizing the second labeled
22 decoder probe. And Fan's reference to the above

1 embodiments includes the workflow just above that
2 in the same column, lines 21 to 36, and that's
3 what's cited in the petition throughout the
4 grounds when discussing these elements of the
5 claims, the steps that are leading up to this
6 removal step.

7 And so our point here is that Fan's
8 disclosure in column 2, lines 56 to 58, has to be
9 read in context with Fan, column 2, lines 21 to
10 36, which also includes figure 1, and all together
11 that's very clearly a disclosure of removing the
12 secondary probe that had been hybridized with the
13 primary probes before the next round of
14 hybridization.

15 So if you look at figure 1, you'd see
16 that. It's in the petition on page 28, there's a
17 labeled diagram of figure 1 showing that there's,
18 secondary probes are hybridized, and then in the
19 right image those secondary probes are removed and
20 those are replaced with different secondary
21 probes.

22 And then the last point here, Dr.

1 Spellman -- yes.

2 JUDGE HULSE: I'm sorry to interrupt.
3 We're getting pretty deep into the weeds here of
4 the argument. How is this issue any different
5 than any other case? It sounds like you're
6 basically disagreeing with what they've argued in
7 the preliminary response. And it's not like this
8 is, this is not a discretionary denial issue under
9 314 or 325 that we would normally permit further
10 briefing. This is kind of the issue that I think,
11 generally speaking, we would not need further
12 briefing on.

13 What is your response to that? I'm
14 assuming that Patent Owner will argue.

15 MR. HOLMAN: Thanks, Your Honor, yeah.
16 So Petitioner believes that good cause exists
17 here. For one, it's more than just a disagreement
18 with positions. It's the, you know, Petitioner
19 could not have anticipated that Patent Owner was
20 going to mischaracterize the Petitioner's argument
21 in this way. So it's not so much a disagreement
22 on what's disclosed in Fan, it's a

1 mischaracterization of what's presented in the
2 petition, and that's where we think good cause
3 exists and why we think an additional briefing is
4 warranted here.

5 Additionally, this issue applies to all
6 the grounds in the petition because Fan is a
7 primary reference in all the grounds, and this
8 issue is potentially dispositive to the Board's
9 decision on institution.

10 JUDGE HULSE: Okay. Let's move on to
11 the second issue.

12 MR. HOLMAN: Okay. So the second issue
13 relates to claim construction. In this case here
14 the Patent Owner first argues in its POPR that to
15 specify how a Co-Plaintiff's interpretations of
16 the claims connect to any particular claim
17 construction. This is in the POPR, page 12.

18 And similar to the above previous
19 argument, this, from Petitioner's view, this is a
20 mischaracterization of what's presented in the
21 petition because the petition applies claim
22 constructions based on the Co-Plaintiff's

1 preliminary infringement contentions. That's made
2 very clear in the petition, page 12. And then
3 when discussing each claim element, the grounds,
4 the petition goes through that in a very formulaic
5 manner, explaining that according to the
6 Co-Plaintiffs, you know, this claim term or this
7 phrase means X, Y or Z, and then goes on to
8 explain how the prior art reference, for example,
9 Fan, discloses X, Y or Z.

10 And then the Patent Owner -- it doesn't
11 end there. The problem is the Patent Owner goes
12 on in its POPR to mischaracterize what's required
13 under Rule 104(b)(3). According to the Patent
14 Owner in the POPR, they argue that Petitioner is
15 required to provide a means-plus-function claim
16 construction in the IPR petition because
17 Petitioner argued for such a construction for a
18 claim term in the parallel District Court
19 litigation. And this is in the POPR, pages 13 to
20 16.

21 But our point here is that Rule
22 104(b)(3) recites, or requires that an IPR

1 petition must explain how the challenged claim is
2 to be construed. And it goes on at 104(b)(4) to
3 require that the Petitioner explain how that
4 construed claim is unpatentable. And that's what
5 the petition does, right?

6 So in our case here, the claims are to
7 be construed under the Co-Plaintiff's
8 interpretations, the petition says that, which
9 according to the Co-Plaintiffs is not governed by
10 Section 112(f), right? There's not means plus
11 function, and then because in this petition the
12 petition is not constrained in claims Section
13 112(f), and there's no requirement under Rule
14 104(b)(3) to identify portions of the
15 specification that describe the structure
16 corresponding to the claim function.

17 And there's, just briefly, there's
18 numerous cases that support that. For example,
19 the 10X versus Bio-Rad case that's cited in the
20 petition at page 12, that's IPR 2020-0086, Paper
21 8, at pages 18 and 19, as well as numerous other
22 Board decisions all make it clear that a

1 Petitioner can apply constructions consistent with
2 Patent Owner's infringement contentions solely for
3 the purposes of an IPR even when the Petitioner
4 may disagree with those constructions.

5 So here a good cause, Petitioner
6 believes good cause exists to address this issue,
7 again because it's not necessarily a disagreement
8 of a term, like what a term means, but it's a
9 mischaracterization, the POPR is a
10 mischaracterization of what's presented in the
11 petition. And we couldn't -- the Petitioner
12 couldn't anticipate that the Patent Owner was
13 going to, you know, re-form Petitioner's arguments
14 in this way. And this issue also applies to all
15 the grounds in the petition and is potentially
16 dispositive to the Board's decision on
17 institution.

18 So just summing up, the Petitioner is
19 seeking authorization for a five-page reply to
20 address these two issues. And I think, as we
21 mentioned in our email to the Board, Petitioner is
22 amenable to Patent Owner receiving a sur-reply of

1 equal length. Thank you.

2 JUDGE HULSE: Okay. I have a quick
3 question, though.

4 So the preliminary response was filed on
5 December 14, 2023, and according to the email, you
6 didn't contact Patent Owner until about a month
7 later, on January 10th I think it was. Can you --
8 is there a reason for that, that delay?

9 MR. HOLMAN: Sure, Your Honor, I'm happy
10 to address that, yeah. So you're exactly right,
11 the POPR was filed on December 14. We ran into
12 the Christmas and New Year's holidays and had some
13 scheduling difficulties to confer.

14 On our side, we did reach out to Patent
15 Owner, counsel for Patent Owner within a month of
16 the POPR's filing, so we reached out to them on
17 January 10th, but they were unable to meet and
18 confer until the 16th, after which we promptly
19 emailed the Board with Petitioner's request.

20 JUDGE HULSE: Okay. Patent Owner, would
21 you like to respond?

22 MR. GROSSMAN: Sure. Your Honor, would

1 you like me to just sort of go through those
2 points in order starting with Fan and then claim
3 construction, or is there something --

4 JUDGE HULSE: Sure.

5 MR. GROSSMAN: -- you would like me to
6 address first?

7 Sure. So with regard to Fan, and being
8 mindful of Her Honor's request to keep this at a
9 high level, I agree with Your Honor that this does
10 not constitute the type of situation that
11 constitutes good cause. Listening to my colleague
12 argue, this really comes down to, I think, a
13 disagreement about what the portions of Fan that
14 they cite in their petition say. And I do think
15 in our POPR we go through them pretty methodically
16 to try to show what they are arguing and why it
17 doesn't satisfy the relevant limitations.

18 And I think that, I'm happy to address
19 any of the particular ones that Mr. Holman
20 identified, but we think that if you go through
21 the POPR and you look at the portions that they
22 rely on, of Fan that the other side relies on,

1 what you can see is they're focusing on portions
2 of it that talk about washing unhybridized probes
3 or they're talking about removal in a very generic
4 sense and not removal of the specific part of the
5 claim within the specific requirements of the
6 claim which talk about removal from the hybridized
7 complex.

8 There's actually only one portion where
9 they actually talk about dehybridization at all in
10 a parenthetical, and we do address that in our
11 POPR as not being prior art because it's not
12 contained in the Fan provisional.

13 So all of these arguments, all of these
14 issues are not about mischaracterizations. They
15 are a disagreement about what the provisions of
16 Fan mean and what was said in the petition. And I
17 think the petition has to stand for what it says
18 and not really be permitted to, in a reply, use it
19 as an opportunity to try to say, well, this may be
20 what we said, but this is really what we meant,
21 especially given that the petition was filed on
22 the very last day of the one-year period.

1 I'm happy to move on to claim
2 construction unless Your Honor has any questions
3 about Fan.

4 JUDGE HULSE: Nope. Go right ahead.

5 MR. GROSSMAN: Sure. And with regard to
6 claim construction, again, I don't think this is a
7 question of any kind of mischaracterization or any
8 kind of new unanticipated issue.

9 You know, the issue we have raised is
10 that, in this seating, the Petitioner said that
11 they are relying on our constructions from the
12 District Court. And of course in the District
13 Court proceeding it's been the position of Harvard
14 and its real party-in-interest Vizgen that this,
15 the particular system limitation at issue, one of
16 the limitations at issue I should say, is not
17 governed by 112(f). However, Petitioner has taken
18 the exact opposite approach and has argued that
19 that claim phrase is governed by 112(f).

20 And in fact, the claim construction
21 hearing, which was the same day that Petitioner
22 reached out to us about this, and I raised this to

1 my colleague and they said there was no connection
2 between the two, but my understanding is that same
3 day at the claim construction hearing Petitioner
4 was still advocating that the claim term, the
5 system claim term be governed by 112(f).

6 And the problem is there is a, those two
7 positions are diametrically opposed with each
8 other, meaning whatever law that Petitioner wants
9 to cite to about slightly differing claim
10 constructions between a District Court proceeding
11 and an IPR is a different situation to say it's
12 governed by 112(f) or it's not governed by 112(f).
13 Those are the exact opposite. And that is what is
14 in our POPR. And we point to a case, the
15 OrthoPediatrics case in our POPR that addresses
16 that, that having such a diametrically opposed
17 position is a basis for denial. That's on page
18 15.

19 So, again, I don't think that there is a
20 question of a mischaracterization or a question of
21 an unanticipated argument. If the Petitioner had
22 wanted to address their, their difference and

1 inconsistent position on this claim term in the
2 District Court, they could have raised that in
3 their petition, but they didn't. That was their
4 decision. And those claim construction positions
5 were staked out as reflected in, I believe Exhibit
6 2004 and 2005 of our POPR, were staked out at the
7 beginning of August, which was before the petition
8 was filed. So they were clearly aware of this
9 issue and chose not to address.

10 So I think that that's really the
11 question, and again, is exactly the type of issue
12 that would not constitute good cause.

13 JUDGE HULSE: Thank you.

14 Mr. Holman, would you like to respond
15 particularly to that latter point?

16 MR. HOLMAN: Sure. If I may, I'd just
17 point out that the cases that Patent Owner relies
18 on in its POPR regarding the claim construction is
19 the OrthoPediatrics case and the Ebates
20 Performance case. Neither of those cases really
21 apply or have the same fact pattern here.

22 For example, in the OrthoPediatrics

1 case, Petitioner in that case argued how the claim
2 limitations should not be construed and didn't set
3 forth any construction. And in the Ebates
4 Performance case, the Petitioner argued in the
5 petition that the claim term should be construed
6 under means-plus-function, but then failed to
7 provide the structure associated with the claim
8 function. So I mean the facts are just very
9 distinguishable there.

10 In contrast, like I mentioned the 10X
11 versus Bio-Rad case cited in the petition. You
12 could also look at the Google v. AGIS Software
13 case. That is IPR 2019-01085, Paper 10, as well
14 as several others that have more similar fact
15 patterns to the circumstances here.

16 And then one really super brief point on
17 the removing step limitation. I will just point
18 out that the POPR glosses over the testimony of
19 Dr. Spellman on this issue. In his declaration,
20 Exhibit 1002, for example, paragraph 129, where
21 Dr. Spellman testifies, after reading all these
22 disclosures in Fan, he concludes that Fan, quote,

1 must remove fluorescently labeled decoder probes
2 from the bar code probes in between rounds of
3 sequential hybridization. And that's removing the
4 hybridized probes as claimed. That's not washing
5 away unhybridized probes as Patent Owner alleges.
6 Thank you.

7 JUDGE HULSE: Great. Thank you very
8 much.

9 May I put you all on mute while I confer
10 with Judge Braden. Thanks.

11 (A recess was taken.)

12 JUDGE HULSE: The Panel is back online.
13 Mr. Holman and Mr. Grossman are both still on?

14 (Simultaneous speaking.)

15 Thank you.

16 The panel has conferred and we are not
17 persuaded that good cause exists to grant the
18 Petitioner's request for authorization to file a
19 reply to the preliminary response. We heard both
20 sides, and we find that these issues are ones that
21 we can evaluate, without the need for further
22 briefing, on our own.

1 And separately, so given the delay in
2 this request, we're concerned about the timing
3 that we have for entering our decision on whether
4 to institute if we were to allow for further
5 briefing.

6 So given that Petitioner has not shown
7 good cause exists, we deny that request.

8 While I have you both on the phone,
9 though, does anybody have anything else that you
10 would like to discuss with us?

11 We'll start with Petitioner.

12 MR. HOLMAN: No, Your Honor. Thanks.
13 Nothing from Petitioner.

14 JUDGE HULSE: And Patent Owner?

15 MR. GROSSMAN: No, Your Honor, nothing
16 from Patent Owner. Thank you for your time.

17 JUDGE HULSE: Sure. And for the Court
18 Reporter, we heard a question about Judge Braden's
19 last name. It's B-R-A-D-E-N.

20 We will enter an Order summarizing this
21 call in due course. And with that, this call is
22 adjourned. Have a good day.

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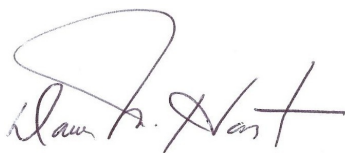
(Off the record at 1:23 p.m.)

CERTIFICATE OF SHORTHAND REPORTER

I, Dawn M. Hart, the officer before whom the foregoing proceeding was taken, do hereby certify that the foregoing transcript is a true and correct record of such proceedings; that said proceedings were taken down by me stenographically and thereafter reduced to typewriting under my direction; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 26th day of January, 2024.

My commission expires:
January 2, 2025

A handwritten signature in cursive script, appearing to read "Dawn M. Hart", is written over a horizontal line.

NOTARY IN AND FOR THE
STATE OF MARYLAND

Transcript of Board Conference Call
Conducted on January 19, 2024

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