

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE THOMAS S. HIXSON MAGISTRATE

IN RE APPLICATION OF)
ILLUMINA CAMBRIDGE LTD.) No. 19-MC-80215
)
) San Francisco, California
) Friday
) May 1, 2020
) 2:00 p.m.

TRANSCRIPT OF REMOTE AT&T TELECONFERENCE PROCEEDINGS

APPEARANCES:

For Plaintiff: FOLKMAN LLC
PO Box 116
Boston, Massachusetts 02131
BY: THEODORE JOEL FOLKMAN, ESQ.

HECHT PARTNERS LLP
20 West 23rd Street
Fifth Floor
New York, New York 10010
BY: MINYAO WANG, ESQ.

WEIL GOTSHAL & MANGES LLP
700 Louisiana
Suite 1700
Houston, Texas 77002
BY: DOUG MCCLELLAN, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR
Official Reporter - US District Court
Computerized Transcription By Eclipse

Debra L. Pas, CSR, RPR, RMR, CRR
Official Reporter - U.S. District Court - San Francisco
(415) 431-1477

APPEARANCES: (CONTINUED)

For Respondents: ARNOLD & PORTER KAYE SCHOLER LLP
5 Palo Alto Square.
Suite 500
3000 El Camino Real
Palo Alto, California 94306
BY: KATIE JEANNINE LEWIS SCOTT, ESQ.
JING WANG, ESQ.

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FRIDAY - MAY 1, 2020

2:03 P.M.

P R O C E E D I N G S

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THE CLERK: Good afternoon, everyone. This is the Courtroom Deputy. We're here in Civil Action 19-80215, In Re the Application of Illumina Cambridge Ltd.

Will counsel please state their appearances. Let's start with the plaintiff and move through them. The Honorable Thomas S. Hixson presiding.

MR. FOLKMAN: Good afternoon, Your Honor. This is Ted Folkman of Folkman LLC. I am counsel for Illumina.

My colleague, Minyao Wang of Hecht Partners is on the line, and Doug McClellan, who is with Weil and represents Illumina in the main infringement cases in this Court, is on the line as well.

I just heard someone join. It may have been Will Noone, who is in-house patent litigation counsel for Illumina. If that wasn't him, I do think he intends to join at some point.

THE COURT: Good afternoon.

For the respondents.

MS. SCOTT: Yes. Good afternoon, Your Honor. This is Katie Scott from Arnold and Porter, and with me on the line is Jing Wang.

THE COURT: All right. Good afternoon.

Is there anybody else who hasn't been announced?

1 (No response.)

2 I will take that as a "no."

3 I have read the parties' joint discovery letter and the
4 administrative motion. I have on my list of issues to be
5 decided basically four things.

6 First, what needs to be produced right away for the Swiss
7 action.

8 Second, when should that production happen. I think
9 Illumina wants May 4th, and respondents have offered May 6th,
10 I think.

11 Then there is the question of MGI tax documents.

12 And then whether I need to set a deadline for the
13 remainder of the production that doesn't concern the Swiss
14 actions.

15 Mr. Folkman, do you agree those are the issues for today?
16 Is there anything you would like to add to this list?

17 **MR. FOLKMAN:** I think everything you've said is
18 correct, Your Honor.

19 We do have sort of a backdrop request for relief, which is
20 to set a date for a deposition of the gentleman that we
21 identified in our papers just in case the response, assuming
22 that the Court were to order a response, was something along
23 the lines of: None of the respondents have any of the
24 information you need urgently in their possession, custody or
25 control.

1 **THE COURT:** Okay. I did see that.

2 Ms. Scott, are there any other issues that you would like
3 to add to the list?

4 **MS. SCOTT:** No. I think that's all.

5 The one thing I would -- I would say, though, is that with
6 respect to MGI Tech's documents that that, I think, partially
7 feeds into the first question of what needs to be produced and
8 when.

9 So, you know, depending on where you stand right now, it
10 may make sense to take that up first.

11 **THE COURT:** Okay. Well, fair enough. That's a good
12 point. I guess we should get our arms around it.

13 So what I ruled and what Judge Orrick ruled is that
14 because CGI had legal control over MGI Tech at the time that
15 you all became aware of the 1782 application, then CGI is
16 obligated to produce everything that was in MGI Tech's
17 possession, custody or control, I guess, prior to October 2019.

18 And it looks like from the letter brief, Ms. Scott, that
19 you guys are taking issue with that.

20 **MS. SCOTT:** Yes, Your Honor.

21 So first of all, I would say that I think there is sort of
22 two issues.

23 First, one is in the original -- in your original order,
24 Your Honor, I think there was some misunderstanding in the
25 sense that there was a reference to after CGI having been

1 acquired by BGI Shenzhen, certain documents were transferred to
2 affiliates in the BGI group in China.

3 I also just wanted to first point out that that was
4 actually something that happened long ago in 2012, when
5 Complete Genomics was originally -- originally they became part
6 of the BGI group.

7 So just to be clear, during the restructuring that
8 happened in October, there was no shipping of documents
9 anywhere, or disconnecting of hard drives, or deleting of
10 anything.

11 So I just want to clarify that that did not happen.

12 **THE COURT:** Okay. Thank you.

13 **MS. SCOTT:** But what our position has been is that as
14 of -- even as of the time of that restructuring, CGI or MGI --
15 well, CGI I guess, they did not have what we would say is
16 actual control, and they certainly didn't have access to
17 many -- I would say almost all of the documents that -- or at
18 least essential sources for the documents that Illumina is
19 requesting.

20 So, for example, they did not have access to the current
21 financial database. They don't have access to the sort of
22 version controlled records of technical products.

23 So the kinds of things that normally for these sorts of
24 requests you would go to a central source and you would -- you
25 know, you would collect them, here that wasn't -- you know, the

1 respondents in the U.S. did not have access to those things and
2 they were restricted from having access to those things.

3 So, you know, in our view that they did not have actual
4 control of those documents. So --

5 **THE COURT:** How can you say that a parent company did
6 not have legal control over those documents?

7 **MS. SCOTT:** Well, they -- I mean, I think it was
8 really a function of the way that the companies saw them. I
9 mean, the way that the companies saw themselves prior to this
10 restructuring is really the same as it is now, which is MGI
11 Tech has always -- in terms of the leadership and the
12 organization has always essentially seen CGI as a subsidiary,
13 as if sort of almost like -- in a way like an R & D arm of the
14 MGI organization.

15 So there was -- you know, the databases themselves are
16 restricted. You know, they don't -- they just simply don't
17 have access to those things.

18 And my understanding from -- you know, in terms of trying
19 to get arms around what we could collect from CGI was that
20 there were times when they would ask for documents and
21 sometimes they wouldn't get things or sometimes they would get
22 old information.

23 So it was not a free-flowing, you know. CGI would go to
24 MGI Tech and say, like: We control you. Give us your
25 documents. This is just not how the organizations worked.

1 So I understand the point about sort of legal control in
2 terms of the parent/subsidiary relationship, but in terms of
3 actual controls, it just wasn't there. And that's really a
4 concern.

5 And then I think when you compound that with the
6 extraterritorial impact of this -- you know, expanding this
7 into a collection, into, you know, a Chinese company who, I
8 think in their view, had control of CGI, instead of the other
9 way around, then that's where we really, you know, take issue
10 with the Court's order ordering CGI to, you know, necessarily
11 produce anything that was in the hands of MGI Tech.

12 **THE COURT:** I see. I understand what you're saying,
13 but you've lost on this twice, so it's done. You have to do
14 it.

15 **MS. SCOTT:** Your Honor, in terms of the
16 extraterritorial effect, I would ask that if Your Honor would
17 consider staying that order, for the MGI Tech documents, to be
18 able to give us the opportunity to appeal.

19 **THE COURT:** You already appealed and you lost.

20 **MS. SCOTT:** My understanding, Your Honor, is that we
21 would have the option of appealing to the Ninth Circuit for
22 this issue.

23 **THE COURT:** Let me see.

24 You could, but you didn't act promptly. I mean, Judge
25 Orrick issued his order on April 7th, and it's now May 1st. If

1 you're waiting until the last minute once I've told you that
2 I'm going to order you to produce something and now you're
3 asking for a stay, that's just dilatory.

4 You have been under an order since April 7th to collect
5 documents and produce them in a time frame that they could be
6 used in the Swiss action, and you knew what that deadline was.

7 If you're waiting right until the edge of that deadline
8 and ask for a stay, no, I won't give you a stay. That's just
9 irresponsible and dilatory.

10 **MS. SCOTT:** Your Honor, I'm sorry. That is certainly
11 not the intention. In fact, and I think opposing counsel would
12 even agree with that.

13 At least our understanding, not opposing counsel's
14 understanding, but our understanding was that in looking at
15 Judge Orrick's order, that it was making clear that we only had
16 to produce documents that were in the respondent's possession.
17 And in our letter brief we cited a number of quotes where it
18 seems like it does that. It makes that clear, at least to us.
19 That's how we understood this order.

20 So it was only in the process of the meet-and-confer that
21 it came to light that we were not on the same page on this
22 issue.

23 **THE COURT:** That's totally ridiculous. I'm not
24 buying any of that.

25 **MS. SCOTT:** Understood, Your Honor.

1 **THE COURT:** All right.

2 Now, let's go to Mr. Folkman. What needs to be produced
3 right away for the Swiss action?

4 **MR. FOLKMAN:** Yeah. There is a few things, Your
5 Honor. We need to know who is selling, supplying,
6 supporting BGI -- can you hear me?

7 **THE COURT:** I can hear you. I'm sorry. The phone is
8 sometimes awkward because you don't have body language to
9 indicate when I want to jump in in the middle of your speaking.

10 I want to write an order saying what respondents have to
11 produce.

12 **MR. FOLKMAN:** Yes. So item No. 1, Your Honor, we
13 need the identity of entities that are selling, offering for
14 sale, importing, supplying, servicing or supporting BGI
15 products in Switzerland.

16 So number one is who are the people who are actually doing
17 activities in Switzerland that we would say infringe.

18 Number two --

19 **THE COURT:** Wait. Stop. I want to phrase this in
20 terms of topics in the subpoena. Like, in terms of what you've
21 requested.

22 **MR. FOLKMAN:** Oh, sure.

23 Topics number one through three, Your Honor, in the
24 document subpoena. And for right now, because we're only
25 talking about things that we're asking for on an emergency

1 basis, if you were to order the production of all -- you know,
2 of documents sufficient to show the topics listed in requests
3 one through three with respect to Switzerland on or before May
4 4th, that would be satisfactory.

5 **THE COURT:** Okay. So documents responsive to topics
6 one, two and three with respect to Switzerland is what you
7 want.

8 **MR. FOLKMAN:** Yes, yes.

9 **THE COURT:** Okay. Go on.

10 **MR. FOLKMAN:** I would also like, Your Honor, an order
11 that says that if -- and it could be the 4th. It could be the
12 6th. I'm not going to quibble about two days.

13 If by the date that you set we don't have those documents
14 in hand, I would like to have the right to take a deposition
15 of -- and I'm going to get the fellow's name to make sure that
16 I have it exactly right. It is Mr. Chaturvedi,
17 C-H-A-T-U-R-V-E-D-I, who is the gentleman that we identified in
18 the papers that were filed a few days ago, limited to the
19 topics -- and this would be the analogous topics in the
20 deposition subpoena. And I'm just going to confirm this, but I
21 believe it's topics one, two and three of the deposition
22 subpoena. Similarly limited to Switzerland.

23 And I would like it to be clear, just because I think
24 there may be some dispute about this later, that if that's what
25 ends up happening, that's not our only chance at a 30(b)(6)

1 deposition. It doesn't mean that we can't pursue the documents
2 also.

3 You know, I don't -- I don't want there to be any -- any
4 later dispute. We're just trying to deal with this really
5 urgent need, and I don't want to prejudice other rights that we
6 have later in discovery to take a 30(b)(6) deposition pursuant
7 to the subpoena on other issues.

8 **THE COURT:** Okay. So this would be -- your subpoena
9 asks for certain topics, and you would just want part of that
10 deposition now and not all of it.

11 **MR. FOLKMAN:** Correct. Because the only emergency --
12 you know, the reason why we asked you for this expedited
13 hearing, and I'm grateful that you were able to do it, is
14 Switzerland is the emergent need. We are still in the process
15 of meeting-and-conferring with counsel on the larger issues,
16 but we really felt that we needed to have this resolved
17 immediately.

18 **THE COURT:** Okay. Got it. So the depo was
19 contingent on them not producing documents?

20 **MR. FOLKMAN:** Well, no. I mean -- you know, I'm not
21 saying that it's contingent. We won't -- if we get the
22 documents that say this is who the folks in Switzerland are who
23 distribute, you know, sell, whatever, the products, we're not
24 going to take a deposition just to take a deposition.

25 I just am concerned that the response that we're going to

1 get back is going to say something like: These documents are
2 not in the possession, custody or control of any of the
3 respondents or, you know, of MGI Tech, or MGI Tech is refusing
4 to produce them citing, you know, concerns about
5 extraterritoriality that you've just heard a little bit about.
6 I just want to have that as a backup because I am concerned
7 about what the response is going to be.

8 **THE COURT:** I see. Contingent orders, I don't know.
9 I'm not wild about them. I would rather just order something.

10 Are you --

11 **MR. FOLKMAN:** If you -- that's fine. I -- you know,
12 if you're willing just to order it. We may agree with counsel
13 not to take it after seeing what they produce. But if you want
14 to order it and then we'll work that out amongst ourselves,
15 that's perfectly okay.

16 **THE COURT:** All right. Let me -- so when would the
17 depo -- say the deadline to produce is May 6th. When would you
18 want the depo?

19 **MR. FOLKMAN:** Well, it would have to be either the
20 7th or the 8th, Your Honor, because, you know, it would be
21 tight anyway to deal with Swiss counsel, but -- you know, we
22 would need to have the transcripts done on a rush basis to
23 overnight -- you know, to email it over there so that they
24 would be in a position to use it on the 11th.

25 I mean, that's going to put an exceptional burden on them,

1 you know, because their briefing is already well underway.
2 But, you know, I think it's the best we can do.

3 **THE COURT:** If you don't mind waiting one sec, I want
4 to pull up your original subpoena just to make sure I know --

5 **MR. FOLKMAN:** Sure. If you look at ECF 1, Your
6 Honor, it's Page 12 of 137 and 13 of 137.

7 **THE COURT:** Okay. Hold on.
8 (Brief pause.)

9 **THE COURT:** Oh. It's topics one, two and three?

10 **MR. FOLKMAN:** Correct.

11 **THE COURT:** Okay. Topics one, two and three.

12 **MR. FOLKMAN:** As it relates to Switzerland.

13 **THE COURT:** Yeah, as it relates to Switzerland. And
14 then -- okay. On Page 45, topics one, two and three as they
15 relate to Switzerland.

16 So the thing with the 30(b)(6) depo is I can specify the
17 topics, but I can't specify the deponent. That's just the
18 nature --

19 **MR. FOLKMAN:** Well, yeah. I -- I understand what
20 you're saying, Your Honor.

21 I think in these circumstances I would submit that you do
22 have the power under Rule 30 to -- to require that this
23 particular person be deposed. I think that Illumina has a very
24 good reason to believe that he does know the answer to these
25 questions.

1 I think that -- and this is not directed in any way at
2 counsel. I think that BGI's approach to this case has been
3 exceptionally wrong-headed and has merely delayed things to the
4 last minute, and I think that it's appropriate in the
5 circumstances.

6 **THE COURT:** Okay. I hear what you're saying. No.
7 In theory under Rule 30(b)(6) a company can hire a paid actor
8 and provided that the preparation is good enough, that person
9 can be their designee.

10 So I -- I hope counsel will live up to their obligation to
11 prepare the witness. But you either can specify the person or
12 the topics, and you've chosen the topics.

13 **MR. FOLKMAN:** Understood, Your Honor.

14 **THE COURT:** All right.

15 Now, let me hear, Ms. Scott, from you. I'm going to order
16 respondents to produce documents responsive to topics one, two
17 and three with respect to Switzerland, and that's going to
18 include everything that MGI Tech had when it was still a
19 subsidiary of CGI. And I'm thinking the date that you offered,
20 May 6th.

21 Do you have any issues with that?

22 **MS. SCOTT:** I do not, Your Honor.

23 **THE COURT:** Okay. And I'm thinking ordering that the
24 30(b)(6) depo on topics one, two and three with respect to
25 Switzerland to take place no later than May 8th. Is that

1 workable on your end?

2 **MS. SCOTT:** I believe so, Your Honor. With the
3 understanding that you're not ordering it to be a particular
4 individual, I think that we should be able to make that work.

5 **THE COURT:** Okay.

6 Okay. And then it sounds to me like with respect to the
7 remainder of the discovery that doesn't relate to Switzerland,
8 neither side thinks I need to set a deadline right now, so I'm
9 inclined not to.

10 How is that, Mr. Folkman?

11 **MS. SCOTT:** Your Honor, we're scheduled to talk
12 immediately after this call. We had a meet-and-confer
13 scheduled that sort of got preempted by the notice everybody
14 received from the Court this afternoon.

15 I'm comfortable, given sort of what's happened in this
16 hearing, continuing the discussion to arrive at a -- at a sort
17 of an agreed date. I think that if we need to come back to the
18 Court, we will do it very promptly. I hope that won't be
19 necessary.

20 **THE COURT:** Okay. And, Ms. Scott, can we just go
21 with that approach; that I don't specify deadlines for the
22 remainder of the production?

23 **MS. SCOTT:** That's fine with us, Your Honor.

24 **THE COURT:** Okay. All right. I will get out a
25 written order this afternoon.

1 Mr. Folkman, is there anything further you want me to
2 address?

3 **MR. FOLKMAN:** No. Thank you, Your Honor.

4 **THE COURT:** And how about Ms. Scott?

5 **MS. SCOTT:** That's all, Your Honor. Thank you.

6 **THE COURT:** All right. Thank you, counsel.

7 (Proceedings adjourned.)
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CERTIFICATE OF OFFICIAL REPORTER

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

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, May 6, 2020