No. 19-2285

IN THE
United States Court of Appeals for the Federal Circuit

BIO-RAD LABORATORIES, INC., THE UNIVERSITY OF CHICAGO,
Plaintiffs-Appellees,

v.

10X GENOMICS, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Delaware
No. 1:15-cv-00152-RGA, Hon. Richard G. Andrews

APPELLANT'S MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL

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Material redacted from the Declaration of Dr. Michael Schnall-Levin and Exhibit 1 thereto includes confidential information about 10x's redesigned products, commercially sensitive sales information, and confidential information describing the research plans of third-parties.

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INTRODUCTION

Without holding a hearing, the district court entered a permanent injunction prohibiting 10x Genomics from selling its cutting-edge life science tools that are essential to groundbreaking research into diseases like cancer and autoimmunity. Add3-9.[1] 10x requests that the Court immediately enter an interim stay pending consideration of this motion, and then stay the injunction pending appeal. 10x requested a stay in the district court. *See* Add579-580. The district court denied a stay; the injunction is effective August 28, 2019. Add3-9; Add29. Plaintiffs oppose a stay and will file a response.

Plaintiffs' injunction request prompted an outpouring of alarm from some of the most prominent researchers at some of the most prestigious research institutions in the country, such as Memorial Sloan Kettering Cancer Center, the Broad Institute, MD Anderson Cancer Center, and University of Southern California Keck School of Medicine. These scientists described how indispensable 10x's products are to their research on diseases as varied as cancer of the prostate, breast, colon, and brain; endometrial and ovarian cancer; multiple myeloma; graft-

[1] "Add__" refers to the attached stamped Addendum.

versus-host disease; and pediatric immune disorders. They emphasized that no one—including plaintiff Bio-Rad Laboratories—offers acceptable substitutes for the 10x products they rely on to carry out their research.

The district court thought it was sufficiently protecting the public interest in continued scientific research because 10x has been developing a new, noninfringing system. But it ignored that 10x currently has *no new system* for two of its five enjoined product lines—including a new, unique product that has already yielded significant strides in cancer research, and for which Bio-Rad offers no alternative. The court also thought it was adequately protecting the public interest by allowing researchers to continue using 10x instruments already in the field. But the accommodation for early adopters is of no benefit to the broader population of researchers who are just now appreciating the benefits of 10x's products.

This Court should stay the injunction pending appeal not just because an injunction disserves the public interest, but also because the balance of harms strongly favors 10x and 10x is overwhelmingly likely to prevail on appeal.

The balance of harms is not even close. The five product lines subject to this injunction are 10x's only products. Two of those lines are immediately cut off. On the remaining three, implementing an abrupt, rushed transition to the new design will disrupt 10x's business. Conversely, Bio-Rad will not suffer by deferring an injunction pending appeal, because an injunction will yield Bio-Rad little benefit regardless of when it takes effect. Well after 10x entered the market, Bio-Rad bought these patents from a failed start-up. Throughout this case, Bio-Rad has never even claimed to offer a product with the same functions as four of 10x's five product lines.[2] For those lines, the injunction obviously will not win Bio-Rad any sales. Even as to the fifth, on which Bio-Rad does claim to compete, Bio-Rad cannot expect to gain many sales. There are at least 10 companies vying for those sales, Add740, and leading researchers have panned Bio-Rad's product as "unsuitable," "unable to achieve acceptable results," "completely inadequate," and "inferior to the point that it is unusable" for their work. Add617-619;

[2] Just a few months ago, Bio-Rad released a product that it claims replicates some of the functionality 10x's ATAC-Seq. There is no record evidence of its function or performance. For purposes of this brief, we adhere to the record evidence on Bio-Rad's products.

Add621; Add628. More broadly, Bio-Rad makes more than 9000 products. Add25. The lone Bio-Rad product the injunction supposedly protects represents less than 0.2% of Bio-Rad's annual revenues. *Id.*

All the disruption for both the scientific community and 10x's business will likely prove unjustified because 10x has a high likelihood of prevailing on appeal. The judgment rests on at least two legal errors. The first is a pure legal question about the doctrine of equivalents, on which the district court changed position over the course of the litigation. The court concluded that a claim term requiring a component to be "non-fluorinated" can be the equivalent of a component that is fluorinated—impermissibly vitiating a claim limitation. And it did so even though the patentee added that modifier during prosecution to overcome prior art.

The second is an error in claim construction. The court found preambles non-limiting, even though they provide essential antecedent basis and context for the body of the claims.

BACKGROUND

10x Makes Industry-Leading Life Science Research Tools.

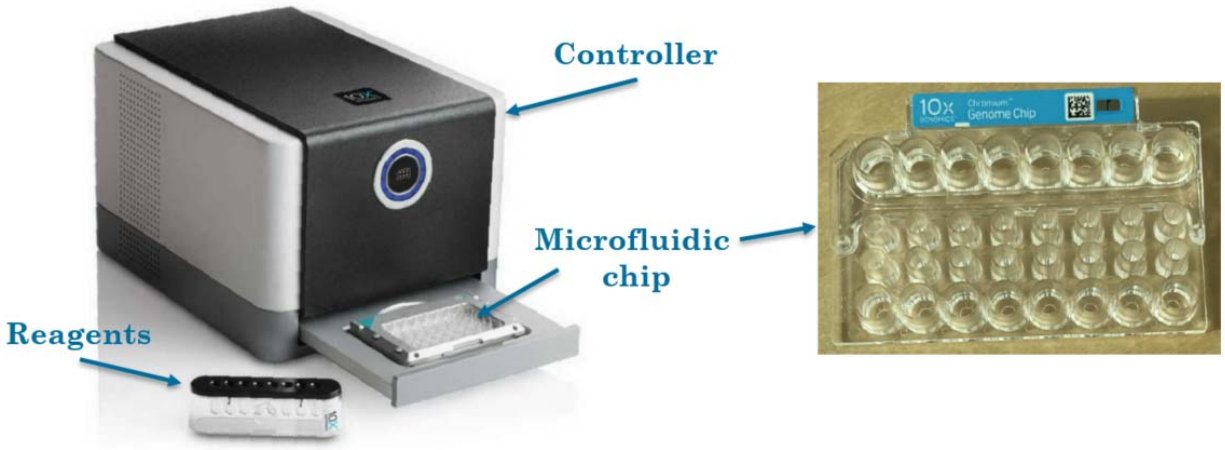
Scientists consider 10x's products "central in [their] efforts" to study and treat cancer, immune disorders, and neurological diseases. Add617. 10x's products allow scientists to analyze the DNA, RNA, and proteins in hundreds of thousands of individual cells in a single experiment. This "single-cell" technology is "enabling a revolution in the biomedical sciences," *id.*, and giving researchers "unprecedented insight into deadly diseases," Add625.

10x has five product lines: Single Cell 3' Gene Expression, Linked-Reads, Single Cell V(D)J, Single Cell ATAC-seq, and the year-old Single Cell CNV. Add583-586(¶4). They are not interchangeable; each profiles different aspects of a sample and "provides fundamentally different biological information" using customized reactions, data analysis, and visualization software. Add582-586(¶¶3-4).

At issue in this case are patents relating to forming "microfluidic droplets." Droplets are nanoliter-sized volumes of water-based fluids. Droplets are formed in oil, like how droplets of vinegar form in an oil-based salad dressing. In 10x's products, each droplet is designed to hold

a single cell or a small fragment of DNA, plus highly customized reagents for analyzing the biological material. Each droplet is like a tiny test tube holding the cells or DNA fragments separate from one another.

Each of 10x's product lines uses three categories of components depicted below: a hardware instrument, microfluidic chips, and a variety of specialized chemical reagents. The instrument—a controller—is about the size of a toaster. The disposable microfluidic chips, which fit in the instrument, have networks of "microfluidic channels," each about the width of a human hair. In the accused products, droplets are formed at junctions in the microfluidic channels. The reagents encompass a wide array of specialized products—including enzymes, DNA barcodes, and proprietary microscopic beads—that 10x has fine-tuned to perform all sorts of unique reactions allowing scientists to analyze the biological material of individual cells. Add582-583(¶3).



See Add551-552(¶382); Add741 (annotated). The chips and customized reagents vary from one product line to the next. Add583-586(¶4).

Bio-Rad Purchases This Litigation From A Failed Start-Up.

This litigation was filed by RainDance Technologies, Inc., the exclusive licensee of the asserted patents from the University of Chicago. Add484-503. Once RainDance's product failed commercially and it had no success licensing its patents, RainDance sued 10x. Bio-Rad then purchased RainDance—including this lawsuit—and substituted itself as plaintiff. Add693; Add521-522.

Bio-Rad manufactures and sells thousands of types of laboratory instruments. Add687. Bio-Rad purported to be a 10x competitor. But throughout trial, it claimed to compete with only one of 10x's product lines, Single Cell 3' Gene Expression. Add589-594(¶¶10-14); Add704.

The only Bio-Rad product identified as competitive is called ddSEQ. Even as to that one product, any competition is limited because researchers consider ddSEQ inferior across many metrics, including efficiency, error rates, and cost. Add591-594(¶¶ 11-14); Add616-646 (letters from researchers); Add724-726, Add731-732, Add736-738. As evident from the critiques quoted above (at 3), some researchers consider Bio-Rad's ddSEQ "completely inadequate" for their research. Add623. Bio-Rad did not dispute that neither ddSEQ nor any other Bio-Rad product performs the same functions as 10x's other four product lines. *See* Add699-700.

The District Court Enters An Injunction.

The case proceeded to verdict on three patents: U.S. Patent Nos. 8,889,083, 8,304,193, and 8,329,407. The jury found the asserted claims infringed and valid. It awarded Plaintiffs their full requested damages, amounting to a 15% royalty. Add475-483.

Plaintiffs moved for a permanent injunction. Add567-568. They originally proposed to enjoin all sales of instruments and consumables (that is, chips and reagents). Add574-576. More than a dozen researchers from leading institutions around the country responded

with letters alerting the court to the dire consequences of an injunction. Add616-646. The Broad Institute submitted an amicus brief opposing the injunction. Add603-604. Researchers said that 10x's products have "proven to be … essential and irreplaceable." Add630-631. They explained that they "would not be able to execute a large part of [their] research agenda"—including dozens of government-funded projects—"without access to 10x Genomics products." Add617-619. They certainly could not substitute Bio-Rad's products, because the "drop in data quality" puts "many discoveries out of reach." Add618. These protests were so compelling that Plaintiffs narrowed their request to allow the use of *existing* 10x instruments with accused consumables. Add607.

Without holding a hearing, the district court granted that slightly narrower injunction, Add3-9; Add27, dividing the scientific community into two categories: The early adopters who happen to already have access to a 10x instrument can benefit from any 10x product line—accused or not. But those who are just learning about 10x's technology now cannot use any 10x product unless and until a new design is available for the application they plan to use.

Meanwhile, 10x worked rapidly to devise noninfringing systems. 10x has succeeded in inventing a new microfluidic chip (with corresponding adjustments to its reagents) for three of its five product lines, but has not yet been able to design a replacement for two: Linked-Reads and CNV. Add596(¶19), Add602(¶31). CNV is used for cutting-edge cancer research. Add588-589(¶9); *see* Ex.A, Schnall-Levin Decl.(¶9). Linked-Reads is a novel, efficient, and cost-effective tool used to study genetic mutations that predispose individuals to diseases. Add586(¶6). Bio-Rad does not sell a substitute for either. *Id.* Indeed, there is no other such product on the market that fills either need. Add586(¶6); Add588-589(¶9).

Here is a summary of the competitive landscape:

10x Product	**Bio-Rad's Purported Competing Product**	**Other Competitors**	**New Design?**
Single Cell 3' Gene Expression	ddSEQ	~10 products	✓
Single Cell V(D)J	✗	✗	✓
Single Cell ATAC-seq	✗	✗	✓
Linked-Reads	✗	✗	✗
Single Cell CNV	✗	✗	✗

ARGUMENT

This Court should stay the injunction pending appeal. In assessing whether a stay is warranted, this Court applies a four-factor test: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990). The Court applies these factors on a "'sliding scale,'" such that "'[t]he more likely the [applicant] is to win, the less heavily need the balance of harms weigh in his favor.'" *Standard Havens*, 897 F.2d at 513. Alternatively, if the "harm to applicant is great enough," the Court "will not require 'a strong showing' that applicant is 'likely to succeed on the merits.'" *Id.*

I. 10x Is Highly Likely To Succeed On Appeal.

10x has a strong likelihood of success on appeal. The injunction rests on an infringement judgment that is highly vulnerable on at least two separate legal grounds, covering all asserted claims. And for the

reasons explained below (§§ II, III), the injunction is likely to be vacated on appeal even if infringement is sustained.

A. 10x's fluorinated microfluidic chips are not "non-fluorinated."

The '083 patent claims a microfluidic system with a "non-fluorinated microchannel." Add367. The inventors added this limitation during prosecution to overcome prior art. Add547-548. All of 10x's accused microfluidic chips currently have microchannels made with 0.02% Kynar, a polymer containing fluorine. Add714. There is no way to call those fluorinated microchannels "non-fluorinated," so the jury found no literal infringement. Add477. Yet the jury found infringement under the doctrine of equivalents. *Id.* The court should never have given the jury that option, for two independent reasons.

1. The district court's conclusion that 10x's fluorinated microchannels can be equivalent to the claimed "non-fluorinated microchannels" violates the principle that the doctrine of equivalents "cannot be employed in a manner that wholly vitiates a claim limitation." *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1346 (Fed. Cir. 2001); *see Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29-30 (1997). The rule applies

with particular force where, as here, a claim specifically *excludes* a feature: "The *presence* of a feature in an accused device … cannot possibly be equivalent to the *claimed absence* of that feature, and no reasonable factfinder could conclude otherwise." *Moore U.S.A., Inc. v. Standard Register Co.*, 229 F.3d 1091, 1115 n.5 (Fed. Cir. 2000) (emphasis added). When, for example, "a patent states that the claimed device must be 'non-metallic,' the patentee cannot assert the patent against a metallic device on the ground that a metallic device is equivalent to a non-metallic device." *SciMed*, 242 F.3d at 1347.

The district court recognized the clear vitiation problem at summary judgment, holding that "Plaintiffs may not assert the '083 patent, which claims a 'non-fluorinated microchannel,' against a product containing a 'fluorinated microchannel.'" Add560. And during Bio-Rad's case-in-chief, the court repeated its concern, observing that "I might end up striking the doctrine of equivalents opinion," Add717, and "we're probably in" the specific exclusion "ballpark," Add720. But then, at the end of trial, the court reversed course. Add565. It deemed the vitiation doctrine inapplicable because 10x's "addition of Kynar did not change how the microchannels worked." Add656-657, Add565.

There is no such change-the-function requirement for the prohibition against claim vitiation. Designers routinely add (or subtract) features from products to avoid claim limitations. The resulting products either satisfy the claims or they do not. This Court has never held that the vitiation determination depends on a court's judgment as to whether the added feature is sufficiently functional.

If it did, multiple equivalence cases would have come out differently. In *Moore*, for example, the claimed envelope had adhesive "extend[ing] the majority of the length[]" of the cardstock. 229 F.3d at 1106. The accused infringer made an envelope with adhesive extending only 48% of the length. Although the difference between 50.1% and 48% is unlikely to have any functional effect, the Court rejected an equivalence theory, holding "it would defy logic to conclude that a minority—the very antithesis of a majority—could be insubstantially different from a claim limitation requiring a majority." *Id.*

2. Bio-Rad's doctrine of equivalents theory is separately barred by prosecution history estoppel. *Warner-Jenkinson*, 520 U.S. at 39. The claims originally covered any sort of "microchannel." Add547-548. The examiner rejected them as anticipated by prior art that disclosed the

same use of microchannels. Add536-543. The patentee pointed out that the prior art disclosed coating the microchannel wall with a fluorinated oil. Add547-548. It therefore amended the pending claims to require a "non-fluorinated microchannel," and argued that amendment overcame the prior art. Add546 (underlined portion added to claim).

In doing so, the inventors surrendered "*all* territory between the original claim limitation and the amended claim limitation." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.,* 344 F.3d 1359, 1367 (Fed. Cir. 2003) (emphasis added). That choice was "a clear and binding statement to the public that [fluorinated microchannels] are excluded from the protection of the patent," and "the patentee cannot be allowed to recapture the excluded subject matter under the doctrine of equivalents without undermining the notice function of the patent." *SciMed*, 242 F.3d at 1347; Add524-529.

B. The district court erred in removing a limitation from the claims.

The '193 and '407 patents both claim a method of conducting a "reaction in plugs [a synonym for microfluidic droplets] *in a microfluidic system*." Specifically, the preambles of claim 1 in the two patents recite, respectively, "[a] method for conducting a reaction in plugs *in a*

microfluidic system" and "[a] method for conducting an autocatalytic reaction in plugs *in a microfluidic system*." Add290; Add185 (emphasis added). But 10x's instruments do not perform any reaction while the plugs are in the microfluidic system; all the reactions occur in a separate instrument that 10x does not even make. So a critical issue in the case is whether the preamble is limiting.

A preamble is limiting when "it recites essential structure or steps, or if it is 'necessary to give life, meaning, and vitality' to the claim." *Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002). In other words, a preamble is limiting if it "provides the only antecedent basis and thus the context essential to understand the meaning of" terms in the body of the claim. *Seachange Int'l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1376 (Fed. Cir. 2005).

That is the case here. The preamble phrase "reaction in plugs in a microfluidic system" provides antecedent basis and context for the terms "reaction" and "microfluidic system." For example, the body of the claim requires forming a "plug" "for conducting *the* reaction between the biological molecule and the at least one reagent." What "reaction"? The only way to know is to refer back to the preamble, which describes

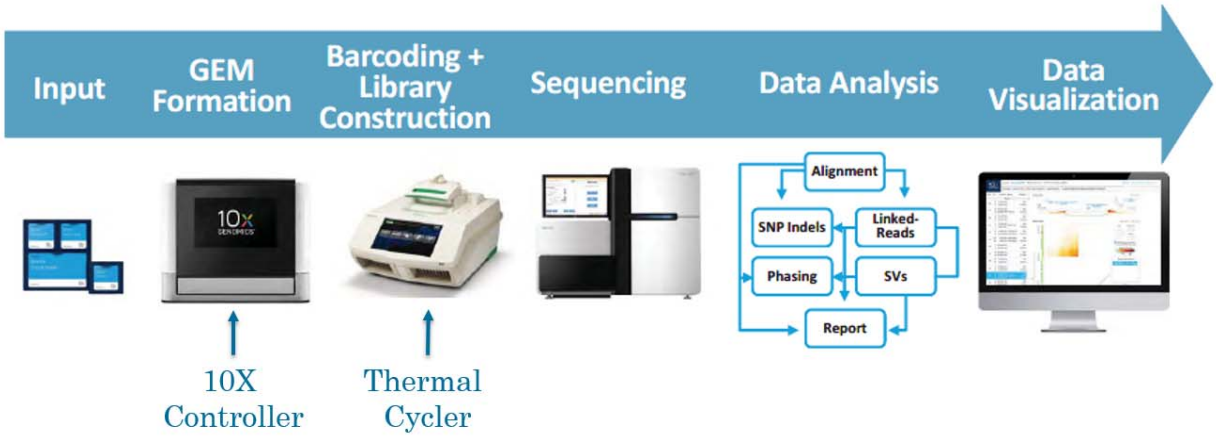
"a reaction in plugs in a microfluidic system." No other portion of the claim defines "the reaction" or provides the essential context that the claim is directed to a method "for conducting a reaction" and that reaction happens "in plugs in a microfluidic system." Similarly, the body of the claim also requires "providing *the* microfluidic system." Which one? Again, no other portion of the claim defines "the microfluidic system."

Given the patentee's decision "to use *both* the preamble and the body to define the subject matter of the claimed invention," "the invention so defined, and not some other, is the one the patent protects." *Bell Comm'ns Research, Inc. v. Vitalink Commc'ns Corp.*, 55 F.3d 615, 620 (Fed. Cir. 1995). It would be especially inappropriate to ignore the preambles here, because the examiner amended them during prosecution to include that very language. *See* Add506, Add512; *Catalina Mktg.*, 289 F.3d at 808.

In concluding otherwise, the district court adopted an incongruous construction that neither side advanced. It concluded that *part* of each preamble was limiting. Add519; Add661. It acknowledged that the reaction must take place in the "plug," but not that the plug must be in

the microfluidic system when the reaction occurs. The court later described its construction as "puzzl[ing]" but nonetheless prohibited 10x from arguing to the jury that the reactions must occur in the microfluidic system. Add684, Add708-709. The court's rationale was that "[n]othing in the body of the claims further limits the location of the reaction." Add518-519. By that logic, no preamble would ever be limiting.

Under the correct construction, 10x does not infringe, because, as Plaintiffs' own witnesses confirmed, there are no biological or autocatalytic reactions that occur within 10x's microfluidic system (i.e., 10x's controller). Add696, Add712. Chemical reactions occur only after a researcher removes the microfluidic chip from the instrument, removes the droplets from the chip, and transfers the droplets to a separate instrument called a thermal cycler:



Add647(DDX6.5) (annotated).

II. The Public Interest Favors Staying The Injunction.

Bio-Rad recognized the importance of 10x's products to research and public health when it withdrew its demand for an unqualified injunction and limited its motion to allow researchers to continue buying consumables for instruments already in use. But that modest limitation is not nearly sufficient, for two reasons.

First, scientists who want to launch new research projects will suddenly find themselves without access to two important tools. In stating broadly that 10x's effort to devise noninfringing systems "is largely complete and expected to work as well as its existing products," Add26, the district court overlooked the undisputed evidence that 10x has no new system for two product lines—Linked-Reads and CNV. Add601-602(¶30); Ex.A(¶¶4-5). Scientists who do not already have

access to a 10x instrument will be unable to use those tools to conduct cutting-edge research.

10x's CNV line vividly illustrates the consequences. CNV is a path-breaking tool for cancer research. It allows researchers to identify genetic mutations within cancer cells and target treatments for those specific mutations. *See* Ex.B, Harbour Decl.(¶¶5-7); Ex.C, Ragoussis Decl.(¶4); Ex.D, Carpten Decl.(¶¶7-10); Ex.E, Raphael Decl.(¶¶4-6). One of the world's leading cancer researchers, Dr. John Carpten of the University of Southern California, explained how unique and valuable CNV is in his research. He explained that "[w]ithout access to 10x's CNV product, there is no feasible way to conduct [his] research" into ovarian cancer. Ex.D(¶¶10-11). So too for Dr. Raphael of Princeton University, who uses 10x's CNV to study pancreatic and breast cancers. Ex.E(¶¶4-5). He explained that "use of the 10x Single Cell CNV product [is] critical" to his research, and no other product "provide[s] the capability" of 10x's CNV. *Id.*(¶7). Other scientists have submitted declarations explaining equally important research that CNV enables them to conduct—from identifying the origins of always-lethal

glioblastoma to studying aggressive eye cancers to developing targeted treatments for ovarian cancer. Ex.C(¶4); Ex.B(¶¶5-6); Ex.D(¶10).

10x's Linked-Reads product line has proved indispensable to scientists studying genetic mutations and screening for diseases like colon cancer. Add586(¶6); Ex.A(¶¶16-22). Linked-Reads allows researchers to sequence whole strands of DNA using "short-read" sequences, which are faster and more accurate than "long-read" sequencers. Add555-556(¶¶94-97). Over the years, researchers have made huge strides forward using this tool, including studying how cancer cells rearrange their own DNA over time and how breast cancers form. Add557-558(¶101); Add640; Ex.A(¶¶16-22). There are no substitutes that allow a scientist to use short-read sequencers to get long-range genetic data. Add586(¶6); Ex.A(¶16).

The district court thought that the public interest is sufficiently served simply by allowing these individual scientists—and others who pioneered these advances—to continue their research. But the court did not explain how it advances the public interest to deny the same essential tools to other scientists eager to join these emerging fields. The problem is particularly acute with CNV. 10x launched the product

about a year ago. The first papers describing the groundbreaking results have only recently been published. Dr. Carpten, an opinion leader in cancer research, obtained a 10x instrument specifically for the CNV product. Add628; Ex.D(¶7). In 2018, he presented his early results using CNV at the American Association for Cancer Research annual meeting, an assembly of 20,000 researchers, to an "amazing" reaction; "doctors were truly excited about the prospects for using the CNV system in their own work." *Id.*(¶¶12-17). He was inundated with inquiries from scientists eager to extend his research. *Id.*(¶¶17-18). But the injunction exempts only him and others who happen to already have access to a 10x instrument. Researchers like Dr. Raphael, whose new start-up is in the final stages of securing a grant to pursue research on personalized cancer therapy using a yet-to-be-purchased 10x instrument, would find their work "impossible." Ex.E(¶¶8-11). He gave voice to countless scientists poised to enter the field when he protested: The injunction is "a great loss for not only basic health science research but also for the ability to translate such research into commercial diagnostics and therapies." *Id.* He is emblematic of a large population "young investigators [interested] in adopting this technology" who are

now shut out. Ex.C(¶7); Ex.B(¶8); Ex.D(¶¶18-21); Ex.A(¶¶11-13) (market's reaction to CNV).

And for what benefit? Bio-Rad gains nothing from stopping 10x's sales—and freezing the field of researchers—because it has no product that provides the same functionality as CNV or Linked-Reads.

Second, even for the product lines for which 10x has developed a noninfringing system, the injunction disrupts the progress of science and "stifle[s] young researchers focused on pushing the boundaries of what is currently possible." Add619; Ex.D(¶¶ 20-21). Researchers want to have the option of replicating the results of peers at other institutions—and then extending their work. The most effective way to do that is to use the same tools. *See* Ex.C(¶6). But scientists who do not already have access to a 10x instrument will not have that option.

Staying the injunction pending appeal will preserve the status quo, in which researchers can freely choose whether to buy Bio-Rad's products or any of 10x's products. "[P]reservation of th[e] status quo is an important factor favoring a stay" and "is preferable to forcing the [appellant] to develop new procedures which might be required only for a short period of time." *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346

(1977) (Rehnquist, J., in chambers); *see Cordis Corp. v. Bos. Sci. Corp.*, 99 F. App'x 928, 935 (Fed. Cir. 2004).

In contrast to 10x's affirmative evidence of harm to the public interest, Bio-Rad adduced *no* evidence that an injunction would be in the public interest. Add568-569; Add606. Instead, Bio-Rad relied solely on—and the district court accepted—attorney arguments that "[i]t is generally in the public interest to uphold patent rights." Add25. The district court's speculation that maybe someday Bio-Rad will offer a competing product is not enough. Add26. Where "a plaintiff fails to show 'that the public interest would not be disserved by a permanent injunction,' then the district court may not issue an injunction." *Amgen Inc. v. Sanofi*, 872 F.3d 1367, 1381 (Fed. Cir. 2017) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). And this Court should not sustain it pending appeal.

III. The Balance Of Harms Favors A Stay.

The harm that an injunction will inflict on 10x will be far worse than any harm Bio-Rad will suffer from a stay.

Starting with 10x's side of the ledger, 10x invested hundreds of millions in developing these products. Ex.A(¶3). It will suffer clear and

immediate economic harm the moment it has to stop selling product lines for which it has no new system. Even as to the three other lines, the commercial launch of a new scientific research tool is a complex process, which typically takes months of intensive effort. Add597(¶21); Ex.A(¶¶6-8). Abruptly accelerating a process as the injunction requires almost guarantees hitches that could cost 10x good money and lose it good will. Ex.A(¶8). Plus, of course, the revenue losses can be highly consequential for a small company like 10x, which has not yet turned a profit. Add727. None of these costs will be reversed once 10x prevails on the appeal and the injunction is vacated. A win just creates more disruption, because the instruments 10x sells in the meantime will be compatible only with 10x's new microfluidic chips.

In contrast, Bio-Rad will suffer no substantial injury from a stay. Bio-Rad's 9000 other products and $2-billion-a-year revenue stream will mitigate any speculative harm from 10x's continued sales while the Court considers this appeal. Add25. The only Bio-Rad product on which Bio-Rad even claims to compete with 10x (ddSEQ) accounts for just 0.2% of Bio-Rad's revenue. *Id.*

Even as to that one product, there is little risk of harm to Bio-Rad. As discussed (at 8), Bio-Rad is unlikely to win the sales 10x loses, not just because it will be vying against at least 10 other competitors, Add740, but also because researchers have panned Bio-Rad's product as "inferior to the point that it is unusable" for their work. Add628. *See Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1324 (Fed. Cir. 2012) (where irreparable injury is based on lost sales, "a likelihood of irreparable harm cannot be shown if sales would be lost regardless of the infringing conduct").

That is why Bio-Rad could not point to even a single customer it lost to 10x. Add533-534(¶110). It had to withdraw its lost profits claim when the district court demanded an offer of proof. *See* Add562, Add563. Even if Bio-Rad could have shown that it lost some sales to 10x, that "is not enough" to justify injunctive relief. *Apple*, 678 F.3d at 1324-25.

For all these reasons, this Court is likely to vacate the injunction on appeal even if it affirms the infringement judgment. Under *eBay,* Bio-Rad had to show how 10x's sales irreparably harm Bio-Rad *in a way that money damages cannot fix.* In particular, the district court

misunderstood what it means for two companies to compete as relevant to that analysis—as exemplified most vividly by the court's decision to enjoin every 10x product, even though Bio-Rad has never disputed that it has no product that performs the same functions as four of them. *See* Add583-589(¶¶4-9); Add700, Add703. Bio-Rad cannot be irreparably harmed by sales of CNV, because a scientist cannot buy Bio-Rad's ddSEQ to perform CNV experiments (or the experiments performed by the three other enjoined 10x product lines). The only potential harm Bio-Rad suffers is a loss of royalties—the classic example of harm that does not warrant injunctive relief.

The court thought the absence of direct competition was irrelevant because it believed that 10x and Bio-Rad compete in a broader "market for products that perform genetic analysis on a droplet platform." Add21. But just because the two companies' products involve similar techniques does not mean that all those products compete. To hold that this suffices is like saying that a microscope competes with a telescope in an "optical instrument" market for instruments that use lenses at opposite ends of movable cylinders. There is simply no way for sales of a microscope to irreparably harm a telescope maker—at least not in the

way that counts under *eBay*, such as lost sales, lost market share, or increased marketing costs.

This flawed view of the scope of competition infected other aspects of the court's analysis. For example, in finding harm to Bio-Rad, the district court pointed to Bio-Rad's investment in its "droplet business." Add25. Much of Bio-Rad's "investment" in droplet technology is irrelevant. Specifically, $162 million of it was the cost of purchasing a company that made a different product that indisputably *does not* compete against 10x's products. Add700; Add690. Those investments have no bearing on the value of, or impact of the injunction on, the only product (ddSEQ) on which Bio-Rad claims to compete.

The court's misunderstanding of what competition counts was evident also in another rationale it offered for the injunction: that 10x was "captur[ing] and defin[ing] the market" and it was now necessary to help Bio-Rad overcome 10x's "strong market lead over Bio-Rad." Add22-23. Even if true, *but see* Add531-532(¶94) (describing single-cell technology on market before 10x), this logic again overlooks what sort of competition matters. Any "market lead" over Bio-Rad would apply to just one of 10x's five product lines. And it is wrong, in any event, to

issue an injunction (or sustain it pending appeal) to address past harms, *see Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1367 (Fed. Cir. 1998), and especially to punish 10x for a "market lead" over products that Bio-Rad has never even developed.

CONCLUSION

10x respectfully requests a stay of the injunction until this Court resolves 10x's appeal. If the Court is unable to resolve this motion by August 28, 2019, 10x requests that the Court temporarily stay the injunction until it can rule on this motion. Such a stay is necessary because the injunction requires 10x to give notice to its existing customers and stop selling accused products as of the Effective Date of August 28, steps that will be unnecessarily disruptive if this Court grants a stay pending appeal.

Alternatively, 10x requests expedited consideration of the appeal, with a preference for the earliest available oral argument.

Respectfully submitted,

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August 19, 2019

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Bio-Rad Laboratories, Inc. **v.** 10X Genomics, Inc.

Case No. 19-2285

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

10X Genomics, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
10X Genomics, Inc.	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Ashby & Geddes: Steven J. Balick, Andrew Colin Mayo
Irell & Manella LLP: David I. Gindler, Andrei Iancu, Lindsay A. Kelly, Lauren N. Drake, Elizabeth C. Tuan, Michael H. Strub, Dennis Courtney
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Nicholas Groombridge, David J. Ball, Jennifer H. Wu, Josephine Young, Jennifer R. Deneault, Simone Park
Richards, Layton & Finger, PA: Frederick L. Cottrell, III, Alexandra Ewing, Jason James Rawnsley
Tensegrity Law Group LLP: Daniel Radke

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

8/19/2019
Date

/s/ E. Joshua Rosenkranz
Signature of counsel

Please Note: All questions must be answered

E. Joshua Rosenkranz
Printed name of counsel

cc: Counsel of Record

Reset Fields

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on August 19, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 5,190 words, excluding the parts of the motion exempted by Fed. Cir. R. 27(d).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

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