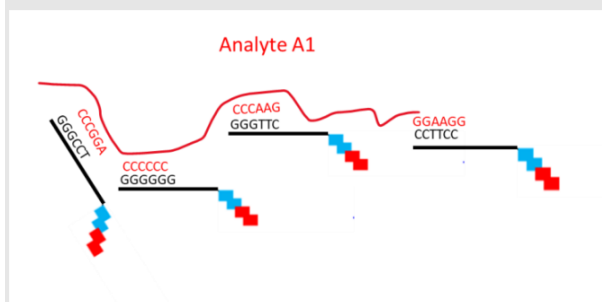


UPC Court of Appeal, 26 February 2024, Nanostring v 10x Genomics



PATENT LAW – PROCEDURAL LAW

Stay of proceedings because of insolvency not justified ([Article 41\(3\) UPCA](#), [Rule 311\(1\) RoP](#))

- Party is declared insolvent only after the conclusion of the oral proceedings and the legal dispute is ready for decision

- At this stage of the proceedings, the parties have already taken all procedural steps and all costs have already been incurred by the parties. If the decision or order affects the bankruptcy estate, it does not differ from the effect that a decision or order issued before the declaration of bankruptcy would have had. Furthermore, the interest in a timely order weighs particularly heavily in proceedings for interim relief, as is the case here. Furthermore, it leads to a fair balance between the legitimate interests of the parties if events that only occurred after the conclusion of the oral hearing are no longer to be taken into account in the decision-making process.

- Confirmed by comparable provisions in the national civil procedural law of several contracting member states of the Convention.

Source: Unified Patent Court

UPC Court of Appeal, 26 February 2024

(Grabinski, Barutel, Blok, Friedrich, Schüler)

Reference number:

UPC_CoA_335/2023

APL_576355/2023

Arrangement

of the Court of Appeal of the Unified Patent Court issued on 02/26/2024

in the proceedings for interim measures relating to

[EP 4 108 782](#)

GUIDING PRINCIPLE

In accordance with the principles of procedural economy and cost efficiency as well as a fair balance between the legitimate interests of the parties, which are to be taken into account in the interpretation of the rules of procedure pursuant to [Art. 41\(3\) UPCA](#), the proceedings do not have to be stayed pursuant to [Rule 311.1](#) sentence 1 RP if a party is declared insolvent only after the conclusion of the oral proceedings and the legal dispute is ready for decision.

KEYWORDS:

Appeal, insolvency of a party.

APPLICANTS and APPOINTMENT CLAIMS

1. **NanoString Technologies Inc.** 530 Fairview Ave N - 98109 - Seattle (WA) - US

2. **NanoString Technologies Germany GmbH** Birketweg 31 - 80639 - Munich - DE

3. **NanoString Technologies Netherlands B.V.** Paasheuvelweg 25 - 1105BP - Amsterdam - NL

Represented by: Attorney Oliver Jan Jüngst, Bird & Bird LLP

APPLICANTS and APPOINTMENTS

1. **10x Genomics, Inc.** 6230 Stoneridge Mall Road - 94588-3260 - Pleasanton (CA) - US

2. **President and Fellows of Harvard College** Suite 727E, 1350 Massachusetts Avenue - 02138 - Cambridge (MA) - US

Represented by: Attorney Prof. Dr. Tilman Müller-Stoy, Bardehle Pagenberg Partnerschaft mbB

DISPOSAL PATENT

[EP 4108782](#)

PANELS AND DECIDING JUDGES

First panel of judges Klaus Grabinski, presiding judge and rapporteur

Françoise Barutel, legally qualified judge

Peter Blok, legally qualified judge

Rainer Friedrich, technically qualified judge

Cornelis Schüller, technically qualified judge

LANGUAGE OF THE PROCEEDINGS

German

OBJECTIONABLE ARRANGEMENT

[Order \("Decision and orders"\) of the Court of First Instance \(Munich Local Chamber\) dated 19/09/2023](#)

- UPC CFI 2/2023

FACTS AND CLAIMS OF THE PARTIES

The applicants and appellees (hereinafter the applicants) are seeking injunctive relief against the respondents and appellants (hereinafter the respondents) for direct and indirect infringement of the European patent with unitary effect (unitary patent) 4 108 782 (injunction patent). The defendants are affiliated as a group of companies, consisting of the American parent company, the German sales and marketing company and a Dutch company, which also maintains the European headquarters of the group of companies.

The court of first instance largely granted the petitioners' corresponding request. The respondents have appealed against this order. The applicants have defended the order.

Following the written proceedings, the oral hearing on the appeal was held before the Court of Appeal of the Unified Patent Court on December 16, 2023.

On February 4, 2024, all of the defendants filed a petition in the U.S. Bankruptcy Court for the District of Delaware together with one of their affiliates to commence bankruptcy proceedings under Chapter 11 of the Bankruptcy Code.

At Defendants' request, the same court entered an order on February 6, 2024, affirming, reiterating, and enforcing the worldwide automatic enforcement, anti-discrimination provisions, and ipso facto protections of

Secs. 362, 365, 525, and 541(c) of the Bankruptcy Code, subject to certain conditions (see U.S. Bankruptcy Court for the District of Delaware, B39).

In view of this development, the applicants request that the proceedings be suspended for a period to be determined by the court.

Respondents consent to the application that the proceedings be stayed in all respects, including but not limited to the delivery of a decision by the Court of Appeal.

REASONS FOR THE ORDER

The parties' requests for a stay of proceedings are not justified.

Pursuant to [Rule 311\(1\)](#) sentence 1 of the Rules of Procedure, the court shall stay the proceedings for up to three months if a party is declared insolvent under the law applicable to the insolvency proceedings.

According to the relevant American law as *lex fori concursus*, proceedings under Chapter 11 Bankruptcy Code (Chapter 11) have been opened over the assets of the defendants. Pursuant to Sec. 301, 362 Bankruptcy Code, the opening of the proceedings was effected by the application filed by the defendants on February 4, 2024. In addition, the US Bankruptcy Court for the District of Delaware has confirmed the worldwide automatic enforcement, the anti-discrimination provisions and the *ipso facto* protection of Sec. 362, 365, 525 and 541(c) Bankruptcy Code - subject to certain conditions - and thus the opening of bankruptcy proceedings by order dated February 6, 2024.

Chapter 11 proceedings aim to reorganize and restructure a company by drawing up a reorganization plan, which must be accepted by the creditors and confirmed by the court. For the duration of the proceedings, the debtor generally retains the power of administration and representation under the *ipso facto* protection of sections 362, 365, 525 and 541(c) of the Bankruptcy Code and an administrator is only appointed in exceptional cases.

Whether the opening of proceedings under Chapter 11 can be regarded as a declaration of insolvency within the meaning of [Rule 311.1](#) sentence 1 of the Rules of Procedure, irrespective of the respondents' continuing capacity to act, does not require a final decision (see on the one hand [BGH, judgment of 13.10.2009 - X ZR 79/06](#), GRUR 2010, 861 on Sec. 240 ZPO; on the other hand [EPO JBK, decision of 13.10.1998 - J 26/95](#), on Rule 90(1)b [now Rule 142.(1)b] AO EPC).

Even if this is affirmed and thus the requirements for the applicability of [Rule 311.1](#) sentence 1 of the Rules of Procedure are met, there is still no reason to suspend the proceedings.

According to the wording of [Rule 311.1](#) sentence 1 of the Rules of Procedure, a stay is provided for if a party has been declared insolvent.

However, the rules of procedure are to be interpreted in accordance with [Art. 41 para. 3 UPCA](#) in such a way that a fair balance between the legitimate interests of all parties is ensured, the proceedings are conducted as efficiently and cost-effectively as possible and the judges are given the necessary discretion without

impairing the predictability of the proceedings. However, it would not be compatible with the principles of procedural economy and cost efficiency in particular if the proceedings had to be suspended even in a case in which a party did not appear until after the end of the oral hearing.

The parties have already taken all procedural steps and all costs have already been incurred by the parties. At this stage of the proceedings, the parties have already taken all procedural steps and all costs have already been incurred by the parties. If the decision or order affects the bankruptcy estate, it does not differ from the effect that a decision or order issued before the declaration of bankruptcy would have had. Furthermore, the interest in a timely order weighs particularly heavily in proceedings for interim relief, as is the case here. Furthermore, it leads to a fair balance between the legitimate interests of the parties if events that only occurred after the conclusion of the oral hearing are no longer to be taken into account in the decision-making process.

The fact that, in particular, the principles of procedural economy and cost efficiency as well as the fair balance between the legitimate interests of the parties speak in favor of not suspending the proceedings if a party is declared insolvent after the conclusion of the oral hearing and the legal dispute is ready for a decision is confirmed by comparable provisions in the national civil procedural law of several contracting member states of the Convention.

According to the French and German Code of Civil Procedure, the opening of insolvency proceedings against the assets of a party generally results in the interruption of the civil proceedings; however, this does not apply if the insolvency proceedings are only opened after the conclusion of the oral hearing (Art. 369, 371 Code de procédure civile; §§ 240, 249(3) Code of Civil Procedure). In Italy, the interruption does occur if the representative of the party over whose assets insolvency proceedings have been opened (Art. 300 Code of Civil Procedure) declares this at the hearing or notifies the other parties; however, according to the case law of the Corte di Cassazione, this is no longer possible after the end of the hearing ([Corte di Cassazione of March 3, 2022 - 7076/2022](#)). In the Netherlands, the proceedings for payment claims are stayed with the declaration of insolvency, while the claimant can request a stay with regard to other claims in order to include the insolvency administrator in the proceedings (Art. 28 and 29 Faillissementswet); however, these provisions are not applicable if the case is already ready for a decision (Art. 30 Faillissementswet).

In view of the above, it is justified not to stay the proceedings in the present case because the Chapter 11 proceedings relating to the assets of the defendants were not opened until after the conclusion of the oral hearing.

ARRANGEMENT

The applications for a stay of proceedings by both parties are rejected.

Klaus Grabinski, President of the Court of Appeal and
judge-rapporteur

Françoise Barutel, legally qualified judge

Peter Blok, legally qualified judge

Rainer Friedrich, technically qualified judge

Cornelis Schüler, technically qualified judge Cornelis
