

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

BIO-RAD LABORATORIES, INC.

Plaintiff,

v.

10X GENOMICS, INC.,

Defendant.

Civil Action No. 1:19-cv-12533-WGY

**DEMAND FOR JURY TRIAL**

10X GENOMICS, INC.,

Counterclaim Plaintiff,

and

Counterclaim Co-Plaintiff as to certain  
claims,

v.

BIO-RAD LABORATORIES, INC.,

Counterclaim Defendant,

and

Counterclaim Co-Defendant as to DJ  
counterclaims.

**BIO-RAD LABORATORIES, INC.’S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF ITS MOTION IN LIMINE # 1 (TO PRECLUDE EVIDENCE OR  
ARGUMENT OF COVID-19 PATIENTS, TESTING, OR RESEARCH BEING  
NEGATIVELY IMPACTED AS A RESULT OF VERDICT)**

Plaintiff Bio-Rad Laboratories, Inc. (“Bio-Rad” or “Plaintiff”) submits this Memorandum of Points and Authorities in Support of its Motion in Limine seeking to preclude evidence or argument of COVID-19 patients, testing, or research being negatively impacted as a result of the verdict.

Pursuant to FRE 403, Plaintiff Bio-Rad moves for an order precluding Defendant 10X Genomics, Inc. (“10X”) from introducing arguments or evidence regarding any negative impact of this case on COVID-19 patients, testing, or research. The dominance of COVID-19 in the public’s psyche and the importance of COVID-19 research to the progress through and out of the pandemic would make any mention of COVID-19 highly inflammatory. As such, evidence and arguments regarding the involvement of 10X in COVID-19 research and the effect of the verdict on such involvement would mislead the jury, confuse the issues, and result in unfair prejudice against Bio-Rad.

The jury, upon hearing about the use of 10X technology in COVID-19 research, might be dissuaded from issuing a finding against 10X because they are fearful that their decision might negatively impact ongoing research or therapies related to COVID-19. Given the dozens of COVID-related exhibits on 10X’s exhibit list, it is clear that 10X is blatantly attempting to transmogrify a routine patent case into a referendum on the alleged importance of 10X products as scientific research tools.

Already during this litigation, 10X has insinuated that COVID-19 therapeutics were developed using 10X systems, and that, consequently, COVID-19 patients, testing, and research would be harmed as a result of this suit. 10X’s CEO, Serge Saxonov, in his deposition testimony, was quick to suggest that 10X’s products had been used in the development of antibody therapies and vaccines against COVID-19. Ex. 1 [Saxonov Tr.] at 170:6-9 (“some of the companies that have developed antibodies -- antibody therapies against COVID . . . have used our products”) and 170:14-16 (“And we also know that -- from people that our products have been used for -- in the context of vaccine development as well.”). However, when asked for specifics, Saxonov could provide no direct evidence, and could rely only on hearsay. *Id.* at 171:5-13 (“I don’t know firsthand,

but I've heard from researchers. . . . I've heard secondhand from researchers, including -- including Anthony -- Tony Fauci making the statement that single-cell technologies have been essential for vaccine development. So I don't have the specific direct evidence”).

Likewise, in his opening report, 10X's invalidity expert, Dr. Fair, emphasized the use of 10X's products in coronavirus research in connection with the “success” of the technology:

10X's products have also been used in at least 2269 publications, **including 48 related to COVID**, based on information provided by 10X . . . . **COVID is a particularly important area of research**, and an email from 10X's CEO Serge Saxonov describes 10X's efforts to assist researches to better understand this deadly disease. 10XMA00345077-78 (describing customers at research institutions such as Vanderbilt University Medical Center, the Institute of Pathogen Biology at the Chinese Academy of Medical Sciences, the Berlin Institute of Health, the Verona University Hospital in Italy, Mount Sinai in New York.).

Ex. 2 [Fair Expert Report] at 766-67 (emphasis added). 10X's damages expert, Julie Davis, also mentions the number of publications related to COVID-19 research that use 10X technology.

Some of 10x's top customers include the Broad Institute, Harvard, UCSF, Washington University, the Allen Institute, BMS, Pfizer, and Genentech. As of the beginning of 2021, there have been at least 2,247 scientific publications based on studies using 10x technology. This includes at least 48 scientific publications related to COVID-19 research.

Ex. 3 [Davis Opening Report] at 6.

Plaintiffs can reasonably believe that 10X intends to pursue this theme at trial, since dozens of papers and presentations relating to coronavirus research using 10X technology have been included in 10X's exhibit list. During the meet and confer to discuss motions in limine, 10X would not agree to refrain from arguing or eliciting testimony about the consequences of the litigation on COVID-19 patients, testing, or research including the possible exclusion of 10X's products as a result of a finding of infringement.

Under FRE 403, a court “may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” In this case, the potential impact of a verdict in favor of Plaintiffs, including harm to COVID-19 patients, unavailable testing, or slower research would be purely speculative. Even if evidence of the use of 10X technology in COVID-19 research is probative for some purpose, the value would be significantly outweighed by the danger of unfairly prejudicing the jury against Plaintiffs, misleading the jury and confusing the issues. As such, it should be excluded under FRE 403.

Courts have previously precluded parties from presenting evidence regarding the consequences of litigation. *Pac. Biosciences of California, Inc. v. Oxford Nanopore Techs., Inc.*, C.A. No. 17-275-LPS-CJB, D.I. 460 at 2 (“it would be inappropriate to put before the jury evidence or argument about the potential impact of a verdict in favor of [plaintiff] such as higher prices or slower medical research - as these issues are not for the jury to decide, are not relevant to any issue the jury will decide, and create an unacceptable risk of unfair prejudice”); *see also Am. Tech. Ceramics Corp. v. Presidio Components, Inc.*, No. 14-CV-6544(KAM)(GRB), 2019 WL 2330855, at \*8 (E.D.N.Y. May 31, 2019) (precluding “evidence of plaintiffs’ request for injunctive relief, enhanced damages, and attorneys’ fees and costs”); *Evolved Wireless, LLC v. Apple Inc.*, No. CV 15-542-JFB-SRF, 2019 WL 1100471, at \*6 (D. Del. Mar. 7, 2019) (precluding evidence and argument related to a potential injunction as “issues that will be tried to the court”); *Ciena Corp. v. Corvis Corp.*, 352 F. Supp. 2d 526, 529 (D. Del. 2005) (Corvis was “not to refer to the injunctive remedy in the presence of the jury.”).

For the foregoing reasons, Plaintiffs respectfully request that the Court preclude 10X from arguing about the consequences of this case including a finding of infringement against 10X may result in harm to COVID-19 patients, testing, or research.

Date: May 28, 2021

By,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 28, 2021, a copy of the foregoing document was electronically filed with the clerk of the Court using the CM/ECF system, which will issue an electronic notification of filing to all counsel of record.

*/s/ Justin L. Constant* \_\_\_\_\_  
Justin L. Constant