

EXHIBIT 9

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MONIB ZIRVI, MATTHEW LUBIN,
MARIA KEMPE and NORMAN GERRY,
Plaintiffs,

v.

Case No 18-CV-7003-JGK

JAY T. FLATLEY, ILLUMINA. INC.,
DAVID R. WALT, STEPHEN P.A. FODOR,
KEVIN GUNDERSON, JIAN BING FAN,
MARK CHEE, ROBIN M. SILVA,
AFFYMETRIX d/b/a as a part of
THERMO FISHER SCIENTIFIC,
JOHN R. STUEPLNAGEL,
APPLIED BIOSYSTEMS
Defendants.

**PLAINTIFFS' RESPONSE TO THE MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS SECOND AMENDED COMPLAINT BY DEFENDANT FODOR**

KOLMAN ELY PC

Timothy M. Kolman
414 Hulmeville Ave.
Pennel, PA 19047
(215) 750-3134

*Attorneys for Plaintiffs Monib Zirvi, Matthew Lubin,
Maria Kempe and Norman Gerry*

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I. INTRODUCTION

Plaintiffs respond herein to Defendant Stephen P.A. Fodor's separate Memorandum of Law disassociating himself and Affymetrix from the conspiracy perpetrated by the Defendants. In doing so, Fodor and Affymetrix indulge in a second bite at the apple, having already benefited from their lawyers' response in the forty-five-page brief filed collectively with the other Defendants.¹

Fodor's argument is that the allegations in the Second Amended Complaint, (SAC) parallel identical patent litigation which happened long time ago. As such, Fodor's argument continues, the statute of limitations has run and, even if it has not, Lubin cannot bring the claim because he has no standing. Finally, Fodor alleges that his involvement in the trade secret misappropriation, either personally or through Affymetrix ended, at the latest, in 2010.

First, the litigation Fodor is referring to was for patent infringement and did not involve the Plaintiffs' unpublished trade secrets. Second, the statute of limitations has been tolled by the fraudulent concealment of Fodor and Affymetrix who are also subject to equitable estoppel. Third, Fodor and Affymetrix were integrally bound up with the other Defendants in the conspiracy to misappropriate Plaintiffs' trade secrets. There is a direct line from Fodor and Affymetrix, which took Plaintiffs' trade secrets as they then existed, through Defendants Fan, Chee and Gunderson to Walt of Illumina and through Illumina to P.E. Biosystems, which colluded with Illumina to pass on, and jointly exploit, the Plaintiffs' trade secrets (as they had then developed). P.E Biosystems was acquired by Thermo-Fisher which is the successor in interest to Affymetrix. In this way, all of the Defendants are inextricably linked. Fourth, Lubin and the other Plaintiffs have standing to bring their case against Fodor and Affymetrix. Fodor falsely states that Lubin was employed by Cornell. He was not and never was. Fodor's assertions regarding the relationship between the Strang Institute and Cornell at the time that Plaintiff Lubin was Medical Director of Strang Institute, are also untrue. (SAC ¶ 35).

¹ Defendant Fodor contends that all of his arguments also apply to Defendant Affymetrix. Absent the authority and consent of Affymetrix (which is adverse to Fodor), Fodor has no right to make such an assertion. To determine the nature of an attorney's conflict of interest, a court should look to "[t]he status of the [attorney's] relationship" with his client "at the time that the conflict arises." *Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009) (quoting *Anderson v. Nassau Cty. Dep't of Corrs.*, 376 F. Supp. 2d 294, 298-99 (E.D.N.Y. 2005)). The ability of corporate counsel to represent individual defendants is limited where there is a potential conflict of interest. *See Mercurio v. City of New York*, 758 F.2d 862, 864 (2d Cir. 1985). However, that said, the inclusion of Affymetrix is of no assistance to the exoneration of Fodor. In fact, quite the contrary.

II. DEFENDANT FODOR IS INTEGRAL PART TO THE CONSPIRACY TO MISAPPROPRIATE AND EXPLOIT PLAINTIFFS' TRADE SECRETS.

Fodor is integrally involved in the exploitation of Plaintiffs' misappropriated trade secrets. He camouflaged Plaintiffs' stolen zip codes as "Tag Sequences" for use in "Tag Arrays." He currently serves as the Scientific Founder of Affymetrix, Inc., and served as its Chief Executive Officer from 1997 to January 1, 2009; Chief Operating Officer & Chief Technology Officer from 1993 to 1997 and served as its President from September 1994 to August 1999.

Significantly, that same month, August 1999, the Joint Development and Licensing Agreement was signed between Cornell and PE Biosystems (now Thermo Fisher Scientific). A few months later, following negotiations, in November 9, 1999, Illumina and P.E. Biosystems formally signed their Joint Development Agreement. Then, in 2014 and 2016, Thermo Fisher Scientific acquired P.E. Applied Biosystems and Affymetrix, respectively. This chronology maps, on the surface at least, the nefarious connection between all the Defendants including Fodor and Affymetrix.

Fodor reviewed the strictly confidential Barany team NCI grant proposal on June 1st, 1994 and, to kill it *in utero*, gave it a poor score to prevent its funding. Then, he returned to "his company, Defendant Affymetrix," and directed three of his employees, Defendants Mark Chee, Jian-Bing Fan, and Kevin Gunderson, whom he supervised, to file multiple patent applications, "to patent the ideas he had learned about when he had 'peer reviewed' the NCI Grant Proposal." Affymetrix and its employees' willful misconduct and their misrepresentations to the USPTO, are detailed throughout the SAC. (SAC ¶¶ 114-131, 180, 189-195, 222, 551-563).

Affymetrix employees, G. McGall and Defendant Mark Chee submitted patent application 08/630,427, filed on April 3rd, 1996, as a continuation of a provisional application PCT/US94/12305 filed on October 26, 1994 (which had Defendant Fodor as a co-inventor), eventually issued as U.S. Patent No. 6,156,501 ("the '501 patent"), on December 5, 2000. (SAC ¶¶ 124-128). (Ex. 1). Defendant Fodor's name does not appear on US6,156,501 because, as stated in the SAC, he acted through his employees, for the sole purpose of insulating himself from his theft of the proprietary trade secrets in the grant review. (SAC ¶¶ 114-115, 119-123, 149-153, 179-180, 282-283, 551-558, 564-569, 570-578).

Although Fodor concealed with cunning the extent of his intellectual property theft, overtly minimizing his and Affymetrix's 'footprints,' he did publish a paper with McGall in 1998, using the *identical* nucleotide analogue that was highlighted in both the 1994 NCI PPG and Defendant Chee's invalidated US6,156,501 patent (See SAC ¶¶ 560-567). (Ex. 2).

Further, Fodor tried to repatent the Zip Code array ideas when he submitted his “Oligonucleotides” patent application 09/519,090 on March 6th, 2000, which issued as US6,582,908 in June 2003. This included *not only* nucleotide analogue 5-propynyl uracil – but also a deliberately altered spelling of 5-(propyn-1-yl) uracil in the application – 3-nitropyrrole. “Peptide nucleic acids” or “PNA” was also included and the term “tag sequence” was also used numerous times, defining them as genetic or molecular “bar codes” for use in “Tag arrays.”, without ever mentioning their intellectual origin from the Barany Team 1994 grant (SAC ¶¶ 122-131,189-195, 560-567; **Ex. 3**).

Over these years, Plaintiffs’ trade secrets appear, heavily camouflaged and fraudulently concealed, in several patent applications from Affymetrix, with no attribution to either the Barany team or to Plaintiffs’ publications. They include, but are not limited to: (i) The McGall et al. and Defendant Chee invalidated Patent, US6156,501, filed Apr. 3rd, 1996 as 08/630,427 (SAC ¶¶ 124-13; **Ex. 1**); (ii) Defendant Fan patent application 60/140,359 filed on June 23rd, 1999, published as US20050074787(SAC ¶¶ 179-180; **Ex. 4-1, Ex. 4-2**); (iii) Affymetrix employee Lockhart patent application 60/195,585 filed April 6th, 2000, issued as US7,157,564 “Tag array sequences”, (SAC ¶¶ 227, 282-283; **Ex. 5**); (iv) Defendants Chee and Gunderson patent application US20020012913, filed September 15th, 1998 as 60/100.393, (SAC ¶¶ 149-153; **Ex. 6-1, Ex. 6-2**); and (v) Fodor’s own patent application filed on March 6th, 2000, issued as US6,582,908 (**Ex. 3**). (SAC ¶¶ 82, 124-126, 128-130, 149-153, 179-180, 282-283, 496-500, 549-558, 559-569, 570-578).

In March 2009, Fodor and Affymetrix, due to their lack of candor, forced Cornell to submit the February 1994 grant proposal during a patent interference lawsuit. (Gorman Decl. Ex.1). Although the grant proposal only names Plaintiff Lubin, many of Plaintiffs’ numerous unpublished trade secrets were purloined by the Defendants.

Fodor, for his part, submitted the Oligonucleotides patent, which was a re-patent of Plaintiffs’ Zip code array technology. He also oversaw the Tag Array and Tag sequence patents at Affymetrix and did so in collusion with Defendants Chee, Fan, and Gunderson (SAC ¶¶ 564-577).

Plaintiffs subsequently determined, through their forensic examination, that several or all of these patent applications, including Grant 70NANB5h1031, with principal investigators Defendant Stephen Fodor of Affymetrix and his co-investigator Defendant Jay Flatley, who was CEO of Molecular Dynamics at the time – and later became CEO of Illumina - should never have been funded by NIST ATP (SAC ¶¶ 130-131, 496, 498, 527-529, 549-558, 577).

Illumina was founded in April 1998 by David Walt. Defendants Chee and Fan were specifically hired by Walt because they had previous experience at Affymetrix in contrived patent

applications. As stated, they had attempted to purloin the Plaintiffs' trade secrets and fraudulently concealed their theft. Defendant Gunderson, previously employed at Affymetrix, was also apprenticed in theft and fraudulent concealment by his co-employee Defendant Chee.

All three Defendants, Affymetrix, Illumina, and P.E. Biosystems created secret "Tag sequences" based on the Plaintiffs' trade secrets (SAC ¶¶ 224, 227, 527, 566, 568, 573, 575). The key Affymetrix "Tag Sequence" and "Tag Array" patent titled "Tag nucleic acids and probe arrays (US7,157,564, originally submitted as US provisional application 60/195585 on April 6th, 2000) cites neither WO97/31256 nor WO97/45559, even though Fodor was aware of these publications (SAC ¶¶ 573). A detailed forensic analysis of the 2,050 Affymetrix "Tag sequences" from Affymetrix's Patent US7,157,564 revealed that Affymetrix followed the teachings of the Plaintiffs' unpublished trade secrets. (SAC ¶¶ 224, 227, 573).

Fodor and Affymetrix continued their violations of candor and disclosure in a 2007-2010 patent interference lawsuit at the PTO. Tellingly, every single one of the 72 Claims of this fraudulent patent were cancelled by the PTAB. There were no depositions and no discovery. Further, the specific nucleotide analogues were neither mentioned nor implicated in the early provisional application PCT/US94/12305, which did list Defendant Fodor as a co-inventor.

Fodor's attempt to limit his and Affymetrix's misappropriations of Plaintiffs' trade secrets to a 2006-2010 window, is not borne out by the facts. (SAC ¶¶ 127, 564-599) (See Nussbacher Email Exhibit 1054 on Page 54 of **Ex. 7**). Plaintiffs' trade secrets, even as they were evolving, were passed from one Defendant to another in a symbiotic cycle of exploitation.

The Plaintiffs' trade secrets relating to the 1994 NCI Grant Proposal provided the blueprint, or road map. The SAC describes with particularity the Plaintiffs' roles in the various trade secrets that were generated and also purloined by the various Defendants over the years (SAC ¶¶ 68-109).

Defendants Chee, Fan, Affymetrix Gunderson, Illumina and P.E. Biosystems communicated with one another about these trade secrets when they conspired to submit patents for Affymetrix and Illumina when Fodor was, at various times CTO or CEO of Affymetrix. (SAC ¶¶ 564). The SAC clearly shows how Fodor and Affymetrix violated numerous laws in their multi-year conspiracy and fraud by concealing their misappropriation of Plaintiffs' trade secrets with such artifice that Plaintiffs could only discover it through an elaborate and lengthy forensic analysis.

Affymetrix employees including Defendant Mark Chee submitted patent application 08/630,427, filed on April 3rd, 1996, eventually issued as U.S. Patent No. 6,156,501 ("the '501

patent”), on December 5, 2000. (SAC ¶¶ 124-128). As described in the SAC, multiple Defendants misappropriated, not only the contents of the 1994 Grant Proposal (as written in their patent applications between 1996 and 2003), but also the unpublished trade secrets. Illumina defendants John Stuelpnagel and Mark Chee learned these through P.E. Biosystems via the Joint Steering Committee.

Defendants Flatley and Walt choreographed these illegal misappropriations as CEO and CSO of Illumina while Defendants Chee and Fan continued to share this information with Fodor, CTO and CEO of Defendant Affymetrix, who had been their former manager. Defendant Gunderson also participated by misrepresenting himself as an inventor on fraudulent patent applications. Finally, Defendant Silva was hired by both Illumina and Affymetrix (with regard to patents Affymetrix licensed from Stanford) to file fraudulent provisional patent applications using false Oaths and Declarations in blatant violation of 18 U.S.C. § 1001. (SAC ¶¶ 30-32, 148, 217-221, 229, 342-358, 359-362, 378, 399-420, 428-438, 461-463, 490, 544-547, 579-589).

These applications were submitted by Chee and Fan for Illumina, but sometimes for Affymetrix. (SAC ¶¶ 562-564, 575-578). Fan is yet another common denominator and go-between between Fodor, Affymetrix and Illumina, having been employed by both companies at the same time. This occurred while P.E. Biosystems was sharing misappropriated trade secrets with Illumina via their Joint Development Agreement. Plaintiffs’ trade secret information, used to fix critical design flaws in Affymetrix’s sequences and arrays was, beyond any scientific doubt, shared between Defendants Chee, Fan, Affymetrix, Illumina and Fodor. (SAC ¶¶ 161, 207, 214, 227, 397, 522, 572-599).

For the foregoing reasons, Defendants Fodor and Affymetrix are inextricably tangled in the web of conspiracy to steal Plaintiffs’ trade secrets and as such, all Plaintiffs have been harmed and all have standing to sue.

III. LUBIN HAS STANDING TO SUE FODOR

Fodor falsely states that Lubin was employed by Cornell. He was an unpaid adjunct and not a Cornell employee. Fodor makes false assertions as to the nature of the relationship between Strang Institute and Cornell at the time that Plaintiff Lubin was Medical Director of Strang Institute. (SAC ¶ 35).

Defendants’ reliance on *St. John's Univ. v. Bolton*, 757 F. Supp. 2d 144 (E.D.N.Y. 2010) is misplaced. First, *St. John's* involved patent, not trade secrets. Second, there is no evidence that “the parties developed ...a relationship of trust and confidence...This inquiry is “fact-specific,” *Henneberry v. Sumitomo Corp. of Am.*, 532 F. Supp. 2d 523, 551 (S.D.N.Y.

2007)(internal quotation marks omitted) and is therefore generally inappropriate for dismissal on a 12(b)(6) motion. However, a conclusory allegation that the parties "developed a relationship of trust and confidence apart from their contractual relationship," Pls.' Opp'n Mem. 11, [*34] is insufficient to plead a fiduciary relationship and survive a motion to dismiss. *See Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 482 (S.D.N.Y. 2009) (conclusory allegation of a "long and enduring relationship . . . of trust and confidence" held insufficient to survive 12(b)(6) motion)". *Barbara v. Marinemax, Inc.*, No. 12-CV-0368 (ARR), 2012 U.S. Dist. LEXIS 171975 (E.D.N.Y. Dec. 3, 2012). *Great Lakes Press Corp. v. Froom*, 695 F. Supp. 1440 (W.D.N.Y. 1987) is equally inapplicable. That case also involves patents and unlike the facts of *Great Lakes*, Plaintiff Lubin was never an employee of Cornell. Neither was he an officer or director of a corporation.

IV. PLAINTIFFS CAN PLEAD A DTSA CLAIM AGAINST FODOR.

The SAC does state that Defendants Fodor and Affymetrix engaged in acts of "continuing misappropriation" after May 2016. As clearly shown, Defendant Fodor's actions and those of Defendant Affymetrix (of which he was CTO and CEO) are integrally bound up with the other Defendants. Fodor's opportunistic attempts to now separate himself from his other confederates, stumble in light of the unambiguous evidence of his ongoing involvement and that of his corporation, Affymetrix. Simply because Fodor's career allegedly ended January 2015, does not mean that his part in the conspiracy does not continue to reverberate each day, to the significant detriment of the Plaintiffs.

V. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court deny Defendant Fodor's Motion to Dismiss.

Dated: April 12, 2019

Respectfully Submitted,

s/Timothy M. Kolman

Timothy M. Kolman, Esq.
Kolman Ely PC
414 Hulmeville Ave.
Penn del, PA 19047
tkolman@kolmanlaw.net

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019 the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Southern District's Local Rules, and/or the Southern District's Rules on Electronic Service upon the following parties and participants:

Robert Haney
Swati Roopa Prakash
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018-1405

Charles Tait Graves
Matthew David Gorman
Vernon Alan Norviel
Wilson Sonsini Goodrich & Rosati
One Market Street, Spear Tower, Suite 3300
San Francisco, CA 94105

Jonathan Bach
Lauren Capaccio
Shapiro Arato Bach LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110

Adam Tschop
Thermo Fisher Scientific, Inc.
5823 Newton Drive
Carlsbad, CA 92008

/s/ Timothy M. Kolman
Timothy M. Kolman

Dated: April 12, 2019