



Case Update – Agilent v. Twist Litigation

January 29, 2019

- On January 29, 2019, Twist Bioscience and Emily Leproust filed a demurrer and motion to strike Agilent's second amended complaint, challenging each of Agilent's legal claims.
- On that same day, Twist and Leproust filed a cross-complaint, asserting six new counterclaims against Agilent and Does 1-10. They also filed their answer and affirmative defenses to Agilent's second amended complaint.

Below are some takeaways from Twist's filings, followed by direct quotes from the cross-complaint:

1. Three years in, Agilent's motives for bringing this case against both Twist Bioscience and Emily Leproust are clear:

"This is a case not truly about any wrongdoing by Defendants Twist Bioscience and its Chief Executive Officer, but rather about a company—Agilent—that is desperate to make up for a series of poor business decisions and willing to misuse the legal system to do so. It is about Agilent management's need to save face and recoup money from having made a massive investment in an outside company instead of developing synthetic biology technology in-house, a losing bet which has left Agilent far behind in the now booming synthetic biology field and unable to catch up. It is about shifting blame for these mistakes and for employee retention issues onto those Agilent viewed as convenient scapegoats: its former employee Dr. Emily Leproust and Twist Bioscience, the fledgling company she helped propel to the forefront of the synthetic biology field."

"In 2013, Agilent's management chose to take a shortcut by out-sourcing its involvement with what was, back then, the nascent synthetic biology field through a 20+ million dollar investment in an outside company, Gen9, Inc., instead of going all-in by devoting its considerable internal resources to developing synthetic biology technology internally. Agilent's management miscalculated the trajectory of Gen9, the amount of support that Agilent would need to provide (support it ultimately failed to provide), and the rapid growth and needs of the synthetic biology field, which Gen9 and Agilent could not meet. In trying to take a shortcut to be a "player" in this field, Agilent has been all but left out of the game. Now Agilent is far behind in the synthetic biology field while Twist continues to gain steam at the leading edge."

2. In Agilent's view, Leproust is a convenient scapegoat—indeed for years, Agilent praised Leproust for her hard work. All that changed after her success made her a target of resentment from Agilent senior management:

"For many years, Agilent recognized Leproust's efforts, enthusiasm, and work ethic, conferring promotions, awards, and additional opportunities on her. Indeed, Leproust was consistently ranked in the top 10% of employees every year she was evaluated from 2001 to 2012... Starting in 2006, Leproust pioneered, architected, and championed a product for Agilent called SureSelect, which launched in 2009 and became a major success for the Genomics division. It also made Agilent a major player in the field of DNA sequencing despite Agilent not offering a sequencing machine. To make SureSelect a success, Leproust spent an increasing and significant portion of her time on business duties, such as assisting the marketing, sales, and customer support departments, while still earning top marks for her R&D accomplishments. After that experience, Leproust wanted to get involved full-time in a business role, but instead the opposite happened. Leproust had her responsibilities reduced to R&D work of lesser importance, even having her SureSelect responsibilities reassigned to others. By this time, while popular and respected by the general workforce, Leproust's success had also made her a target of resentment, particularly from more senior employees in the Labs division, which was responsible for developing transformative new technologies but had been falling short on its mission."

3. Agilent alleges that Leproust's activities before departing from Agilent were unlawful, but fails to recognize that under California law, preparations to compete are wholly protected:

"Nothing about Leproust's efforts to get Twist off the ground before departing from Agilent—such as registering website domains, developing a business plan, seeking funding from potential investors, and eventually incorporating Twist in February 2013— was unlawful. On the contrary, it is well-established that California law permits an employee to make preparations to compete with its current employer, and even to organize and to incorporate a new competing venture, while still employed. Leproust was entirely within her rights to take the steps she did to launch Twist, and her conduct was fully protectable under the law—including because Twist was focused on making custom genes for the synthetic biology market, which Agilent had opted out of."

4. In addition, rather than acknowledge that other methods for writing DNA existed, Agilent has based its lawsuit on a fundamental misconception of what Twist has actually been doing:

"Agilent has based this lawsuit on the misguided conceit that Agilent's way of printing DNA, which was designed as an assembly line for glass-slide microarrays, is the only way Twist could have achieved the results it did with synthesized oligos, and that Twist must therefore be using Agilent's technology. Agilent fails to realize that Twist's technology, unlike Agilent's, was purpose-built from the start for creating commercial synthetic genes, which allowed for engineering trade-offs that Agilent did not consider or could not implement. Indeed, conspicuously absent from Agilent's allegations are any evidence of actual use of Agilent confidential materials, much less trade secrets, by Twist employees to build Twist's business or develop its technology."

5. Agilent also misunderstands the origination of Twist’s technology: while Leproust has focused on the business aspects of Twist, her co-founders Bill Banyai and Bill Peck were focused on making their silicon-based approach to manufacturing DNA a reality—efforts which required substantial time and money and did not rely on any Agilent confidential information or materials:

“To build its first DNA writer, Twist worked with a third-party contractor that Banyai and Peck knew from their days at Complete Genomics. The prototype hardware shipped to Twist in late May 2014, but it was not until after installation and three months of debugging and tinkering, that the first oligos were synthesized during the week of August 24, 2014. Since this first print job, Twist’s engineers and scientists have continued to optimize and refine Twist’s processes and systems through extensive trial and error in order to arrive at the industry-leading synthesis that Twist is capable of today.”

“To reach these milestones, Banyai, Peck, and their team relied on not just their own general skills, knowledge, and training, but also publicly available sources including scientific articles, academic papers, patents, and published patent applications that disclose, among other things, the use of phosphoramidite inks and inkjet printing to perform oligo synthesis. These materials included step-by-step instructions for building the piezoelectric oligonucleotide synthesizer and microarrayer (“POSaM”) platform published by Dr. Lee Hood’s group at University of Washington in 2004, as reflected in the following sources: POSaM: a fast, flexible, open-source, inkjet oligonucleotide synthesizer and microarrayer (July 27, 2004) 5 Genome Biology R.58.1-58.17 and Assembly Manual for the POSaM: The ISB Piezoelectric[sic] Oligonucleotide Synthesizer and Microarrayer v. 1.2, (May 28, 2004). Another example is the 2001 Ph.D. thesis of then-Massachusetts Institute of Technology student Ivan H. Lee, entitled Covalent EndImmobilization of Oligonucleotides onto Solid Surfaces, which described methods for functionalizing silicon wafers for DNA. Similarly, at that time, Banyai, Peck, and their team were well aware of numerous publicly known techniques for the assembly of synthesized oligos into genes.”

6. Through this lawsuit, Agilent seeks to deprive the world of Twist’s groundbreaking technologies—all based on false pretense and ever-shifting legal theories:

“Agilent has embarked on a self-serving campaign that seeks to deprive the world and scientific community of Twist’s groundbreaking technologies—all under the false pretense that Twist somehow stole them from Agilent. Agilent’s actions are not only illegal and harmful to Twist and its employees, but also threaten to impede the advancement of the synthetic biology field as a whole.”

“Agilent’s ever-shifting identification of its alleged trade secrets underscores the fact that it is simply lobbing baseless allegations as part of a larger malicious smear campaign.”

7. In addition to asserting over twenty affirmative defenses, Twist has filed six counterclaims against Agilent alleging—among other unlawful conduct—unfair competition, defamation, and tortious interference:

“Agilent has also made knowingly false and damaging public statements about Twist and its employees, intending to injure Twist’s business and its reputation in the marketplace, and to tarnish the careers of former Agilent employees who went to Twist. Among other things, on the eve of Twist’s October 31, 2018 IPO, Agilent engaged in a calculated and deliberate attempt to undermine the IPO and derail Twist’s attempt to raise important funding.”

“Agilent has planned and engaged in a calculated scheme to broadcast to the marketplace inflammatory and damaging allegations which it knows to be false about Twist and certain of its top executives and scientists, who are former Agilent employees. By these and other actions, Agilent has defamed and disparaged Leproust and Twist and their accomplishments, and has engaged in acts of unfair competition, tortious interference, among other unlawful conduct, to harm Twist and Leproust and to unjustly benefit and enrich itself.”

8. Twist is challenging Agilent’s claims on the grounds that Agilent is unscrupulously attacking employee mobility, seeking to enforce unlawful contractual provisions, and employing bullying tactics, all in violation of California law:

“Agilent seeks to diminish the freedom of innovators and entrepreneurs to seek out more fulfilling work and succeed elsewhere in their chosen profession. Agilent’s claims are motivated by corporate greed and are antithetical to California’s strong public policy favoring employee mobility, an essential driver of technological progress in this state, and the laws enacting that policy.”

“Through this lawsuit, Agilent also seeks to harm Leproust and other former Agilent employees now at Twist by asserting and seeking to enforce purported contract provisions that restrict those former employees’ from using their technical knowledge, training, and hard earned skills for anyone other than Agilent.”

“When Agilent hired Leproust in 2000, it required her to sign an Agreement Regarding Confidential Information and Proprietary Developments (“Agreement”). The asserted Agreement prohibits Leproust from using any “Confidential Information” except in the “performance of Agilent duties,” and from disclosing any such information “both during and after [their] employment with Agilent.” (SAC ¶ 30.) “Confidential Information” is broadly defined to include not only “trade secrets” but also “confidential business and technical information” and the all-encompassing category of “know-how not generally known to the public.” (Id. at ¶ 31.) And there is no time limit on these obligations. (Ibid.)”

“Virtually all of [Leproust’s academic training, scientific research,] business acumen and professional experience could be considered to represent “know-how not generally known to the public,” as well as “confidential business and technical information.” Particularly in light of Leproust’s specialized knowledge and skills, and Agilent’s exceedingly broad allegations and claims in this lawsuit, the asserted Agreement effectively operates as a non-competition agreement, which is void as a matter of law as against California public policy.”

9. Agilent is carrying out a vendetta against Leproust, and persecuting her to intimidate others:

“It is obvious that Agilent seeks to make an example of Leproust, to serve as a warning to other Agilent employees, both former and current, that Agilent is not to be crossed. Agilent is doing so despite being well-aware that preparing for and taking a competing job within one’s

profession of choice is legal and in fact encouraged by California's public policies promoting the freedom of employee mobility. Agilent's intimidation and bullying tactics constitute unfair competition and must be stopped."

10. Agilent has also misused the discovery process, engaging in fishing expeditions and publicly broadcasting distorted versions of information it has learned in confidential proceedings to harm Twist and its employees:

"Agilent knowingly and misleadingly pulled the November 2011 date [it alleges Emily Leproust first became CEO of Twist] out of a confidential, non-public interrogatory response Twist supplied to it during litigation indicating that this was the earliest that Leproust discussed with Twist's co-founders, Banyai and Peck, **the possibility** of their forming a company and that Leproust could be a good candidate for CEO **in the future.**"

"As Agilent also knew full well from discovery, there was no evidence of "midnight downloads" or other en masse document heist, as its inflammatory allegations about "taking" hundreds of documents was meant to convey...evidence shows, however, that Agilent-related documents were inadvertently and passively retained by certain former Agilent employees from their time at Agilent, where these employees would download documents to their devices or send them in an email to themselves so they could continue to do work **for Agilent** while they were at home on nights and weekends. Moreover, Agilent is well aware that under California law, mere possession of Agilent information (which, contrary to Agilent's allegations, does not actually qualify as tradeseecrets in any event) does not amount to wrongful **misappropriation** of the information as required to prove Agilent's trade secret misappropriation claims."

11. Rather than competing fairly in the marketplace and letting consumers pick winners and losers, Agilent is using litigation as a means of stifling innovation and competition:

"The timing of Agilent's lawsuit is telling—only after waiting and watching Twist's success, and failing to perform in the marketplace on its own, has Agilent turned to litigation. In April 2013, Agilent terminated a gene synthesis project that Leproust had been working on (using technology unrelated to that which Banyai and Peck pioneered at Twist) and rejected her suggestion that Agilent pursue that line of development. Though fully aware that it could try to develop its own technology to compete with other companies already in the synthetic DNA marketplace, Agilent decided to take a shortcut through a substantial investment in an outside company called Gen9 already doing work in the field, placing its confidence in Gen9's gene synthesis technology over its own in-house abilities—to the tune of 21 million dollars. Agilent announced this investment around the same time it cancelled Leproust's gene assembly project, publishing a story entitled "Agilent Makes Strategic Investment in Synthetic Biology" to its internal blog on April 24, 2013. The story was picked up by the media at large that same day."

Agilent's lawsuit will not stop Twist from fulfilling its mission: to provide its customers with the highest quality, made-to-order synthetic DNA they need to better the world. Twist fully intends to continue to defend itself against Agilent's baseless claims and in parallel, to vigorously prosecute its new counterclaims.