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Attorneys for Plaintiff
FLUIDIGM CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FLUIDIGM CORPORATION, a Delaware corporation,

Plaintiff,

v.

THERMO FISHER SCIENTIFIC, INC., a Delaware corporation, LIFE TECHNOLOGIES CORPORATION, a Delaware corporation; and APPLIED BIOSYSTEMS, LLC, a Delaware limited liability company,

Defendants.

Case No. 3:17-cv-01457-JD

FIRST AMENDED COMPLAINT FOR:

- (1) BREACH OF CONTRACT**
- (2) BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**
- (3) DECLARATORY RELIEF**

Judge: Honorable James Donato

Complaint filed: 3/17/2017

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1 Plaintiff, Fluidigm Corporation, for its Complaint, alleges as follows:

2 **PARTIES**

3 1. Plaintiff Fluidigm Corporation (“Fluidigm”) is a corporation organized and existing
4 under the laws of the State of Delaware with a principal place of business at 7000 Shoreline Court,
5 Suite 100, South San Francisco, CA 94080.

6 2. Plaintiff is informed and believes that Defendant Thermo Fisher Scientific, Inc.
7 (“Thermo Fisher”) is a corporation organized and existing under the laws of the State of Delaware
8 with its principal place of business at 168 Third Avenue, Waltham, MA 02451.

9 3. Plaintiff is informed and believes that Defendant Life Technologies Corporation
10 (“Life Technologies”) is a corporation organized and existing under the laws of the State of
11 Delaware with its principal place of business at 5791 Van Allen Way, Carlsbad, CA 92008.

12 4. Plaintiff is informed and believes that Defendant Applied Biosystems, LLC
13 (“Applied Biosystems”) is a limited liability company organized and existing under the laws of the
14 State of Delaware with its principal place of business at 5791 Van Allen Way, Carlsbad,
15 CA 92008.

16 5. Plaintiff is informed and believes that, from at least approximately June 30, 2011 to
17 about February 3, 2014, Applied Biosystems was a wholly-owned subsidiary of Life Technologies
18 and operated not as a separate corporate entity, but rather as the “alter ego” or “instrumentality” of
19 its parent, Life Technologies.

20 6. Plaintiff is informed and believes that, on or about February 3, 2014, Thermo
21 Fisher acquired Life Technologies (and its wholly owned subsidiary, Applied Biosystems).

22 7. Plaintiff is informed and believes that, from at least about February 3, 2014 to the
23 present, Applied Biosystems has operated not as a separate corporate entity, but rather as the “alter
24 ego” or “instrumentality” of its parent, Thermo Fisher, within Thermo Fisher’s Life Sciences
25 Solutions Segment.

26 8. Plaintiff is informed and believes that, from at least about February 3, 2014 to the
27 present, Life Technologies has operated not as a separate corporate entity, but rather as the “alter
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1 ego” or “instrumentality” of its parent, Thermo Fisher, within Thermo Fisher’s Life Sciences
2 Solutions Segment.

3 9. Plaintiff is informed and believes that, on or about March 31, 2016, Thermo Fisher
4 acquired Affymetrix, Inc. (“Affymetrix”), a corporation organized and existing under the laws of
5 the State of Delaware, and, further, that Affymetrix thereafter continued to operate not as a
6 separate corporate entity, but rather as the “alter ego” or “instrumentality” of its parent, Thermo
7 Fisher, within Thermo Fisher’s Life Sciences Solutions Segment.

8 10. As plead in this Complaint, from at least approximately June 30, 2011 to about
9 February 3, 2014, Life Technologies’ conduct in using its subsidiary Applied Biosciences was
10 unjust, fraudulent, or wrongful towards Plaintiff, and Plaintiff has suffered harm as a result of Life
11 Technologies’ conduct.

12 11. As plead in this Complaint, from at least about February 3, 2014 to the present,
13 Thermo Fisher’s conduct in using each of its subsidiaries Applied Biosciences and Life
14 Technologies has been unjust, fraudulent, or wrongful towards Plaintiff, and Plaintiff has suffered
15 harm as a result of Thermo Fisher’s conduct.

16 12. As plead in this Complaint, from at least about March 31, 2016 to the present,
17 Thermo Fisher’s conduct in using its subsidiary Affymetrix has been unjust, fraudulent, or
18 wrongful towards Plaintiff, and Plaintiff has suffered harm as a result of Thermo Fisher’s conduct.

19 **GENERAL ALLEGATIONS**

20 13. Plaintiff creates and manufactures innovative technologies and life science tools
21 designed to revolutionize biology through a relentless pursuit of scientific truth. Plaintiff’s core
22 technologies, based on microfluidics and mass cytometry, enable the exploration and analysis of
23 individual cells as well as the industrial application of genomics.

24 14. On or about June 30, 2011, Plaintiff and Applied Biosystems entered into an
25 agreement entitled Patent Cross-License Agreement Between Applied Biosystems, LLC and
26 Fluidigm Corporation (“Agreement”). Plaintiff is informed and believes that Thermo Fisher and
27 Life Technologies are each in possession of the Agreement and aware of its terms.

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1 15. The Agreement provides, *inter alia*, for the payment of running worldwide
2 royalties to Plaintiff based “on Net Sales of Instruments sold by [Applied Biosystems] and its
3 Affiliates.”

4 16. The Agreement provides, *inter alia*, for the payment of running worldwide
5 royalties to Plaintiff based “on Net Sales of Consumables sold by [Applied Biosystems] and its
6 Affiliates.”

7 17. At all times since Plaintiff and Applied Biosystems entered into the Agreement, all
8 Applied Biosystems “Instruments,” whether microfluidic reader instruments and/or other, non-
9 microfluidic, reader instruments, and all Applied Biosystems “Consumables” must be accounted
10 for when determining worldwide royalties due to Plaintiff.

11 18. At all times since Plaintiff and Applied Biosystems entered into the Agreement,
12 Life Technologies has been an “Affiliate” under the Agreement.

13 19. At all times since Plaintiff and Applied Biosystems entered into the Agreement, all
14 Life Technologies “Instruments,” whether microfluidic reader instruments and/or other, non-
15 microfluidic, reader instruments, and all Life Technologies “Consumables” must be accounted for
16 when determining worldwide royalties due to Plaintiff.

17 20. At all times since Thermo Fisher acquired Life Technologies, Thermo Fisher has
18 been an “Affiliate” under the Agreement.

19 21. At all times since Thermo Fisher acquired Life Technologies, all Thermo Fisher
20 “Instruments,” whether microfluidic reader instruments and/or other, non-microfluidic, reader
21 instruments, and all Thermo Fisher “Consumables” must be accounted for when determining
22 worldwide royalties due to Plaintiff.

23 22. At all times since Thermo Fisher acquired Affymetrix, Affymetrix has been an
24 “Affiliate” under the Agreement.

25 23. At all times since Thermo Fisher acquired Affymetrix, all Affymetrix
26 “Instruments,” whether microfluidic reader instruments and/or other, non-microfluidic, reader
27 instruments, and all Affymetrix “Consumables” must be accounted for when determining
28 worldwide royalties due to Plaintiff.

1 24. After Plaintiff and Applied Biosystems entered into the Agreement, through about
2 December 31, 2014, Life Technologies delivered certain royalty payments and reports to Plaintiff
3 under the Agreement for Applied Biosystems.

4 25. Beginning on or about January 1, 2015, and continuing to the present, Thermo
5 Fisher delivered certain royalty payments and reports to Plaintiff under the Agreement for Applied
6 Biosystems.

7 26. Plaintiff is informed and believes that, from approximately December 19, 2012 to
8 the present, Applied Biosystems and/or Thermo Fisher failed to fully report on and remit
9 worldwide royalty payments to Plaintiff for all Applied Biosystems “Instruments” and all Life
10 Technologies “Instruments” as required by the Agreement.

11 27. Plaintiff is informed and believes that, from approximately February 3, 2014 to the
12 present, Applied Biosystems and/or Thermo Fisher failed to fully report on and remit worldwide
13 royalty payments to Plaintiff for all Applied Biosystems “Instruments,” all Life Technologies
14 “Instruments,” and all Thermo Fisher “Instruments” as required by the Agreement.

15 28. Plaintiff is informed and believes that, since approximately March 31, 2016,
16 Applied Biosystems and/or Thermo Fisher failed to fully report on and remit worldwide royalty
17 payments to Plaintiff for all Applied Biosystems “Instruments,” all Life Technologies
18 “Instruments,” all Thermo Fisher “Instruments,” and all Affymetrix “Instruments” as required by
19 the Agreement.

20 29. For example, Plaintiff is informed and believes that at least the QuantStudio™ 3,
21 QuantStudio™ 5, QuantStudio™ 6 Flex, QuantStudio™ 7 Flex, QuantStudio™ 12K Flex,
22 QuantStudio™ 3D, QuantStudio™ DX, ViiA7™, StepOne™, StepOnePlus™, PikoReal™, and
23 SureTect™ Real-Time PCR Systems, GeneTitan™ Instruments, and SOLiD™ Next-Generation
24 Sequencing Systems, each being configurable to read microfluidic chips or arrays, non-
25 microfluidic 96-well plates, non-microfluidic 384-well plates, and/or other, non-microfluidic,
26 reader instruments are “Instruments” under the Agreement. In particular, Plaintiff is informed and
27 believes that, absent the Agreement, the products listed above, along with all Consumables sold
28 for use with these products, would infringe upon at least one valid claim of at least one U.S. patent

1 identified below and/or corresponding patents issued in foreign jurisdictions (i.e. Europe, China,
2 Japan, and Singapore): U.S. Patent No. 7,307,802; U.S. Patent No. 7,588,672; U.S. Patent No.
3 7,906,072; U.S. Patent No. 8,048,378; U.S. Patent No. 8,512,640; U.S. Patent No. 8,721,968; U.S.
4 Patent No. 8,926,905; U.S. Patent No. 9,234,237; and, U.S. Patent No. 9,663,821.

5 30. As just one example of patent infringement that would occur absent the protections
6 granted under the Agreement, Defendants' ViiA7 Real-Time PCR Reader would infringe at least
7 Claim 1 of U.S. Patent No. 7,906,072. Defendants market the ViiA7 instrument as an apparatus
8 that monitors the amplification of targeted DNA molecules during PCR (polymerase chain
9 reaction) in real-time, i.e. not at the end-point of the reaction, allowing for accurate and sensitive
10 data analysis. The ViiA7 instrument is thus used for imagining a fluidic device comprising a
11 plurality of processing sites, such as a 96- or 384-well plate or microfluidic array card. The
12 imaging system of the ViiA7 comprises (i) an illumination system coupled to the fluidic device
13 (e.g. a 96- or 384-well plate larger than 30.7 mm x 30.7 mm) and adapted to illuminate the fluidic
14 device with electromagnetic radiation (i.e. fluorescence); (ii) an imaging system, referred to as the
15 OptiFlex™ System, coupled to the fluidic device and adapted to receive electromagnetic radiation
16 emitted from the plurality of processing sites; (iii) a multi-pixel detector coupled to the imaging
17 system for collection of emitted fluorescence, with a detection area less than the device dimension;
18 and (iv) a thermal controller coupled to the fluidic device (required for thermocycling).

19 Accordingly, the ViiA7 is an Instrument covered by Reader Patent Rights under the Agreement.

20 31. Further, Plaintiff is informed and believes that Thermo Fisher, Life Technologies,
21 and/or Applied Biosystems have neither reported on nor remitted worldwide royalty payments to
22 Plaintiff for all "Instruments."

23 32. Plaintiff is informed and believes that Thermo Fisher, Life Technologies, and/or
24 Applied Biosystems have neither reported on nor remitted worldwide royalty payments to Plaintiff
25 for all "Consumables."

26 33. At all times since Plaintiff and Applied Biosystems entered into the Agreement,
27 Plaintiff has performed its obligations under the Agreement.
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1 34. As a result of Thermo Fisher’s, Life Technologies’, and Applied Biosystems’
2 myriad failures to abide by the clear terms of the Agreement, Plaintiff has been and continues to
3 be damaged in an amount to be determined at trial. Such damages include, but are not limited to,
4 the worldwide royalties that Thermo Fisher, Life Technologies, and/or Applied Biosystems have
5 withheld from Plaintiff royalties and interest on those royalties.

6 35. Plaintiff has, pursuant to the Agreement, retained an independent auditor to inspect
7 records pertaining to all worldwide royalties for “Instruments” and “Consumables” due and
8 payable to Plaintiff under the Agreement. Plaintiff provided notice of its independent auditor’s
9 inspection to Thermo Fisher, Life Technologies, and Applied Biosystems on December 16, 2016.

10 36. Should that independent audit reveal any understatement of such payments by
11 Thermo Fisher, Life Technologies, and/or Applied Biosystems, and Thermo Fisher, Life
12 Technologies, and/or Applied Biosystems again breach the Agreement by refusing to remit the
13 amount of such understatement to Plaintiff, Plaintiff expressly reserves its right to, and will, seek
14 leave to amend this Complaint and recover for that separate and independent breach of the
15 Agreement.

16 37. Further, should Thermo Fisher, Life Technologies, and/or Applied Biosystems be
17 required to pay the full cost and expense of that independent audit, and again breach the
18 Agreement by refusing to remit the amount of such full cost and expense to Plaintiff, Plaintiff
19 expressly reserves its right to, and will, seek leave to amend this Complaint and seek to recover for
20 that separate and independent breach of the Agreement.

21 **FIRST CAUSE OF ACTION**

22 **(Breach of Contract)**

23 38. Plaintiff realleges and incorporates herein by reference each and every allegation
24 contained in Paragraphs 1 through 37 of this Complaint as if set forth in full herein.

25 39. Thermo Fisher, Life Technologies, and Applied Biosystems have materially
26 breached the Agreement by failing to fully report on and remit worldwide royalty payments to
27 Plaintiff for all Applied Biosystems “Instruments,” all Life Technologies “Instruments,” all
28 Thermo Fisher “Instruments,” and all Affymetrix “Instruments.”

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1 40. Thermo Fisher, Life Technologies, and Applied Biosystems have materially
2 breached the Agreement by failing to fully report on and remit worldwide royalty payments to
3 Plaintiff for all Applied Biosystems “Consumables,” all Life Technologies “Consumables,” all
4 Thermo Fisher “Consumables,” and all Affymetrix “Consumables.”

5 41. As a result of Applied Biosystems’ material breach of the Agreement, Plaintiff has
6 been damaged and continues to be damaged in an amount to be proven at trial. These damages
7 include, but are not limited to, the worldwide royalties that have been withheld from Plaintiff and
8 interest on those royalties.

9 **SECOND CAUSE OF ACTION**

10 **(Breach of Good Faith and Fair Dealing)**

11 42. Plaintiff realleges and incorporates herein by reference each and every allegation
12 contained in Paragraphs 1 through 40 of this Complaint as if set forth in full herein.

13 43. There is an implied covenant of good faith and fair dealing in every contract that
14 neither party will do anything which will injure the right of the other to receive the benefits of the
15 agreement.

16 44. Thermo Fisher, Life Technologies, and Applied Biosystems have acted in bad faith
17 by failing to pay worldwide royalties to Plaintiff for all “Instruments” of Applied Biosystems and
18 its “Affiliates” under the Agreement, continuously refusing to provide Plaintiff with any
19 information concerning relevant reader instruments and Thermo Fisher’s, Life Technologies’, and
20 Applied Biosystems’ understanding thereof, and by improperly attempting to self-servingly
21 exclude, at least, non-microfluidic reader instruments from the Agreement.

22 45. As a result of Thermo Fisher’s, Life Technologies’, and Applied Biosystems’
23 breach of the implied covenant of good faith and fair dealing, Plaintiff has been damaged and
24 continues to be damaged in an amount to be determined at trial.

25 **THIRD CAUSE OF ACTION**

26 **(Declaratory Relief)**

27 46. Plaintiff realleges and incorporates herein by reference each and every allegation
28 contained in Paragraphs 1 through 37 of this Complaint as if set forth in full herein.

1 47. An actual, present and judiciable controversy has arisen and now exists between
2 Plaintiff and Defendants regarding Plaintiff’s contractual audit right. Plaintiff contends that the
3 auditor is entitled to undertake any investigation the auditor deems necessary to determine what
4 royalties are owed Plaintiff under the Agreement, and Defendants contend that the auditor’s work
5 is limited to calculating the royalties due on those products that Defendants admit are Instruments
6 under the Agreement. A declaratory judgment is necessary and proper to set forth and determine
7 whether the auditor is entitled to undertake any investigation it deems necessary to determine what
8 royalties are owed Plaintiff under the Agreement.

9
10 **PRAYER**

11 WHEREFORE, PLAINTIFF prays for judgment as follows:

12 a. On the First Cause of Action, against Thermo Fisher, Life Technologies,
13 and Applied Biosystems as follows:

14 1. For damages in an amount to be proven at trial.

15 b. On the Second Cause of Action, against Thermo Fisher, Life Technologies,
16 and Applied Biosystems as follows:

17 1. For damages in an amount to be proven at trial.

18 c. On the Third Cause of Action, against Thermo Fisher, Life Technologies,
19 and Applied Biosystems as follows:

20 1. A declaration that the auditor is entitled to undertake any
21 investigation it deems necessary to determine what royalties are owed Plaintiff under the
22 Agreement.

23 d. On all causes of action, against Thermo Fisher, Life Technologies, and
24 Applied Biosystems as follows:

25 1. For reasonable attorneys’ fees;

26 2. For costs of suit; and

27 3. For such other relief as the Court may deem just and proper.
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1 Dated: July 17, 2017

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Tracy M. Talbot
Berrie R. Goldman

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By /s/ K. Lee Marshall
K. Lee Marshall

Attorneys for Plaintiff
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