

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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XENOMICS, INC.,

Plaintiff,

-against-

SEQUENOM, INC.,

Defendant.

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Index No.  
Date Purchased  
Plaintiff(s) designate(s)  
NEW YORK  
County as the place of trial.

The basis of venue is  
Plaintiff's address

**SUMMONS**

Plaintiff(s)' address:  
420 Lexington Avenue, Suite 1701  
New York, New York 10170

09603278

To the above named Defendant(s):

**You are hereby summoned** to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance on the Plaintiff's Attorney(s) within **twenty** days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York  
October 15, 2009

**JAROSLAWICZ & JAROS, LLC**

Attorneys for Plaintiff  
225 Broadway, 24<sup>th</sup> Floor  
New York, New York 10007  
(212) 227-2780

By: 

**David Jaroslawicz**

Defendant(s) address(es):

SEQUENOM, INC.  
3595 John Hopkins Court  
San Diego, California 92121

**FILED**  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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XENOMICS, INC.,

Index No.

Plaintiff,

**VERIFIED COMPLAINT**

-against-

SEQUENOM, INC.,

Defendant.

09603278

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Plaintiff, by its attorneys, Jaroslawicz & Jaros, complaining of the defendants, upon information and belief, alleges as follows:

**THE PARTIES**

1. At all times hereinafter mentioned, plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Florida, with its principal place of business in the State of New York.
2. At all times hereinafter mentioned, the plaintiff was the owner of certain valuable patents as set forth in Exhibit A.
3. At all times hereinafter mentioned, upon information and belief, the defendant Sequenom, Inc. is a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in the State of California.
4. Defendant is a publicly traded company on the NASDAQ, trading under the symbol SQNN.

5. At all times hereinafter mentioned, the defendant held itself out as a highly competent biotech company with a research and development department with respect to, among other things, non-invasive testing for Down Syndrome; the test was known as SEQureDx™ (hereinafter referred to as defendant's "Down Syndrome test").

### **THE UNDERLYING FACTS**

6. Plaintiff had certain patents which would enable the defendant to develop and market its Down Syndrome test.

7. On or about October 29, 2008, the plaintiff and defendant entered into a licensing agreement whereby defendant would be given exclusive rights to plaintiff's patents set forth in Exhibit A. A copy of that agreement is annexed hereto as Exhibit B.

8. Pursuant to the terms of the agreement, particularly ¶3.1 thereof, plaintiff received a small up-front payment.

9. In addition to the small up-front payment, plaintiff was receive royalties equal to six percent (6%) of the net sales revenues received by the defendant, net licensing and other revenues received by the defendant.

10. Plaintiff was also to receive various other benefits, including minimum royalties.

11. As a publicly traded company, the defendant was required to, and did, file various press releases and statements with the Securities & Exchanges Commission ("SEC").

12. On June 4, 2008, defendant issued a press release entitled, "*Sequenom Announces Results of Screening Studies for Down Syndrome and Updates Development of*

*Noninvasive Prenatal Diagnostics at Analyst and Investor Briefing*" (Exhibit C), touting the test in question.

13. On June 23, 2009, defendant announced it was raising over \$85 million in a public offering based in part on its representations as to the status of its test program, particularly its non-invasive Down Syndrome testing (Exhibit D).

14. On September 23, 2008, defendant issued a press release entitled, "*Sequenom Announces Additional Positive Results for Down Syndrome Test at Analyst Briefing*" (Exhibit E), again touting the test in question.

15. It was in reliance upon these press releases and SEC filings, and by the defendant making similar misrepresentations, and other statements made by the defendant's representatives to the plaintiff, the plaintiff agreed to enter into the licensing agreement with the defendant on October 29, 2008 (Exhibit B).

16. Defendant maintained the charade that it had valid testing procedures:

(a) On December 1, 2008, defendant issued a press release entitled, "*Next-Generation Technology Shown to Accurately Detect Fetal Down Syndrome in First Trimester of Pregnancy*" (Exhibit F).

(b) On January 28, 2009, defendant issued a press release entitled, "*Sequenom Announces New Positive Data on Down Syndrome Detection and Unveils Breakthrough DNA Approach to Prenatal Diagnostics – Data Continue to Support Significant*

*Market Potential for Sequenom Prenatal Franchise; Down Syndrome Test on Track for Launch in June 2009*" (Exhibit G).

(c) On February 3, 2009, defendant issued a press release entitled, "*Sequenom Announces Findings on Methylation Markers and RNA-SNP Markers as Presented at SMFM – Company Provides Additional Details on SEQureDx Trisomy 21 Technology Performance Data*" (Exhibit H), again touting the test in question.

17. Suddenly, on April 29, 2009, defendant admitted that its representations had been fraudulent by issuing a new press release entitled "*Sequenom Announces Delay in Launch of SEQureDx Trisomy 21 Test*" (Exhibit I).

18. Thereafter on May 1, 2009, defendant filed a Form 8-K with the SEC stating that several class action complaints had been filed against it as a result of its misrepresentations with respect to its Down Syndrome test (Exhibit J).

19. On May 22, 2009, plaintiff wrote to the defendant (Exhibit K) requesting the return of the license for the technology and patents and any damages which had been suffered.

20. Defendant's counsel responded with an arrogant letter (Exhibit L), claiming that despite the documentation and admission by the defendant, the defendant had done nothing wrong.

21. On September 28, 2009, defendant fired five employees, including the president and chief executive officer Harry Stylli; the senior vice president of research and development Elizabeth Dragon; the names of the other persons who were fired were not released. In addition,

several other persons left the defendant's employ, including Paul Hawran, the chief financial officer, and Steven A. Ownings, vice president of Commercial Development.

22. The above followed an internal investigation by the defendant overseen by the law firm, Sheppard, Mullin, Richter & Hampton, which claims to have interviewed over forty witnesses and reviewed over three hundred thousand documents.

23. On September 28, 2009, the defendant announced that the FBI and U.S. Attorney had requested to meet with the defendant and were investigating it and what had occurred with respect to its alleged successful Down Syndrome test; defendant filed a Form 8-K with the SEC on October 5, 2009 (Exhibit M).

24. Plaintiff relied upon the fact that defendant was fully funded and would be able to complete its testing and research and would be able to continue to raise money as needed in the future based on of the fraudulent representations it was issuing as to its program and tests and the raising of \$85 million based upon these representations.

25. In an interview on October 6, 2009, Ian Clements, head of corporate communications for the defendant, announced that the T-21 Down Syndrome testing had a projected market of possibly as high as a billion dollars.

**AS AND FOR A FIRST CAUSE OF ACTION**

26. Had the defendant not fraudulently misrepresented the status of its testing for Down Syndrome, plaintiff never would have entered into an agreement with the defendant and given the defendant exclusive license to plaintiff's patents (Exhibit A).

27. Defendant's misrepresentations were material, willful and deliberate, as documented by its own internal investigation, its press releases and Form 8-K's annexed hereto.

28. It has become apparent, in light of defendant's fraudulent conduct, that the defendant has no real non-invasive testing for Down Syndrome, and the numerous class actions against the defendant and the officers involved in the fraud, that defendant's ability to raise funds has been greatly impaired; that the defendant may no longer be a viable entity, and certainly will not have the funds necessary to continue testing, and had plaintiff known of this, it never would have entered into an agreement with the defendant.

29. By reason of the defendant's conduct, plaintiff has been damaged in that it cannot and will not receive royalties; it was induced to part with valuable exclusive patents and licensing rights; its reputation has been adversely affected; and plaintiff has been otherwise damaged.

30. By reason of the foregoing, plaintiff is entitled to recover all of its damages, together with punitive damages for defendant's willful fraud, in an amount not to exceed the sum of Three Hundred Millions Dollars (\$300,000,000).

**AS AND FOR A SECOND CAUSE OF ACTION**

31. Plaintiff repeats, reiterates and realleges each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

32. Based upon the defendant's fraudulent conduct as set forth above, plaintiff was induced to enter into an agreement dated October 29, 2008 (Exhibit B), giving up various valuable patent rights.

33. Due to the defendant's inequitable conduct and fraud, plaintiff is entitled to rescind that agreement and to have the court deem it null and void so that the plaintiff can license its patents to a legitimate company or develop its own products without being hampered by an agreement with the defendant which was fraudulently obtained by the defendant through its fraudulent conduct.

**AS AND FOR A THIRD CAUSE OF ACTION**

34. Plaintiff repeats, reiterates and realleges each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

35. Defendant has breached the agreement entered into between the parties by fraudulently misrepresenting the status of the company, particularly as to its Down Syndrome test, and other misrepresentations and fraudulent conduct as set forth above.

36. Plaintiff would never have entered into an agreement providing for royalties and licensing fees which were, in essence, non-existent and will never be paid by the defendant because its entire representation was fraudulent.

37. By reason of the defendant's breach of the agreement, plaintiff has been damaged as set forth above.

38. By reason of the foregoing, plaintiff is entitled to recover all of its damages from the defendant.

WHEREFORE, plaintiff demands judgment against the defendant, to recover for all of its damages, including punitive damages, all together with the costs and disbursements of this action.

JAROSLAWICZ & JAROS, LLC  
Attorneys for Plaintiff  
225 Broadway, 24<sup>th</sup> Floor  
New York, New York 10007  
(212) 227-2780

By: \_\_\_\_\_

  
**David Jaroslawicz**

DAVID JAROSLAWICZ, a member of the firm of JAROSLAWICZ & JAROS, attorneys for the plaintiff(s) in the within action, duly admitted to practice in the Courts of the State of New York, affirms the following statements to be true under the penalties of perjury, pursuant to Rule 2016 of the CPLR:

That he has read the foregoing **Complaint** and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters, he believes them to be true.

Affiant further states that the source of his information and the grounds of his belief are derived from the file maintained in the normal course of business of the attorneys for the plaintiff(s).

Affiant further states that the reason this affirmation is not made by the plaintiff(s) is that at the time this document was being prepared, the plaintiff(s) was (were) not within the County of New York, which is the County where the attorney for the plaintiff(s) herein maintains his office.

Dated:           New York, New York  
                  October 15, 2009

  
\_\_\_\_\_  
DAVID JAROSLAWICZ

JAROSLAWICZ & JAROS, LLC

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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XENOMICS, INC.,

Plaintiff,

-against-

SEQUENOM, INC.,

Defendant.

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Summons and Verified Complaint

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Jaroslawicz & Jaros, LLC  
225 Broadway, 24<sup>th</sup> Floor  
New York, New York 10007  
(212) 227-2780

By: \_\_\_\_\_

  
David Jaroslawicz

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