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and EMILY LEPROUST

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County of Santa Clara
16CV291137
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SANTA CLARA**

14 AGILENT TECHNOLOGIES, INC., a
Delaware Corporation,
15 Plaintiff,
16 v.
17 TWIST BIOSCIENCE CORP., a Delaware
Corporation; EMILY LEPROUST, an
Individual; and DOES 1 through 20, inclusive,
18 Defendants.

Case No. 16-cv-291137
**DEFENDANTS' ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Action Filed: Feb. 3, 2016
Judge: Hon. Brian C. Walsh
Location: Department 1

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1 Defendants Twist Bioscience Corp. (“Twist”) and Emily Leproust (“Leproust”) (together
2 the “Defendants”), hereby answer the first amended complaint of plaintiff Agilent Technologies,
3 Inc. (“Agilent” or “Plaintiff”).

4 **GENERAL DENIAL**

5 Pursuant to California Code of Civil Procedure § 431.30(d), Defendants hereby deny each
6 and every material allegation in the first amended complaint and further deny that Agilent has
7 been damaged in the manner alleged, in any manner, or in any amount.

8 **FACTS SUPPORTING GENERAL DENIAL AND AFFIRMATIVE DEFENSES**

9 1. Agilent’s lawsuit against Twist and Dr. Emily Leproust attempts to stifle the
10 legitimate and innovative work of a burgeoning start-up company and one of its top executives. In
11 particular, Agilent’s complaint wrongly tries to suffocate the creation of new technology and
12 solutions by a new business, and to diminish the freedom of innovators and entrepreneurs to seek
13 out more fulfilling work and succeed elsewhere.

14 **Twist’s Innovative Origins**

15 2. Twist originated as a collaboration between two engineers, Bill Banyai, Ph.D., and
16 Bill Peck, Ph.D., based on the idea that the synthetic DNA market could be revolutionized through
17 a new oligonucleotide synthesis and gene assembly technology. Applying their engineering
18 expertise, Banyai and Peck conceived of a new and innovative way to synthesize oligonucleotides
19 (“oligos”), which are short DNA sequences, and assemble them into longer DNA constructs, such
20 as genes, more effectively than existing technology allowed.

21 3. Dr. Banyai and Dr. Peck met in 2008 while working at Complete Genomics, a
22 DNA sequencing company in Mountain View, California. Banyai is a former Stanford engineer
23 with a Ph.D. in optical science from the University of Arizona, and previously worked as a
24 physicist at Lawrence Livermore National Laboratory in Livermore, California. Peck holds a
25 Ph.D. in mechanical engineering from the University of Alberta and completed a Stanford post-
26 doc at NASA.

27 4. Banyai and Peck began independently developing their start-up idea in 2011 while
28 working together at Complete Genomics, which had long been using synthesized oligos to

1 sequence human genomic DNA patterned on silicon chips. Banyai was hired in 2006 to build
2 Complete Genomics' DNA sequencing team and technology from the ground up. Banyai
3 recruited Peck to join his team in 2008. Banyai, Peck, and Leproust left their respective jobs at
4 Complete Genomics and Agilent in April 2013 to pursue their start-up efforts in the form of Twist.

5 5. Banyai and Peck conceived—and later refined through collaboration with other
6 brilliant and accomplished scientists and engineers—innovative silicon-based technologies and
7 other innovations for synthesizing custom oligos and assembling them into longer synthetic DNA
8 constructs. These innovations are the subject of multiple patent applications filed by Twist. Two
9 of the applications have already been granted and issued as United States patents, having
10 undergone examination by the USPTO, which deemed Banyai and Peck's innovations to be novel
11 over older technology. Significantly, although Twist's patents and applications manifest the
12 innovations conceived and developed by Banyai and Peck, *not one* of them is in dispute in
13 Agilent's lawsuit. Agilent does not allege that Banyai and Peck incorporated Agilent's purported
14 trade secrets into those patents and applications.

15 6. Early on, Twist's founders approached venture capitalists with Banyai and Peck's
16 ideas for revolutionizing the synthetic DNA industry. Twist's fundraising success came from
17 showing investors how the limitations of then-current technologies could likely be overcome if
18 Twist were able to pursue its silicon-based engineering solutions. With an early infusion of
19 capital based on this potential, Twist was able to quickly develop new, patentable technology.

20 7. Beginning with just Banyai, Peck, and Leproust in April 2013, Twist has now
21 grown to over 150 employees. Twist's cutting edge, made-to-order synthetic DNA is offered to
22 researchers and companies for a wide range of uses, including personalized medicine,
23 pharmaceutical research, biodefense, genome engineering, and even data storage.

24 8. Numerous prospective employees have been drawn to Twist because of its proven
25 leadership, start-up atmosphere, and position at the leading edge of the synthetic DNA industry.
26 Twist's employees have come from all over the industry and world, including many who followed
27 Banyai over the years from Complete Genomics, as well as Glimmerglass, the first company
28 Banyai founded.

1 **Dr. Leproust's Loyalty To Agilent And Lawful Choice To Find New Employment**

2 9. Dr. Emily Leproust earned a Ph.D. in Organic Chemistry in 2001 from the
3 University of Houston where she was published extensively for her research and development of
4 novel DNA microarray synthesis processes, including novel synthesis chemistry and microarray
5 characterization. Recognizing Leproust's talent, Agilent hired her even before she finished her
6 degree. For nearly 13 years, Leproust worked at Agilent, making important contributions to
7 Agilent's research, development, and manufacturing of DNA microarray products and
8 applications, authoring and co-authoring numerous peer-reviewed papers, collaborating with
9 researchers at public universities, and undertaking increased responsibilities.

10 10. For many years, Agilent recognized Leproust's efforts, enthusiasm, and work ethic,
11 conferring promotions, awards, and additional opportunities on her. Indeed, Leproust was
12 consistently ranked in the top 10% of employees every year from 2000 to 2012.

13 11. Starting in 2006, Leproust pioneered, architected, and championed a product for
14 Agilent called SureSelect, which launched in 2009 and became a major success for the Genomics
15 division. It also made Agilent a major player in the field of DNA sequencing despite Agilent not
16 offering a sequencing machine. To make SureSelect a success, Leproust spent an increasing and
17 significant portion of her time on business duties, such as assisting the marketing, sales, and
18 customer support departments, while still earning top marks for her R&D accomplishments. After
19 that experience, Leproust wanted to get involved full-time in a business role, but instead the
20 opposite happened. Leproust had her responsibilities reduced to R&D work of lesser importance,
21 even having her SureSelect responsibilities reassigned to others.

22 12. Leproust nevertheless continued to loyally work full-time at Agilent until resigning
23 on April 12, 2013. Leproust faithfully performed her Agilent duties while employed there, each
24 year meeting, and exceeding, the goals set for her. Even after learning of Banyai and Peck's idea
25 for the company that became Twist, her interactions with them prior to leaving Agilent did not
26 encumber her work in advancing Agilent's research nor divide her loyalties.

27 13. As Twist's first and only Chief Executive Officer, Leproust has provided executive
28 leadership. Banyai and Peck have served as Chief Operating Officer and Chief Technology

1 Officer, respectively, since Twist’s founding, leading the technical work.

2 **Agilent’s Opportunistic Lawsuit Against Leproust And Twist**

3 14. The timing of Agilent’s lawsuit is telling—only after waiting and watching Twist’s
4 success, and failing to perform in the marketplace on its own, has Agilent turned to litigation. In
5 April 2013, though fully aware that it could try to develop its own technology to compete with
6 other companies already in the synthetic DNA marketplace, Agilent decided to take a shortcut
7 through an investment in an outside company called Gen9 already doing work in the field.
8 Nevertheless, despite making a substantial initial investment in Gen9, Agilent failed to provide
9 Gen9 continued material support, either financially or through technology sharing. Instead, after
10 trying to entice Leproust back by offering her an R&D leadership position, Agilent set its sights on
11 litigation.

12 15. In February 2014, Agilent had its attorneys send letters to Twist ostensibly to
13 remind Leproust of her purported obligations regarding use of Agilent trade secrets and
14 confidential information. Agilent admitted in those letters that it knew Twist was in the process of
15 developing DNA products at the time, but took no legal action nor gave any indication it planned
16 to file a lawsuit. Agilent then sat idly for two years. Not until February 2016, after Twist had
17 done the hard work of establishing itself and its silicon-based technology as a game changer in the
18 synthetic DNA industry, did Agilent make any further moves. And this time, instead of
19 approaching Twist in any way, Agilent filed this lawsuit without any advance notice, falsely and
20 harmfully accusing Twist and Leproust of misconduct.

21 16. Despite supposed concern that its trade secrets were being misused and its interests
22 harmed, Agilent waited to file suit until after the media publicly reported an infusion of tens of
23 millions of dollars of new investor capital in Twist. What’s more, Agilent has based this lawsuit
24 on the misguided conceit that Agilent’s way of printing DNA, which was designed as an assembly
25 line for glass-slide microarrays, is the only way Twist could have achieved the results it did with
26 synthesized oligos, and that Twist must therefore be using Agilent’s technology. What Agilent
27 fails to realize is that Twist’s technology, unlike Agilent’s, was purpose built from the start for
28 creating commercial synthetic genes, which allowed for engineering trade-offs that Agilent did not

1 consider or could not implement.

2 17. Through this lawsuit, Agilent attempts to circumvent hard work, innovation, and
3 competition in the marketplace by litigating its way into a share of Twist's hard-earned success.
4 The value of Twist and its technology, however, are based on the pioneering work of founders Bill
5 Banyai and Bill Peck, along with the business leadership of Emily Leproust: assets that Agilent
6 simply has no right to claim.

7 **AFFIRMATIVE DEFENSES**

8 18. By alleging the affirmative defenses set forth below, the Defendants do not agree or
9 concede that they bear the burden of production or persuasion on any of these issues, whether in
10 whole or in part. Defendants assert the following affirmative defenses to the first amended
11 complaint:

12 **FIRST AFFIRMATIVE DEFENSE**

13 Plaintiff has failed to state facts sufficient to constitute a cause of action.

14 **SECOND AFFIRMATIVE DEFENSE**

15 Plaintiff released, relinquished, waived, and/or abandoned any right to any of the claims
16 upon which Plaintiff now seeks relief.

17 **THIRD AFFIRMATIVE DEFENSE**

18 Plaintiff's claims are barred, in whole or in part, by any and all applicable statutes of
19 limitations.

20 **FOURTH AFFIRMATIVE DEFENSE**

21 Any alleged conduct or omission by Defendants was not the cause in fact or proximate
22 cause of any injury alleged by Plaintiff.

23 **FIFTH AFFIRMATIVE DEFENSE**

24 Plaintiff's purported trade secrets are not protectable or were otherwise not
25 misappropriated because they were already disclosed within the public domain, were generally
26 known, or were the subject of independent development or ready ascertainability.

27 **SIXTH AFFIRMATIVE DEFENSE**

28 Plaintiff has failed to state facts sufficient to support an award of punitive damages.

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SEVENTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred, in whole or in part, by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred, in whole or in part, because by virtue of its own conduct, Plaintiff is estopped from recovering from Defendants.

NINTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred, in whole or in part, by the doctrine of unclean hands.

TENTH AFFIRMATIVE DEFENSE

Defendants have not committed the wrongs alleged in the first amended complaint. Thus, Plaintiff is barred from recovery, in whole or in part, to the extent that recovery by Plaintiff would constitute unjust enrichment and a windfall to Plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery, in whole or part, because any actions taken by Defendants, if any, with respect to Plaintiff, were based on an honest, reasonable, and good faith belief in the facts as known and understood at the time.

TWELFTH AFFIRMATIVE DEFENSE

At all relevant times, Plaintiff consented to and approved all the purported acts and omissions about which Plaintiff now complains.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred, in whole or in part, to the extent the purported acts and omissions about which Plaintiff now complains are licensed or otherwise authorized by persons or entities with the right to license or authorize.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff’s claims for a constructive trust are barred or otherwise unavailable, either in whole or part, under the California Uniform Trade Secrets Act and California contract law.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff’s claims for a constructive trust are barred, either in whole or part, because Defendants’ alleged profits, gains, increases in value, or equity interests are not the result of any

1 conduct complained of by Plaintiff.

2 **SIXTEENTH AFFIRMATIVE DEFENSE**

3 Plaintiff's claims are barred because they seek to enforce purported contract provisions that
4 are against public policy and are therefore void and unenforceable, including under Cal. Business
5 and Professions Code § 16600 *et seq.*

6 **SEVENTEENTH AFFIRMATIVE DEFENSE**

7 Plaintiff's claims are barred because Plaintiff failed to take reasonable efforts and/or
8 precautions to protect its purported trade secrets.

9 **EIGHTEENTH AFFIRMATIVE DEFENSE**

10 Plaintiff's claim for misappropriation of trade secrets was brought and has been maintained
11 in bad faith, as Plaintiff had no evidence of misappropriation prior to commencing this lawsuit and
12 continues to maintain this suit even after exculpatory evidence has been made known.

13 **NINETEENTH AFFIRMATIVE DEFENSE**

14 Plaintiff has failed to state facts sufficient to support an award of attorneys' fees against
15 Defendants.

16 **TWENTIETH AFFIRMATIVE DEFENSE**

17 Plaintiff's request for injunctive relief is improper as there is no likelihood of future injury
18 to Plaintiff and there exists an adequate remedy at law to address the claims set forth in the first
19 amended complaint.

20 **TWENTY FIRST AFFIRMATIVE DEFENSE**

21 Plaintiff voluntarily and with knowledge assumed the risk of all damages of which Plaintiff
22 complains.

23 **TWENTY SECOND AFFIRMATIVE DEFENSE**

24 Plaintiff failed to take reasonable efforts or make reasonable expenditures to mitigate
25 and/or avoid the damages of which Plaintiff complains.

26 **TWENTY THIRD AFFIRMATIVE DEFENSE**

27 Plaintiff's claim for breach of contract is barred, either in whole or in part, because there is
28 no enforceable contract, including because there was no mutual assent or exchange of valuable

1 consideration between the parties to the alleged contract.

2 **RESERVATION OF RIGHTS**

3 Defendants reserve the right to assert additional defenses, including based on additional
4 information learned or obtained during discovery.

5
6 **PRAYER FOR RELIEF**

7 Wherefore, Defendants pray for relief as follows:

- 8 1. That the Complaint be dismissed with prejudice and that Plaintiff take nothing
- 9 thereby;
- 10 2. For Defendants’ costs of suit, including reasonable attorneys’ fees;
- 11 3. For attorneys’ fees and costs pursuant to California Civil Code Section 3426.4; and
- 12 4. For such other and further relief as the Court may deem proper.

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14
15 DATED: January 30, 2017

Respectfully submitted,

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17 By  _____

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