

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE (WILMINGTON)

10X GENOMICS, INC., et al.,	}	Docket No. 21 C 263
Plaintiffs,		22 C 261
		22 C 1375
vs.	}	
VIZGEN, INC.,		Chicago, Illinois
Defendant.		June 14, 2024 8:45 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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1 (The following proceedings were had telephonically:)

2 THE CLERK: Case 21 C 263, 10X v. NanoString; 22 C
3 261, 10X v. NanoString; and 22 C 1375, NanoString v. 10X.

4 THE COURT: All right. Good morning. This is Judge
5 Kennelly. Let's start off with counsel for 10X, please.

6 MR. POWERS: Good morning, your Honor. Matt Powers
7 for 10X. Also, Jason Rawnsley is on the phone as well.

8 THE COURT: Thanks.

9 Counsel for Harvard.

10 MR. DORSNEY: Good morning, your Honor. It's Ken
11 Dorsney from Morris James, and I have co-counsel on the line
12 from Foley & Lardner, Michael Tuteur and Robin -- Ruben
13 Rodrigues. Sorry about that.

14 THE COURT: And counsel for Bruker, which for the
15 benefit of the court reporter is B-R-U-K-E-R.

16 MS. PIERGIOVANNI: Good morning, your Honor. This is
17 Rosemary Piergiovanni from Farnan, and I have with me on the
18 line Derek Walter and Ed Reines from Weil.

19 THE COURT: Okay. So a bunch of issues to cover here
20 from the status report.

21 So on the substitution, I didn't check back this
22 morning, but I'm pretty sure -- I've got -- tell me if I'm
23 wrong -- I've got draft orders on each of the three cases
24 regarding substitution, right?

25 MR. REINES: This is Ed Reines from Weil, yes, your

1 Honor, you do.

2 THE COURT: Okay. And this is the part that I didn't
3 look back at. Do those orders kind of hold open this issue of
4 continuing to discuss whether Bruker Corp. should be a
5 defendant? Do the orders include something about that?

6 MR. REINES: Yes, consistent with an ongoing
7 conversation about that.

8 THE COURT: Okay. So I'll get all of those orders
9 taken care of, I don't know if it will be today, but no later
10 than Monday, with the clerk's office out in Delaware.

11 So a couple questions about the respective positions
12 on Bruker Corp.

13 So I take it that the auction relating to NanoString
14 was done under the auspices of a bankruptcy court; is that
15 right?

16 MR. REINES: That's correct, your Honor.

17 THE COURT: And it was bankruptcy court in Delaware
18 or somewhere else?

19 MR. REINES: Delaware.

20 THE COURT: Okay. So my question is -- you know, I
21 think what's contemplated by the status report is you're going
22 to talk a little bit more about this, and then -- or maybe
23 you're done talking -- and then, you know, somebody's going to
24 file a motion, I guess the plaintiffs are going to file a
25 motion to join Bruker as a defendant.

1 So my question is -- there's at least a tinge in the
2 discussion about this, that, hey, we were misled during the
3 sale to believe that Bruker was the party taking over and then
4 the switch was done after the fact.

5 So my question is, is that -- is there some reason
6 why that shouldn't go to the bankruptcy court to decide in the
7 first instance as opposed to me?

8 MR. REINES: Your Honor, this is Ed Reines. This is
9 my thinking on it, is that Bruker Corp. is willing to stand
10 behind everything that happened in the bankruptcy court, so
11 there's no suggestion that we're not doing everything we said
12 we would do in the bankruptcy court, which did contemplate, by
13 the way, a subsidiary being created that would actually be the
14 buyer.

15 The only -- the real issue before your Honor is, you
16 know, is it appropriate that Bruker Corp. needs to be
17 independent of its, you know, standing behind -- accepting
18 whatever obligations it accepted there, is there -- is there
19 an actual claim and -- or like a patent infringement claim
20 against the parent or something like that.

21 So I do think -- at this point, from your Honor's
22 perspective, I think the parties need to discuss it further.
23 Rule 19 was introduced this week as a new theory. We need to
24 see what and how they want to try to add Bruker Corp. You
25 know, is it appropriate. If it's appropriate, you know, then

1 there'll be no motion. If they want to just add it because
2 they want free discovery from different people and we don't
3 think that's appropriate, then we'll contest it.

4 So I agree with your Honor's first instinct that the
5 parties really hadn't completed the conversation about it and
6 that a motion is appropriate if there's a dispute.

7 THE COURT: Okay. One more question for Mr. Reines
8 before I ask people on the other side to weigh in on this.

9 So if it ends up that Bruker ends up getting added
10 one way or another, and I don't have a position on that
11 because I don't know enough to say, would it be likely that
12 you'd be representing that entity as well as the other -- the
13 other ones?

14 MR. REINES: That's a good question. So there are --
15 there's a new law firm that's provisional counsel for Bruker
16 Corp. that will be co-counseling in with us.

17 We were waiting, because -- just the technicalities
18 of it, they were waiting for Bruker to actually become a party
19 before they did that. And because the substitutions weren't
20 signed, they don't represent NanoString, whereas, I do. So
21 that's why I'm the one that's appearing here now alone and not
22 with them.

23 But there will be a new law firm that will be joining
24 once the substitutions are signed, and then we'll be working
25 together.

1 THE COURT: Right. But -- so is that -- is it
2 likely -- and I know you can't speak for them at this point,
3 but I'm just trying to get a feel for it -- is it likely that
4 if Bruker Corp. itself got added as a party, that that other
5 same law firm that -- law firm that you just mentioned --

6 MR. REINES: Yes.

7 THE COURT: -- are you representing them too?

8 MR. REINES: Yes, your Honor.

9 THE COURT: Okay. All right. That's what I needed
10 to know.

11 Okay. All right. So before anybody starts talking
12 on other side, I guess the proposal on the table is give me
13 some reasonably prompt -- reasonably short amount of time to
14 continue to talk about this and then set a deadline for filing
15 any motions to add or join parties.

16 So if -- if somebody thinks I ought to do something
17 other than that -- in other words, I don't have to decide
18 anything today -- but if anybody thinks I should do something
19 other than that, please free to tell me now.

20 If you're okay with that, tell me that, and we'll
21 just get those dates and move on to the next issue.

22 MR. POWERS: This is Matt Powers for 10X. We think
23 that's exactly right.

24 THE COURT: Okay. What do you think the deadline
25 should be for filing motions, which is basically kind of a

1 cutoff date for discussions if you want to look at it that
2 way?

3 MR. POWERS: A week from now.

4 THE COURT: Okay. So that's the current proposal on
5 the table.

6 Counsel for Harvard want to say anything, want to
7 suggest anything different from that?

8 MR. RODRIGUES: This is Ruben Rodrigues for Harvard
9 from Foley. Nothing further on us.

10 THE COURT: Okay. Mr. Reines, is one week okay for
11 you?

12 MR. REINES: Yeah, that's fine. We don't have a
13 draft pleading or anything like that.

14 THE COURT: Yeah, that's fine.
15 Okay. So on the issue --

16 MR. POWERS: This is Matt Powers again. The only
17 addition is we think there should be an expedited briefing
18 schedule on that motion if it has to be filed.

19 THE COURT: We're going to cross that bridge when we
20 get to it. I do want to get things kind of moving back again,
21 so don't -- I wouldn't be too worried about that.

22 Okay. On the Bruker substitution issue, I'll get the
23 orders entered, and then the parties are to continue to confer
24 regarding the proposed addition of Bruker Corp. as a
25 defendant, and any motions to join or add parties are to be

1 filed by no later than the 21st of June.

2 And then as soon as I see that, I'll get a schedule.
3 It usually takes a day because I have to communicate with the
4 clerk's office in Delaware about it, but it will be pretty
5 quick.

6 Okay. Moving on.

7 I want to skip ahead a little bit. And this has to
8 do with the case that was tried, the 653 case.

9 On page 8 of the status report, there's a proposal
10 for supplemental briefing on the post-trial motions to address
11 the changed circumstances since NanoString's bankruptcy and
12 asset acquisition by Bruker.

13 So somebody needs to tell me what the changed
14 circumstances are that would have a bearing on a motion for
15 new trial or a motion for judgment as a matter of law or a
16 motion to --

17 MR. POWERS: This is Matt Powers, your Honor, for
18 10X. The motion for new trial, I doubt that it affects the
19 JMOL. I doubt it affects it.

20 It does affect the motion for enhancement of damages
21 after the entry of an injunction because --

22 THE COURT: In what way?

23 MR. POWERS: NanoString's opposition relies in
24 substantial part on the conditions of its financial position
25 at that time that are now substantially changed.

1 THE COURT: Okay. You've explained it. I get it.

2 So on the defense side, I guess this would be
3 Mr. Reines, are there any other changed circumstances you can
4 think of other than that that would call for additional
5 briefing?

6 MR. REINES: No, your Honor, not that I realize, but,
7 you know, we're going to be responding to what is -- you know,
8 we're in responsive mode, so --

9 THE COURT: So here's the -- so here's the -- so
10 here's the deal. I'm not taking 25 more pages of briefs given
11 the narrow scope of this, and it's not going to take six weeks
12 to do it.

13 So plaintiffs -- it's going to be five and five, and
14 there's not going to be a reply because there doesn't need to
15 be a reply on this. It's a pretty clear and narrow and
16 focused issue.

17 So plaintiff has got a week to file a supplemental
18 brief on post-trial motions in the 653 case, no more than five
19 pages, and defendants got a week after that to file a
20 supplemental response, no more than five pages.

21 Okay. Next issue, and I'm backing up in the status
22 report a little bit here, re-setting the schedules upon
23 lifting of the bankruptcy stays.

24 It looks like there's an agreed schedule or a
25 proposed agreed schedule on the 261 case, and then the dispute

1 has to do with the 1375 case.

2 So let me just speak frankly with you. If these
3 cases go past August of next year, I may be giving them back
4 to the judges in Delaware because I -- my -- I didn't -- I
5 didn't enlist for a specific period, it's kind of at my
6 discretion, but my dealing with them is going to come to an
7 end at some point.

8 And so I get both sides' positions on who's trying to
9 go first and who's trying to go second and what the
10 justifications are for each of that. I mean, my inclination
11 would be to have one of the -- a case, to have a trial date in
12 June. And as of right now, I'm not prepared to say which case
13 it would be, but a trial date in June of 2025.

14 Now, if that ended up being the 261 case, that would
15 mean you'd have to squeeze the schedule that you've got in
16 that case because the schedule right now ends at the end of --
17 close to the end of June. That's just on the summary judgment
18 and Daubert motions.

19 I don't think -- I don't think it's feasible --
20 particularly because we have the trial in February, I don't
21 think it's feasible to do both of the cases in June of 2025.
22 And when I say "both," I mean the 261 and the 1375. But
23 you've heard what I said about August. So August is the
24 latest.

25 So I'm -- you know, I'm -- I don't -- as I sit here,

1 and I know people probably thought this, but I don't have it
2 on the top of -- don't know it off the top of my head, I don't
3 recall exactly what the sequence was before we did all of
4 this. I'm disinclined to say that the sequence ought to be
5 changed from what it was before just because of the fortuity
6 of NanoString's bankruptcy.

7 What I'd like you to do on that is -- you don't have
8 to go all the way back to the drawing board, but go back
9 consistent with what I just said and try to figure out if
10 there's a way of, you know, reconfiguring these proposed
11 schedules to do it and get me something within a week. A week
12 is the 21st. And that can just be a --

13 MR. REINES: Your Honor --

14 MR. COURT: -- status report or whatever you want to
15 call it.

16 Yes, Mr. Reines.

17 MR. REINES: Your Honor -- yes. Sorry. Ed Reines.
18 In terms of -- just so that we understand and we can conform
19 to what your Honor is directing, when you say you want to be
20 done by August, you mean that -- is August (background noise)
21 or you want August to be, you know, before August 1 for the
22 final trial?

23 THE COURT: What I'm telling you is if it looks like
24 there's no way to do this so that everything can be done
25 before August 1, then I may be just calling up Judge Connolly

1 and saying, I need to give back one of these cases.

2 MR. REINES: Okay. That's very helpful. Thank you.

3 THE COURT: Okay. Then the last thing has to do
4 with the -- and I left it for last because it's the least
5 interesting of the issues -- it's the thing about who gets
6 what kind of hours for what depositions.

7 So there's one thing I just need to call out a little
8 bit. On page 10 of the status report, and this is in the
9 Bruker section, first full paragraph, the second sentence
10 says -- there's a phrase that says, "There are no existing
11 time limits because the original concept of coordinated
12 Vizgen/NanoString deposition discovery renders the original
13 order obsolete."

14 So I want to just let you know that the existing time
15 limits are in a little thing called an order by the court, and
16 to say that something that you guys did makes that order go
17 poof is just, I think, a complete misunderstanding of how
18 courts work. It's my order. It's in effect until I say
19 otherwise.

20 So there are existing time limits, and that's why
21 we're talking about this. Don't think that there's -- nobody
22 came in on a motion and said, Judge, vacate that order because
23 of X, Y, and Z.

24 And so it's not vacated. It's still in place. It's
25 still in effect, and so on.

1 As far as the issue is concerned that is discussed
2 here, it seems to me that what ought to happen is that the
3 transcripts ought to be turned over to Bruker. There ought to
4 be some understanding about cost sharing. I thought that
5 there was an issue raised about that because Bruker didn't
6 have to contribute to any of that. You ought to come up with
7 some agreement about how much of a cost because Bruker is
8 going to get the benefit of all that that Bruker should share.
9 That Bruker should get a chance to look at them under a pretty
10 tight schedule. And then you should talk more about what, if
11 anything, needs to be tweaked about the overall hours limit
12 and how it gets calculated and how, you know, if at all, the
13 delay in the cases due to the NanoString bankruptcy should be
14 taken into account.

15 It doesn't make any sense to me at all -- I mean, I
16 get it from a theoretical perspective, but it doesn't make any
17 sense to me at all from a practical perspective how it makes
18 sense to basically make Bruker negotiate in the blind because
19 everybody else has got the information they don't.

20 And I get that you wouldn't have known at the
21 beginning, but we're not at the beginning. We're down the
22 road. So changed circumstances exist there.

23 So that's what you ought to do. Talk, figure out how
24 much Bruker's going to kick in to cover its share of the costs
25 of the depositions that it will now have the benefit of and

1 will get the chance to read and review. Come up with some
2 short time frame. And I know that there's a lot of
3 depositions to read, but, you know, there's a dozen lawyers on
4 each -- that are on the caption on each party in the case, and
5 there's probably another couple of dozen behind the curtain,
6 so there's plenty of people to look at this stuff.

7 We've been under a relatively short schedule. Confer
8 in good faith. Get me a proposal or get me something that
9 says, here's each side's proposal, and we can't agree,
10 adjudicate it.

11 So that's what I want you to do. And it's in your
12 mutual benefit --

13 MR. REINES: Your Honor --

14 THE COURT: -- to have that done sooner rather than
15 later.

16 Yes, Mr. Reines.

17 MR. REINES: Your Honor, I totally agree with that,
18 sooner rather than later, and we appreciate your order, and I
19 apologize for that sentence coming off as presumptive. We
20 just meant that conceptually, it was -- it didn't seem to fit
21 at all. But I apologize for what --

22 THE COURT: You don't have to apologize. No, I got a
23 thicker skin than that. You don't have to apologize. Don't
24 worry about it. I just wanted to call it out because it read
25 a different way than you probably intended it.

1 Okay.

2 MR. REINES: Thank you.

3 THE COURT: So I think we've covered all of the
4 issues, and I'm just going to leave the timing on the last one
5 in your hands with the comment that it's in your mutual best
6 interest to get it done quicker rather than later.

7 All right. Anything else anybody wants to bring up?
8 First 10X?

9 MR. POWERS: No, your Honor.

10 THE COURT: Harvard?

11 MR. RODRIGUES: Nothing else, your Honor.

12 THE COURT: All right. And Bruker.

13 MR. REINES: No, your Honor. Thank you.

14 THE COURT: Okay. Have a good day. Take care.

15 (Which were all the proceedings had in the above-entitled
16 cause on the day and date aforesaid.)

17 I certify that the foregoing is a correct transcript from
18 the record of proceedings in the above-entitled matter.

19 /s/ Carolyn R. Cox, RPR, F/CRR June 17, 2024
20 Official Court Reporter
21 United States District Court
22 Northern District of Illinois
23 Eastern Division
24
25