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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

AGILENT TECHNOLOGIES, INC.,

**Case No. 16-CV-291137**

Plaintiff,

**ORDER NUMBER 5  
BY DISCOVERY REFEREE**

v.

Action Filed: February 3, 2016  
Location: Department 1  
Judge: Hon. Brian Walsh  
Discovery Referee: Hon. James Ware (Ret.)

TWIST BIOSCIENCE CORP., EMILY  
LEPROUST, SIYUAN CHEN, SOLANGE  
GLAIZE, *et al.*

Defendants.

**DISCOVERY REFEREE'S STATEMENT OF DECISION REGARDING  
DEFENDANTS' MOTION TO COMPEL COMPLIANCE WITH  
SEPTEMBER 20, 2018 DAMAGES DISCOVERY ORDER AND FOR SANCTIONS**

**I. INTRODUCTION**

On March 1, 2019, Defendants and Cross-Complainants Twist Bioscience Corp. and Emily Leproust ("Defendants") filed a Motion entitled, "Defendants' Motion to Compel Agilent to Comply with September 20, 2018 Order on Damages Discovery and for Sanctions." The

1 Motion was referred to the Referee pursuant to California Code of Civil Procedure sections  
2 638 and 644 and the January 22, 2019 Stipulation and Order of the Court.

3 Pursuant to the requirements of paragraph 4 of the January 22 Stipulation and Order,  
4 the Referee conducted an in-person hearing on the Motion on April 16, 2019, at the JAMS  
5 Silicon Valley Resolution Center. Counsel for all parties were present. The hearing was  
6 recorded by a stenographer. The Motion was submitted to the Referee for a decision.

## 8 II. PROCEDURAL BACKGROUND<sup>1</sup>

9 On May 31, 2018, Defendants propounded a set of interrogatories relating to damages.  
10 In general, Plaintiff objected to the interrogatories on multiple grounds. On August 28, 2018,  
11 at an Informal Discovery Conference ("IDC"), Defendants notified Judge Walsh that  
12 Defendants objected to Plaintiff's response and, if Plaintiff persisted in failing to provide a  
13 substantive response, Defendants would make a formal motion to compel a further response.  
14 Judge Walsh agreed that Defendants were entitled to information about the costs and  
15 expenses before the close of fact discovery. The parties submitted a stipulation that Plaintiff  
16 would provide a chart showing the costs and expenses in connection with each trade secret  
17 identified on Plaintiff's [then] operative 2019.210 Statement re trade secrets by no later than  
18 December 7, 2018. On September 20, 2018, Judge Walsh signed the Stipulation and adopted it  
19 as an Order of the Court.<sup>2</sup>  
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25 <sup>1</sup> The Referee bases his recitation of the events that took place before his appointment on  
26 statements made in the moving and responding papers.

27 <sup>2</sup> Although Plaintiff does not dispute that it stipulated to the December 7, 2018 deadline and  
28 all other discovery timelines within the September 20, 2018 Order, it avers to some  
reservations to entering into the agreement. (See Opposition at 4.) The Referee finds that any  
reluctance Plaintiff had at the time of the agreement is moot for the purposes of these  
proceedings as the Court had relied on the parties' stipulation in entering its Order.

1 Plaintiff did not produce the complete information on December 7, 2018. Rather,  
2 Plaintiff produced a two page narrative introduction followed by a few pages of laboratory  
3 expenses but not per trade secret. (See Declaration of Maragret H. Shyr, "Shyr Decl. re  
4 Responses to 3rd Interrog," Ex. E.<sup>3</sup>) The Referee is informed that Plaintiff told Defendants  
5 that Plaintiff was having difficulty gathering the information, and periodically confirmed  
6 Plaintiff's continuing difficulty.  
7

8 On March 1, 2019, Defendants<sup>4</sup> submitted a Notice of Motion re: Damages and  
9 Sanctions and supporting Memorandum of Points and Authorities ("Motion") and the  
10 Declaration of Margaret H. Shyr. In the Motion, Defendants ask the Referee to: (1) require  
11 Plaintiff to provide a complete response to Interrogatory No. 228, with a chart that breaks  
12 down, by each individually alleged trade secret as identified in Agilent's operative 2019.210  
13 statement, the specific costs and expenses that Agilent incurred in connection with developing  
14 each trade secret; (2) require Plaintiff to supplement its responses to Defendants' six other  
15 damages-related interrogatories in advance of Defendants' depositions of relevant Agilent  
16 witnesses; and (3) sanction Plaintiff for willful violation of the Court's September 20, 2018  
17 Order. (Motion at 2-3.)  
18  
19

20 On March 15, 2019, Plaintiff filed its Opposition. In the Opposition, Plaintiff contends,  
21 *inter alia*, that it is not withholding anything improperly, and that it was not required to  
22 perform a complete damages analysis prior to filing its Complaint. Specifically, Plaintiff  
23 contends that it provided the "building blocks" of the costs and expenses of Plaintiff's trade  
24  
25

26  
27 <sup>3</sup> In Exhibit H, which incorporates Interrogatory No. 217, Plaintiff provides objections and a  
28 further explanation that getting costs for each trade secret development will require more  
time.

<sup>4</sup> Defendants Siyuan Chen and Solange Glaize are not listed as moving parties.

1 secrets on December 7, 2018, with the intention to supplement its production with more  
2 information at a later date, because of the time and costs associated with collecting the data  
3 not generated in its usual course of business. (Opposition at 2-3.)  
4

5 On April 15, 2019, Plaintiff sent an email to the Referee, with copies to defense  
6 counsel, that notified the Referee that concurrently to the email Plaintiff had served a  
7 supplemental response to Special Interrogatory No. 228 and a declaration of counsel. The  
8 supplemental response includes a chart that lists groups of 60 trade secrets in a column  
9 labeled "Trade Secrets Included." In corresponding rows, the chart lists monetary amounts in  
10 a column labeled, "Approximate Costs and Expenses Incurred in Developing Trade Secret  
11 Category." The declaration and supplemental response reiterates the difficulty Plaintiff has  
12 with responding to damages interrogatories and the continuing efforts Plaintiff has  
13 undertaken to comply.  
14

15 At the April 16 hearing, defense counsel argued that the chart did not comply with the  
16 September 20, 2018 Order. In addition, defense counsel pointed to the lack of production of  
17 any information about the basis for the monetary information in the chart. Plaintiff's counsel  
18 indicated that "next week" Plaintiff would provide additional supplementation that would  
19 comply with the September 20, 2018 Order and stated that the supplementation would also  
20 include a breakdown of how the costs and expenses were allocated among the trade secrets.  
21

### 22 **III. LEGAL STANDARD**

23 Civil Code of Procedure section 2030.210 provides, "[t]he party to whom  
24 interrogatories have been propounded shall respond in writing under oath separately to each  
25 interrogatory by any of the following: (1) An answer containing the information sought to be  
26 discovered; (2) An exercise of the party's option to produce writings; (3) An objection to the  
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1 particular interrogatory.” If an interrogatory cannot be answered completely, it shall be  
2 answered to the extent possible. Cal. Code Civ. Proc. § 2030.220. If an objection is made to an  
3 interrogatory or to a part of an interrogatory, the specific ground for the objection shall be set  
4 forth clearly in the response. If an objection is based on a claim of privilege, the particular  
5 privilege invoked shall be clearly stated. Cal. Code Civ. Proc. § 2040.230(b).  
6

7 Under these provisions, the Referee proceeds to consider Defendants’ Motion and  
8 Plaintiff’s response with regard to each interrogatory for which Defendants seek to compel  
9 supplemental responses. Neither party has declared that the Motion is “case dispositive” or  
10 presented a “bet-the-company” issue. (See Order of Appointment.) Thus, the Referee reports  
11 his Statement of Decision as a definitive ruling on the Motion.<sup>5</sup>  
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16 <sup>5</sup> The Referee is appointed pursuant to California Code of Civil Procedure §§ 638(a) and  
17 644(a).

18 Section 638 of the California Code of Civil Procedure (“CCP”) provides:

19 A referee may be appointed upon the agreement of the parties filed with the  
20 clerk, or judge, or entered in the minutes, or upon the motion of a party to a  
21 written contract or lease that provides that any controversy arising therefrom  
22 shall be heard by a referee if the court finds a reference agreement exists  
23 between the parties:

24 (a) To hear and determine any or all of the issues in an action or  
25 proceeding, whether of fact or of law, and to report a statement of  
26 decision.

27 Section 644(a) provides:

28 In the case of a consensual general reference pursuant to Section 638, the  
decision of the referee or commissioner upon the whole issue must stand as the  
decision of the court, and upon filing of the statement of decision with the clerk  
of the court, judgment may be entered thereon in the same manner as if the  
action had been tried by the court.

Here, the parties stipulated that the Referee would hear and determine all discovery issues  
raised before the Court in this litigation, and report a binding statement of decision to the  
Court.

1 **IV. DISCUSSION**

2 Defendants' Motion requests further answers to Interrogatory Nos. 217, 218, 219, 220,  
3 222, and 223 and 228. The Referee discusses Interrogatory No. 228 first.

4 **A. Interrogatory No. 228**

5 Interrogatory No. 228, dated May 31, 2018, requests the following:

6  
7 For each individual ALLEGED TRADE SECRET, IDENTIFY all COSTS AND  
8 EXPENSES YOU incurred in creating that ALLEGED TRADE SECRET. (March 1,  
9 2019 Shyr Decl. re Responses to 3rd Interrog.)

10 Upon review, the Referee finds that unquestionably, this is a permissible  
11 interrogatory. The Referee is mindful that since the interrogatory was propounded, the  
12 number and perhaps substance of the alleged trade secrets have changed. Thus, the costs and  
13 expenses analysis for some of the originally alleged trade secrets are no longer relevant.  
14 However, any supplementations should take these modifications into account. Plaintiff  
15 wishes to include expert witness analysis in its response to this interrogatory. As with any  
16 litigation, frequently, expert witnesses become involved as fact discovery comes to a close.  
17 However, the September 20, 2018 Order places Plaintiff under an obligation to provide this  
18 financial information to Defendants so that it can be used during fact discovery. Therefore,  
19 good cause exists for granting the Motion.  
20

21 Accordingly, Defendants' request to compel further responses to Interrogatory No.  
22 228, as to the trade secrets currently asserted, beyond the April 15 supplementation, is  
23 GRANTED. Plaintiff is hereby ORDERED to submit a complete supplemental response for  
24 Special Interrogatory 228 and documents showing a basis of the calculations on or before  
25  
26  
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1 **May 15, 2019.**<sup>6</sup> Moreover, the Referee notes that the April 15, 2019 supplementation is not  
2 made under oath. Plaintiff is ordered to provide the required attestation to it and to all  
3 interrogatory responses.

4 **B. Interrogatory Nos. 217, 218, 219, 220, 222, and 223**

5  
6 In addition to the specific requests made regarding Interrogatory No. 228, Defendants  
7 also request the Referee to compel responses to Defendants' Third Set of Special  
8 Interrogatories, which also includes Nos. 217, 218, 219, 220, 222 and 223, dated May 31,  
9 2018. (Reply at 4.) Defendants allege that the September 20, 2018 Order required Plaintiff to  
10 supplement its responses to those interrogatories, including by specifically identifying  
11 relevant documents on a rolling basis. (Motion at 3.) Defendants contend that Plaintiff has  
12 not submitted any documents, data, or other information identified by Bates number,  
13 pursuant to the September 20, 2018 Order. (Motion at 5-6; September 20, 2018 Order ¶ 7.)  
14  
15

16 For reference, the remaining interrogatories at issue are reproduced in relevant  
17 substantive part below:

18 **Interrogatory No. 217:** With respect to YOUR contention that "Defendants  
19 were unjustly enriched by the misappropriation of Agilent's trade secrets," as  
20 described in YOUR May 1, 2018 Supplemental Interrogatory Responses,  
21 IDENTIFY with specificity for each ALLEGED TRADE SECRET the value of the  
22 benefit or benefits that you contend TWIST would not have achieved except for  
23 the alleged misappropriation.

24 **Interrogatory No. 218:** For each ALLEGED TRADE SECRET, IDENTIFY with  
25 specificity the amount or amounts of all expenses or costs, if any, that you  
26 contend TWIST saved as a result of the alleged misappropriation.

27 **Interrogatory No. 219:** With respect to the "Agilent trade secrets in

28 <sup>6</sup> In Order No. 4, the Referee sets May 20, 2019 - August 10, 2019 as the "deposition period". Thus, requiring Plaintiff to produce supplemental responses by May 15, 2019 provides Defendants with sufficient time to review and prepare for depositions where this information is potentially relevant. (See Order No. 4 at 3.)

1 mechanics, chemistry, biology, and other disciplines” that relate to “Agilent’s  
2 oligo library synthesis technologies,” . . . IDENTIFY all research and  
3 development COSTS AND EXPENSES associated with the “twenty-plus years of  
4 work” that YOU contend it took to develop those secrets.

4 **Interrogatory No. 220:** With respect to the “oligo writer” that “took a small  
5 team” and “two and a half years to build,” as alleged in paragraph 8 of YOUR  
6 COMPLAINT, IDENTIFY all research and development COSTS AND EXPENSES  
7 that you contend it took to develop that oligo writer.

7 **Interrogatory No. 222:** IDENTIFY any attempts made by AGILENT from 2008  
8 to the present to independently design and build an inkjet writer capable of  
9 synthesizing oligos, and with respect to each such effort IDENTIFY (a) any  
10 budgets or project plans associated with those efforts; and (b) the target  
11 through-put (i.e., number of oligonucleotides synthesized per day), and cost-  
12 per-oligonucleotide that was sought to be achieved through the project.

11 **Interrogatory No. 223:** With respect to YOUR contention that, “[t]o  
12 independently design and build an inkjet writer capable of synthesizing oligos  
13 at the same industry-leading error rate—without using the Agilent trade  
14 secrets and know-how developed over a decade—would take several years  
15 longer still,” IDENTIFY with specificity all facts that support YOUR contention,  
16 including the associated research and development COSTS AND EXPENSES.  
17 (Shyr Decl. re Responses to 3rd Interrog. at Ex. A.)

16 These interrogatories request value, costs, and expenses information regarding  
17 Plaintiff’s asserted trade secrets, which will go to proving Plaintiff’s damages. In its  
18 Opposition, Plaintiff generally contends that the interrogatories requesting damages  
19 information are best addressed by a damages expert. (See Opposition at 7.) However, it has  
20 also provided approximately 18,000 documents to Defendants on January 31, 2019, that  
21 pertain to the alleged damages. In the production cover letter, Plaintiff identified two  
22 documents by Bates number, AGIL-01178822 and AGIL-01178823, as “data pertaining to the  
23 preparation of the chart provided in Agilent’s December 7, 2018 Supplemental Response to  
24 Twist’s Special Interrogatory No. 228.” (Ehlers Decl. Ex. H.) These documents are 11 and 19  
25 pages in length, respectively, and contain data in spreadsheet form noted “DGG – Diagnostics  
26 and Genomics.” (March 22, 2019 Shyr Decl. ISO MTC Damages Discovery, Exs. A, B.)  
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1           The Referee finds that the September 20, 2018 Stipulation and Order required Plaintiff  
2 to provide documents, data or other information pertaining to its alleged damages on a  
3 rolling basis, in advance of Defendants deposing relevant Agilent witnesses. (See Motion at  
4 5.) In this Motion, the parties dispute whether Plaintiff complied with the September 20,  
5 2018 Order or should now be compelled to do so. Without analysis, Defendants contend that  
6 Plaintiff was required to have these facts available before it first filed suit, pursuant to Cal.  
7 Civ. Code Proc. § 128.7. (Motion at 5.) The Referee interprets Defendants' argument to be  
8 that Plaintiff knowingly brought a meritless suit in bad faith for an anticompetitive purpose,  
9 because it did not and cannot produce a detailed damages analysis for each trade secret it  
10 asserts. However, the Referee is not persuaded that Plaintiff was required to obtain proof of  
11 damages prior to filing suit. Rather, Plaintiff is now obligated to comply with the Court's  
12 discovery orders, which is the focus of this Motion.  
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15  
16           Upon review, it appears that the discovery responses provided by Plaintiff on  
17 December 7, 2018 and January 31, 2019 are minimally sufficient at that stage of discovery for  
18 Defendants to continue scheduling and conducting witness depositions during the  
19 "deposition period" without delaying the discovery schedule. (See Order No. 4 at 3.)  
20 However, the Referee also recognizes the need for the parties to reasonably rely on a  
21 production schedule, given that there is only four and a half months of the discovery period  
22 left. Responses to these interrogatories are ancillary to and in some instances sub-sets of the  
23 costs and expenses that would be provided in a full and complete answer to Interrogatory  
24 228 now due on **May 15, 2019**. Accordingly, the Referee hereby orders Plaintiff to complete  
25 its production related to Interrogatory Nos. 217-220, 222, and 223 no later than **May 10,**  
26 **2019.**  
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1 **C. Defendants' Request for Sanctions and Fees**

2 Defendants request the Referee to sanction Plaintiff "for its willful and continued  
3 violation of the September 20 Order." (Reply at 4.) Defendants request that Plaintiff be  
4 ordered to "either provide basic damages discovery or withdraw its claim for damages in this  
5 case."<sup>7</sup> (Motion at 1.) Defendants also request attorney fees and costs incurred by Defendants  
6 in bringing this Motion. (Motion at 5.) Plaintiff contends that Defendants demanded complex  
7 expert discovery on a truncated schedule, and now improperly seek sanctions "when the  
8 impossibility of that schedule manifests." (Opposition at 6.)  
9

10  
11 "California discovery law authorizes a range of penalties for conduct amounting to  
12 'misuse of the discovery process.'" Doppes v. Bentley Motors, Inc., 174 Cal. App. 4th 967, 991  
13 (Cal. Ct. App. 2009) (quoting Cal. Code Civ. Proc., § 2023.030). Section 2023.010 of the  
14 California Code of Civil Procedure provides, *inter alia*, the following sanctionable misuses of  
15 the discovery process:  
16

- 17 (d) Failing to respond or to submit to an authorized method of discovery.  
18 (e) Making, without substantial justification, an unmeritorious objection to  
19 discovery.  
20 (f) Making an evasive response to discovery.  
21 (g) disobeying a court order to provide discovery.

22 Under Section 2023.030, a court (or Discovery Referee) may impose the following  
23 sanctions for such misuses: (a) monetary sanctions of reasonable expenses including attorney  
24 fees, "unless [the Court] finds that the one subject to the sanction acted with substantial  
25 justification or that other circumstances make the imposition of the sanction unjust"; (b) an

26  
27 <sup>7</sup> Under the California Code of Civil Procedure, a "request for sanction shall, in the notice of  
28 motion, identify every person, party, and attorney against whom the sanction is sought, and  
specify the type of sanction sought. The notice of motion shall be supported by a  
memorandum of points and authorities, and accompanied by a declaration setting forth facts  
supporting the amount of any monetary sanction sought." Cal. Code Civ. Proc. § 2023.040.

1 issue sanction, ordering designated facts as established in favor of the party adversely  
2 affected by the misuse, or prohibiting the misusing party from supporting or opposing  
3 designated claims or offenses; (c) an evidence sanction, prohibiting the misusing party from  
4 introducing designated matters into evidence; and (d) a terminating sanction, either staying  
5 proceedings or striking pleadings, dismissing an action, rendering a default of judgment  
6 against that party, or finding the party in contempt.  
7

8         Moreover, California Code of Civil Procedure section 2025.450(d) authorizes a trial  
9 court to impose an issue, evidence, or terminating sanction under section 2023.030 "if a party  
10 or party-affiliated deponent 'fails to obey an order compelling attendance, testimony, and  
11 production.'" Doppes, 174 Cal. App. 4th at 991. "The trial court should consider both the  
12 conduct being sanctioned and its effect on the party seeking discovery and, in choosing a  
13 sanction, should 'attempt[] to tailor the sanction to the harm caused by the withheld  
14 discovery.' . . . continuing misuses of the discovery process warrant incrementally harsher  
15 sanctions until the sanction is reached that will curb the abuse." Id. at 992 (quoting Do It  
16 Urself Moving Storage, Inc. v. Brown, Leifer, Slatkin Berns 7 Cal. App. 4th 27, 36 (1992)). A  
17 monetary sanction is the least severe sanction, while a terminating sanction is regarded as the  
18 harshest sanction, only to be imposed where misuse is willful, a history of discovery abuse has  
19 occurred, and less severe sanctions did not result in compliance. Id.  
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23         Here, Plaintiff, by its own admission, agrees that the production was not complete,  
24 despite Plaintiff's stipulation to the December 7, 2018 deadline. However, the Referee has  
25 determined that Plaintiff at least partially complied with the September 20, 2018 Order with  
26 an initial production of its trade secrets costs and expenses on December 7, 2018, and  
27 supplemental responses on January 31, 2019 and April 15, 2019, to the extent it was able to at  
28

1 the time. Upon review of the totality of the record, the Referee concludes that Plaintiff has not  
2 willfully disobeyed the Court's September 20, 2018 Order. A "basic" damages discovery or the  
3 "building blocks" of discovery is what the Court and both parties understood would be  
4 provided, and the Referee finds that Plaintiff has engaged in a good faith effort to determine  
5 damages per trade secret, although the data was not produced in its regular course of  
6 business.

8 Accordingly, the Referee finds that the imposition of discovery sanctions, especially  
9 ones as severe as precluding issues, evidence, or claims of damages by Plaintiff, is  
10 unwarranted. Likewise, the Referee declines to impose monetary sanctions because Plaintiff  
11 has provided a substantial justification for the incomplete production provided on December  
12 7, 2018 in response to Interrogatory No. 228.

#### 14 V. CONCLUSION

15 The Referee GRANTS in-part and DENIES in-part Defendants' Motion to Compel Agilent  
16 to Comply with September 20, 2018 Order on Damages Discovery and for Sanctions. Plaintiff  
17 shall supplement its responses consistent with the terms of this Order. The Referee DENIES  
18 Defendants' request for attorney fees and costs and other discovery sanctions.<sup>8</sup>

21 Dated: April 18, 2019

22  
23   
24 \_\_\_\_\_  
25 JAMES WARE  
26 UNITED STATES DISTRICT JUDGE (RET.)  
27 DISCOVERY REFEREE

28 <sup>8</sup> However, Plaintiff is on notice that compliance with the deadlines set in this Order is mandatory and failure to do so may result in potential escalation to discovery sanctions, should this Order fail to "curb" the ongoing production delays. See Doppes, 174 Cal. App. 4th at 992.

**PROOF OF SERVICE BY EMAIL & U.S. MAIL**

Re: Agilent Technologies, Inc. vs. Twist Bioscience Corp., et al.  
Reference No. 1100104633

I, Brian Palencia, not a party to the within action, hereby declare that on April 22, 2019, I served the attached Order No. 5 on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Francisco, CALIFORNIA, addressed as follows:

James M. Pearl Esq.  
Daniel M. Petrocelli Esq.  
J. Hardy Ehlers Esq.  
O'Melveny & Myers LLP  
1999 Avenue of the Stars  
8th Floor  
Los Angeles, CA 90067-6035  
Phone: 310-553-6700  
jpearl@omm.com  
dpetrocelli@omm.com  
jehlers@omm.com  
Parties Represented:  
Agilent Technologies, Inc.

David S. Almeling Esq.  
O'Melveny & Myers LLP  
Two Embarcadero Center  
28th Floor  
San Francisco, CA 94111  
Phone: 415-984-8700  
dalmeling@omm.com  
Parties Represented:  
Agilent Technologies, Inc.

Kevin P. B. Johnson Esq.  
Victoria Maroulis Esq.  
Andrew J. Bramhall Esq.  
Quinn Emanuel Urquhart & Sullivan LLP  
555 Twin Dolphin Dr.  
Fifth Floor  
Redwood Shores, CA 94065  
Phone: 650-801-5000  
kevinjohnson@quinnemanuel.com  
victoriamaroulis@quinnemanuel.com  
andrewbramhall@quinnemanuel.com  
Parties Represented:  
Emily Leproust  
Twist Bioscience Corp.

Melissa J. Baily Esq.  
Quinn Emanuel Urquhart & Sullivan LLP  
50 California St.  
22nd Floor  
San Francisco, CA 94111  
Phone: 415-875-6600  
melissabaily@quinnemanuel.com  
Parties Represented:  
Emily Leproust  
Twist Bioscience Corp.

Michael K. Deamer Esq.  
Ella Hallwass Esq.  
Margaret H. Shyr Esq.

Hana Oh Esq.  
O'Melveny & Myers LLP  
610 Newport Center Dr.

Quinn Emanuel Urquhart & Sullivan LLP  
555 Twin Dolphin Dr.  
Fifth Floor  
Redwood Shores, CA 94065  
Phone: 650-801-5000  
michaeldeamer@quinnemanuel.com  
ellahallwass@quinnemanuel.com  
margaretshyr@quinnemanuel.com  
Parties Represented:  
Emily Leproust  
Twist Bioscience Corp.

Suite 1700  
Newport Beach, CA 92660  
Phone: 949-823-6900  
hoh@omm.com  
Parties Represented:  
Agilent Technologies, Inc.

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco,  
CALIFORNIA on April 22, 2019.



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Brian Palencia  
BPalencia@jamsadr.com