IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and QIAGEN SCIENCES, LLC,	)	
Plaintiffs,	)	Civil Action No. 19-1681-CFC
v.	)	
ILLUMINA, INC.,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S CLAIM CONSTRUCTION ORDER

Pursuant to D. Del. LR 7.1.5(a), plaintiffs, by and through their undersigned counsel, respectfully request clarification, or, in the alternative, reconsideration of this Court's construction of the term "". In support of this motion, plaintiffs state as follows:

I. INTRODUCTION

Plaintiffs respectfully request clarification of this Court's construction of the term "," which the Court defined as "a single linker that directly connects the base to the label." (Ex. 1 [Claim Construction Hearing Tr.] at 57:13-16.) Plaintiffs do not take issue with construing ""as a single linker directly connecting the base to the tag. Plaintiffs only seek clarification that this construction covers a

Illumina Ex. 1159
Illumina v. Columbia

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

single linker even if it was originally synthesized from multiple smaller chemical groups.[1]

If the Court agrees that its construction does not exclude such a single linker just because the single linker was itself made from multiple chemical groups, plaintiffs seek no further relief from the Court. However, if the Court disagrees, plaintiffs respectfully ask for reconsideration because such a construction:

a. permits Illumina to simultaneously obtain diametrically opposite claim constructions under the same *Phillips* standard for non-infringement and invalidity;

b. is mistakenly premised on the belief that plaintiffs sought a construction of " " to mean *both* the one structure connecting the base to the tag, *and* subgroups (*see* Ex. 1 at 55:12-23), and this would improperly read out *all* of the embodiments in the patents-in-suit;

c. improperly denies plaintiffs the benefit of the canon of construction that "a singular noun encompasses the plural for claim construction purposes";

[1] A POSA understands that a "single linker" connecting the base to the tag is typically made from smaller chemical groups that can also be referred to as linkers. (Ex. 4, ¶ 72.)

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

d. does not appear to have considered the evidence that "everybody knows linker can include multiple linkers" (Ex. 1 at 50:9-11); and

e. improperly considers statements by Columbia in a prior IPR as "disclaimers" even though the PTAB rejected the statement and *invalidated* the patent.

II. ARGUMENT

The Federal Circuit recognizes that "district courts may engage in rolling claim construction, in which the court revisits and alters its interpretation of the claim terms" as new evidence becomes available. *Pfizer, Inc. v. Teva Pharms., USA, Inc.*, 429 F.3d 1364, 1377 (Fed. Cir. 2005); *ViiV Healthcare v. Gilead Scis.*, 437 F. Supp. 3d 395, 402 (D. Del. 2020). Reconsideration is appropriate when needed to prevent manifest injustice or clear errors of law, and when new evidence is available. *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010). Motions for reconsideration also are appropriate when the court has misunderstood a party or made an error not of reasoning but of apprehension. *Pacific Biosciences v. Oxford Nanopore Techs.*, No. 17-275, 2019 U.S. Dist. LEXIS 98526, at *4 (D. Del. Jun. 12, 2019).

A. The Current Construction Would Result in Manifest Injustice

The current claim construction would result in manifest injustice. If the Court's construction precludes "single linker" from encompassing linkers made

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

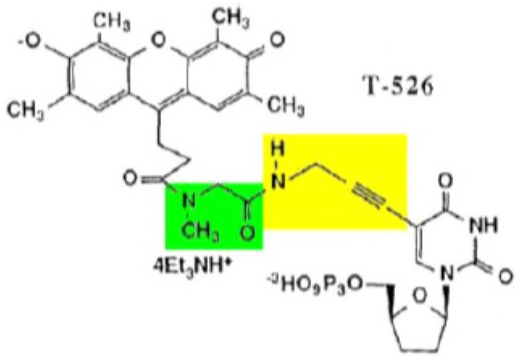
from multiple chemical groups, it would unfairly permit Illumina to achieve different claim constructions under the same *Phillips* standard for purposes of infringement and invalidity. *See Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330 (Fed. Cir. 2003) ("It is axiomatic that claims are construed the same way for both invalidity and infringement.")

Recently, Illumina averred in five IPR Petitions against the patents-in-suit (all subject to the *Phillips* standard of claim construction) that Columbia's claimed " "-based "linker" reads on prior art where the linker includes multiple chemical linkers; and, critically, that "no [Illumina] proposed litigation construction affects the merits of this petition." (*See, e.g.*, Ex. 2 [IPR2020-00988, Paper 1 (Petition)] at 12.) Notably, the "linker" construction that Illumina seeks in those recent IPRs matches (a) Columbia's construction (Ex. 3 [IPR2020-00988, Paper 11 (Patent Owner's Preliminary Resp.)] at 6-8; Ex. 4 [IPR2020-00988, Ex. 2020 (Declaration of Kenneth Johnson)] at ¶ 71), (b) the PTAB's construction in the prior IPRs (JA0040-41, n.33),[2] and (c) Illumina's position in its invalidity contentions in this case (*see* Ex. 5 [Illumina's Initial Invalidity Contentions, App'x B] at 35 [8].).

[2] "JA" is the Joint Appendix [D.I. 55].

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

In particular, in the pending IPRs and its current invalidity disclosures in this case, Illumina argues that "the linker" disclosed in Prober's Figure 2A (along with Dower) discloses Columbia's "linker." (*See e.g.*, Ex. 2 at 53.) It is undisputed that Prober's singular "linker" in Figure 2A contains multiple chemical groups:



(*See* Ex. 4 at ¶ 75 (annotating Ex. 6 [*Prober*] at Fig. 2A, to show multiple chemical groups); Ex. 7 [IPR2018-00291, Ex. 1139 (Illumina's Demonstratives)], Slide 49.) Thus, Illumina uses a construction of Y/linker that includes linkers made of multiple chemical groups.

Finally, Illumina filed the ongoing IPRs in 2020, ***after*** Columbia's alleged disclaimer in 2019, confirming that Illumina understood that Columbia's alleged disclaimer did not exclude a linker made of multiple chemical groups. In these IPRs, while stating that its proposed construction did not conflict with any claim construction in this litigation, Illumina used a construction of "linker" that would encompass a linker made of multiple chemical groups. Given these facts, it would be manifestly unjust to reward Illumina's actions and permit the claim construction

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.