

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ARCTICDX, INC.,

ARCTICAX, INC.,

and

ARCTICAX US LTD.,

Plaintiffs,

v.

SEQUENOM, INC.

and

SEQUENOM CENTER FOR
MOLECULAR MEDICINE, LLC.,

Defendants.

Civil Case No. 2:12cv81

JURY TRIAL DEMANDED

**COMPLAINT FOR PATENT INFRINGEMENT
AND DECLARATORY JUDGMENT**

Plaintiffs ArcticDx, Inc. (“ArcticDx”), ArcticAx, Inc. (“ArcticAx”), and ArcticAx US Ltd. (“ArcticUS”) (collectively “Arctic”), for their Complaint for Patent Infringement and Declaratory Judgment against Defendants Sequenom, Inc. (“Sequenom”) and Sequenom Center for Molecular Medicine, LLC (“SCMM”) (collectively, “Defendants”) allege as follows:

NATURE OF ACTION

1. This is an action in under the patent laws of the United States (35 U.S.C. § 101 et seq.) and the Declaratory Judgment Act (28 U.S.C. §§ 2201 and 2202).

2. ArcticDx seeks damages and injunctive relief for Sequenom's infringement of U.S. Patent No. 8,114,592 ("the '592 patent") related to Sequenom's RetnaGene[®] product.

3. Arctic seeks a declaration that its Macula Risk[®] product and Arctic's activities related thereto do not infringe any valid claim of U.S. Patent Nos. 8,053,190 ("the '190 patent"), 7,867,727 ("the '727 patent"), 7,695,909 ("the '909 patent"), 7,351,524 ("the '524 patent"), or 8,088,579 ("the '579 patent") (collectively, "the DJ Patents").

THE PARTIES

4. ArcticDx is a privately held company incorporated in Canada (registered number of 432117-1) with its principal place of business at 101 College St., Suite 335, South Tower, Toronto, Ontario M5G 1L7, Canada. ArcticDx is dedicated to the development and commercialization of products in the field of medical diagnostics, including genetic diagnostic products and methods.

5. ArcticAx is a subsidiary of ArcticDx. ArcticDx owns the majority of shares of ArcticAx. ArcticAx is a Canadian company with its principal place of business at 101 College St., Suite 335, South Tower, Toronto, Ontario M5G 1L7, Canada. ArcticAx is dedicated to the development and commercialization of products in the field of medical diagnostics, including genetic diagnostic products and methods.

6. ArcticUS is a wholly owned subsidiary of ArcticAx. ArcticUS is incorporated in Delaware with its principal place of business at 27499 Riverview Center Blvd., Suite 413, Bonita Springs, FL 34134. ArcticUS is dedicated to the development

and commercialization of products in the field of medical diagnostics, including genetic diagnostic products and methods.

7. Defendant Sequenom is a Delaware Corporation with its principal place of business at 3595 John Hopkins Court, San Diego, CA 92121. Upon information and belief, Sequenom has an international presence and sells its products, including medical diagnostic products, throughout the United States—including sales within this Judicial District.

8. Upon information and belief, Defendant SCMM is a wholly owned subsidiary of Sequenom with its principal place of business at 301 Michigan Street, NE, Suite 580, Grand Rapids, MI 49503. Upon information and belief, SCMM is an agent and alter ego of Sequenom. Upon information and belief, SCMM performs medical diagnostic services for customers throughout the United States—including customers within this Judicial District.

JURISDICTION AND VENUE

9. This is a civil action arising under the patent laws of the United States, Title 35 of the United States Code. Accordingly, this Court has subject-matter jurisdiction under Title 28, United States Code, §§ 1331 and 1338(a).

10. With respect to the DJ patents, this Court also has subject-matter jurisdiction under Title 28, United States Code, §§ 2201 and 2202. As set forth in detail below, an actual controversy exists between Arctic and Sequenom with respect to the infringement and validity of the DJ Patents because Sequenom has represented that the DJ patents are infringed by Arctic's activities related to its medical diagnostic products.

11. Venue is proper in this Judicial District under 28 U.S.C. §§ 1391(b), 1391(c), and 1400(b). Upon information and belief, Defendants have transacted, and continue to transact, directly and/or indirectly, business in this Judicial District.

12. Upon information and belief, Defendants are subject to this Court's general personal jurisdiction pursuant to due process and/or the Texas Long Arm Statute, based on their substantial business in this forum, including regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from goods and services provided to individuals in Texas and in this Judicial District.

13. Upon information and belief, Defendants have collaborations with entities in Texas and this Judicial District and are thereby doing business in this Judicial District.

14. Upon information and belief, Sequenom offers for sale, sells, and causes to be sold, medical diagnostic products in Texas and this Judicial District, and is thereby doing business in this Judicial District. Upon information and belief, Sequenom employs a sales force that targets "the sun belt," including Texas and this Judicial District, for sales and offers for sale of its medical diagnostic products, including those at issue in this litigation.

15. Upon information and belief, SCMM performs tests pursuant to Sequenom's business dealings in Texas and this Judicial District, including tests for customers in Texas and this Judicial District, and is thereby doing business in this Judicial District.

16. This Court has personal jurisdiction over Defendants by virtue of their systematic and continuous contact with this State and Judicial District. Sequenom

directly and/or through its distribution network, places products within the stream of commerce, which stream is directed at this Judicial District, with the knowledge and/or understanding that such products will be sold in the State of Texas. SCMM directly and/or through Sequenom, renders services pursuant to products placed within the stream of commerce, which stream is directed at this Judicial District, with the knowledge and/or understanding that such services are performed for customers in the State of Texas. Therefore the exercise of jurisdiction over Defendants does not offend traditional notions of fair play and substantial justice.

FACTUAL BACKGROUND

A. Arctic and Macula Risk[®]

17. Age-related macular degeneration (“AMD”) is a disease that damages the tissue in the central portion of the eye, which can worsen over time and cause blindness. The medical research community long considered AMD to be an environmental etiology, but now understands that AMD is strongly influenced by inheritance (*i.e.*, genetics). Specifically, genetic variation is now known to account for the majority of the risk for AMD.

18. The introduction of genetic marker testing into clinical practice has allowed for the identification of patients with at risk for AMD and management of this complex and potentially disabling disease using a personalized approach. Implementation of patient specific management, aided by genetics diagnostics (*e.g.*, Arctic’s Macula Risk[®]) has been a successful development in managing the risk for AMD.

19. Arctic's Macula Risk[®] is a genetic test that incorporates known genetic predictors of AMD progression and is a powerful way of identifying individuals that will progress to late-stage AMD. Specifically, Macula Risk[®] measures eight risk markers and incorporates a risk prediction scoring system that allows the categorization of individuals into different risk groups. Such categorization allows tailored treatment based on the individual's genetic risk for AMD, including a personalized approach to disease surveillance, early intervention, and, ultimately, sight preservation.

B. The '592 Patent and Sequenom's Infringement of the '592 Patent

20. The United States Patent and Trademark Office ("PTO") duly and legally issued the '592 patent on February 14, 2012. The inventor of the '592 patent is Dr. John R.W. Yates and the '592 patent is assigned to Cambridge Enterprise Limited ("CE") of Cambridge, Great Britain. CE is a company wholly owned by The Chancellor, Masters and Scholars of the University of Cambridge.

21. Through a grant of an exclusive right and license under the '592 patent from CE, ArcticDx has all substantial rights to enforce the '592 patent, including all rights to recover for any and all past and present infringement thereof. Through a grant of a sublicense from ArcticDx, ArcticAx and ArcticUS may practice the claims of the '592 patent.

22. The '592 patent teaches and claims novel methods for identifying an increased risk for developing AMD comprising detecting a marker for the disease.

23. Arctic's Macula Risk[®] product practices one or more claims of the '592 patent.

24. Upon information and belief, Sequenom began offering for sale and selling a genetic diagnostic product called RetnaGene[®] in the United States at least as early as May, 2011.

25. Upon information and belief, use of Sequenom's RetnaGene[®] product, including service rendered directly or indirectly by SCMM, practices at least one of the claims of the '592 patent. Upon information and belief, use of Sequenom's RetnaGene[®] product infringes at least one of the claims of the '592 patent.

26. Upon information and belief, Defendants have been aware of ArcticDx's intellectual property—including the published patent application patent (U.S. Patent Appl. Pub. No. 2009/0269761) that lead to the '592—since at least 2010. With respect to the AMD landscape, Ron Lindsay, the Executive Vice President of Research and Development at Sequenom, identified ArcticDx as a competitor to Sequenom and recognized that “there's probably some IP issues there” as early as 2010. (Sequenom, Inc. Q3 2010 Earnings Call, Nov. 4, 2010, available at www SeekingAlpha.com.)

C. The DJ Patents

27. Sequenom claims to be the exclusive licensee of and have the rights to assert the claims of the DJ Patents.

28. The face of the '190 patent indicates that the PTO issued the '190 patent on November 8, 2011, and the inventors of the '190 patent are Michael B. Gorin, Johanna Jakobsdottir, Yvette P. Conley, Daniel E. Weeks, Tammy S. Mah-Fraser, and Robert E. Ferrell.

29. The PTO recorded on June 2, 2011, an assignment of the '190 patent from the named inventors to The University of Pittsburgh – of the Commonwealth System of Higher Education.

30. The claims of the '190 patent are directed to SNP rs10490924, which is in the ARMS2 gene on chromosome 10.

31. Arctic's Macula Risk[®] does not infringe the claims of the '190 patent.

32. The face of the '727 patent indicates that the PTO issued the '727 patent on January 11, 2011, and the inventor of the '727 patent is Gregory S. Hageman.

33. The PTO recorded on February 21, 2008, an assignment of the '727 patent from the named inventor to The University of Iowa Research Foundation.

34. The claims of the '727 patent are directed to a screening method comprising detection for the presence or absence of a deletion of at least 10,000 base pairs in the genomic sequence encoding CFHR1 and/or CFHR3, which is on chromosome 1.

35. Arctic's Macula Risk[®] does not infringe the claims of the '727 patent.

36. The face of the '909 patent indicates that the PTO issued the '909 patent on April 13, 2010, and the inventors of the '909 patent are Michael B. Gorin, Johanna Jakobsdottir, Yvette P. Conley, Daniel E. Weeks, Tammy S. Mah-Fraser, and Robert E. Ferrell.

37. The PTO recorded on July 13, 2007, an assignment of the '909 patent from the named inventors to The University of Pittsburgh – of the Commonwealth System of Higher Education.

38. The '909 patent is from the same patent family as the '190 patent. The claims of the '909 patent are directed to SNP rs10490924, which is in the ARMS2 gene on chromosome 10.

39. Arctic's Macula Risk[®] does not infringe the claims of the '909 patent.

40. The face of the '524 patent indicates that the PTO issued the '190 patent on April 1, 2008, the inventors of the '524 patent are Gregory S. Hageman and Robert F. Mullins, and the patent is assigned to the University of Iowa Research Foundation.

41. The claims of the '524 patent are directed to the use of changes in levels of complement pathway proteins, including C3, C3a, and C5b-9, to diagnose AMD.

42. Arctic's Macula Risk[®] does not infringe the claims of the '524 patent.

43. The face of the '579 patent indicates that the PTO issued the '579 patent on January 3, 2012, and the inventors of the '909 patent are Gregory S. Hageman and Richard J. Smith.

44. The PTO recorded on August 7, 2008, an assignment of the '579 patent from the named inventors to the University of Iowa Research Foundation.

45. The claims of the '579 patent are directed to SNP rs800292, which is in the CFH gene on chromosome 1, as an indicator that the subject is at a reduced risk of developing AMD.

46. Arctic's Macula Risk[®] does not infringe the claims of the '579 patent.

D. Sequenom's Aggressive Litigation Tactics

47. On December 5, 2011, Michael Malecek, a partner at Kaye Scholer LLP and counsel for Sequenom, wrote Mr. Greg Hines, President and CEO of Arctic, stating that it had come to his attention that "ArcticDx has begun offering or is planning to offer

AMD diagnostic services.” A true and correct copy of the December 5, 2011, letter from Mr. Malecek to Mr. Hines is attached hereto as Exhibit A.

48. Mr. Malecek’s letter to Mr. Hines claimed that “Sequenom is the exclusive licensee of several issued patents and pending patent applications worldwide with claims directed to methods of diagnosing AMD.” (Ex. A.) Mr. Malecek’s letter to Mr. Hines referenced the ’190 patent, the ’727 patent, the ’909 patent, and the ’524 patent, as well as U.S. Patent Application No. 11/816167, which the PTO issued as the ’579 patent shortly after the date of Mr. Malecek’s letter. (*Id.* at Appendix.) Mr. Malecek’s letter purported to provide “notice” to ArcticDx of the DJ Patents and requested that ArcticDx “discontinue any diagnostic activities that you may be currently engaging in which are covered by [the DJ Patents,]” and threatened that “Sequenom may seek all damages owed to it for any infringement” of the DJ Patents. (Ex. A.)

49. Mr. Malecek’s letter to Mr. Hines concluded by requesting “a detailed explanation” for Arctic’s belief, if any, that Sequenom’s rights in the 13 U.S. patents and patent applications—and the other 60 foreign patents and patent applications (whether pending, published, issued, granted, or allowed) cited in the Appendix to Mr. Malecek’s letter—“are not relevant to [Arctic’s] AMD testing services.” (*Id.*) Mr. Malecek’s letter requested a response, in writing, by January 11, 2012. (*Id.*)

50. Also on December 5, 2011, Mr. Malecek wrote a letter to Dr. Michael Salem, President and CEO of National Jewish Health (“NJH”). A true and correct copy of the December 5, 2011, letter from Mr. Malecek to Mr. Salem is attached hereto as Exhibit B.

51. Mr. Malecek's letter to Dr. Salem claimed that it had come to his attention that "Advanced Diagnostic Laboratories of National Jewish Health [(“NJH”)], in conjunction with ArcticDx, has begun offering or is planning to offer AMD diagnostic services." (Ex. B.) The remainder of Mr. Malecek's letter to Dr. Salem, including the threats related to the DJ patents and request for a response in writing by January 11, 2012, is substantively the same as Mr. Malecek's letter to Mr. Hines. (Exs. A and B.)

52. According to Sequenom, Arctic and its Macula Risk[®] customers have infringed and are infringing each of the DJ patents.

53. On December 20, 2011, Mr. Arthur Renaud wrote to Mr. Malecek in response to his December 5 Letters and identified himself as Canadian counsel for ArcticDx. A true and correct copy of the December 20, 2011, letter from Mr. Renaud to Mr. Malecek is attached hereto as Exhibit C.

54. Mr. Renaud observed that Mr. Malecek's December 5 letters failed to provide a claim chart or any infringement analysis and noted that, absent these items from Mr. Malecek or Sequenom, the requested detailed response "is neither practical nor warranted." (*Id.*) Mr. Renaud also observed that Mr. Malecek's letter to Dr. Salem "was intended to interfere with [ArcticDx's] economic relationship with NJH" and demanded that Mr. Malecek retract the letter to Mr. Hines. (*Id.*)

55. Lastly, Mr. Renaud requested that Mr. Malecek "direct all future correspondence on this matter to our firm." (*Id.*)

56. Despite Mr. Renaud's request, neither Sequenom nor Mr. Malecek retracted Mr. Malecek's letter to Dr. Salem. Also, neither Sequenom nor Mr. Malecek has responded to Mr. Renaud's December 20, 2011 letter.

57. Sequenom has consistently and aggressively threatened to litigate—and has litigated—its genetic diagnostics-related patents rights to stop perceived competitors from lawfully commercializing their own intellectual property.

58. Upon information and belief, in the last few months alone, Sequenom has engaged in a letter writing campaign to threaten not only ArcticDx and NJH, but other companies practicing in the genetic diagnostics field as well.

59. For example, Mr. Malecek sent letters on behalf of Sequenom dated December 6, 2011 to Aria Diagnostics, Inc. (“Aria”) and Natera Diagnostics, Inc. (“Natera”). *See Aria Diagnostics, Inc. v. Sequenom, Inc.*, Case No. 3:11:cv-06391-SI (N.D. Cal., Dec. 19, 2011) (D.I. 1); *Natera, Inc. v. Sequenom, Inc.*, Case No. 3:12:cv-00132-SI (N.D. Cal., Jan. 6, 2012) (D.I. 1). In those letters, Mr. Malecek made threats similar to those made in his December 5 letters and cited U.S. Patent No. 6,258,540 (“the ’540 patent”). *See id.*

60. Aria and Natera responded to those letters by filing declaratory judgment actions against Sequenom directed to the ’540 patent. *See, e.g., Aria*, Case No. 3:11:cv-06391-SI; *Natera*, Case No. 3:12:cv-00132-SI.

61. Shortly thereafter, Sequenom initiated separate infringement actions asserting the ’540 patent against both Aria and Natera. *See Sequenom, Inc. v. Aria Diagnostics, Inc. et al.*, Case No. 3:12:cv-00189-BEN-BGS (S.D. Cal., Jan. 24, 2012); *Sequenom, Inc. v. Natera, Inc., et al.*, Case No. 3:12:cv-00184-DMS-MDD (S.D. Cal., Jan. 24, 2012).

62. Based on Sequenom’s aggressive correspondence and litigious history, and its failure to respond to Mr. Renaud’s letter, Arctic has formed a reasonable belief

that Sequenom will employ the same litigation tactics in an attempt to eliminate lawful competition from Arctic.

COUNT I
(CLAIM FOR INFRINGEMENT OF THE '592 PATENT)

63. The allegations in Paragraphs 1 through 62 of this Complaint are incorporated by reference as if set forth in their entirety.

64. Defendants' have directly infringed at least one claim of the '592 patent by the use, sale, or offer for sale of, genetic diagnostic products, including Sequenom's RetnaGene product[®].

65. Defendants have contributed to or induced the infringement of at least one claim of the '592 patent by contributing to or inducing the use of genetic diagnostic products, including Sequenom's RetnaGene product[®].

66. Defendants had and have notice of the '592 patent and their infringement of at least one claim of the '592 patent has been deliberate and willful.

67. Defendants' infringing acts have not been authorized by ArcticDx and are in violation of ArcticDx's rights related to the '592 patent.

68. As a direct result of Defendants' infringing acts, ArcticDx has suffered and continues to suffer damages and irreparable harm.

69. ArcticDx has no adequate remedy at law for Defendants' infringing acts. Unless and until Defendants' infringing acts are enjoined by this Court, ArcticDx will continue to be damaged and irreparably harmed.

COUNT II

(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '190 PATENT)

70. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 of this Complaint as if set forth in their entirety.

71. Upon information and belief, Sequenom purports to have the rights to assert the claims of the '190 patent.

72. Arctic's Macula Risk[®] product and Arctic's activities related thereto have not and do not directly infringe any valid and enforceable claim of the '190 patent.

73. Arctic has not induced, and does not induce, infringement of any valid and enforceable claim of the '190 patent.

74. Arctic has not contributorily infringed, and does not contributorily infringe, any valid and enforceable claim of the '190 patent.

75. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether Arctic's Macula Risk[®] product and Arctic's activities related thereto infringe the claims of the '190 patent.

76. Arctic is entitled to a judicial determination and declaration that its Macula Risk[®] product and activities related thereto have not and do not infringe any valid and enforceable claim of the '190 patent.

COUNT III

(DECLARATORY JUDGMENT OF INVALIDITY OF THE '190 PATENT)

77. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 and 71 through 76 of this Complaint as if set forth in their entirety.

78. The claims of the '190 Patent are invalid for failure to meet the requirements of patentability under 35 U.S.C. §§ 102, 103 and/or 112.

79. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether the claims of the '190 patent are invalid.

80. A judicial declaration is necessary and appropriate so that the validity of the claims of the '190 patent and Arctic's rights related thereto may be determined.

COUNT IV
(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '727 PATENT)

81. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 of this Complaint as if set forth in their entirety.

82. Upon information and belief, Sequenom purports to have the rights to assert the claims of the '727 patent.

83. Arctic's Macula Risk[®] product and Arctic's activities related thereto have not and do not directly infringe any valid and enforceable claim of the '727 patent.

84. Arctic has not induced, and does not induce, infringement of any valid and enforceable claim of the '727 patent.

85. Arctic has not contributorily infringed, and does not contributorily infringe, any valid and enforceable claim of the '727 patent.

86. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether Arctic's Macula Risk[®] product and Arctic's activities related thereto infringe the claims of the '727 patent.

87. Arctic is entitled to a judicial determination and declaration that its Macula Risk[®] product and activities related thereto have not and do not infringe any valid and enforceable claim of the '727 patent.

COUNT V
(DECLARATORY JUDGMENT OF INVALIDITY OF THE '727 PATENT)

88. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 and 82 through 87 of this Complaint as if set forth in their entirety.

89. The claims of the '727 Patent are invalid for failure to meet the requirements of patentability under 35 U.S.C. §§ 102, 103 and/or 112.

90. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether the claims of the '727 patent are invalid.

91. A judicial declaration is necessary and appropriate so that the validity of the claims of the '727 patent and Arctic's rights related thereto may be determined.

COUNT VI
(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '909 PATENT)

92. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 of this Complaint as if set forth in their entirety.

93. Upon information and belief, Sequenom purports to have the rights to assert the claims of the '909 patent.

94. Arctic's Macula Risk[®] product and Arctic's activities related thereto have not and do not directly infringe any valid and enforceable claim of the '909 patent.

95. Arctic has not induced, and does not induce, infringement of any valid and enforceable claim of the '909 patent.

96. Arctic has not contributorily infringed, and does not contributorily infringe, any valid and enforceable claim of the '909 patent.

97. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether Arctic's Macula Risk[®] product and Arctic's activities related thereto infringe the claims of the '909 patent.

98. Arctic is entitled to a judicial determination and declaration that its Macula Risk[®] product and activities related thereto have not and do not infringe any valid and enforceable claim of the '909 patent.

COUNT VII
(DECLARATORY JUDGMENT OF INVALIDITY OF THE '909 PATENT)

99. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 and 93 through 98 of this Complaint as if set forth in their entirety.

100. The claims of the '909 Patent are invalid for failure to meet the requirements of patentability under 35 U.S.C. §§ 102, 103 and/or 112.

101. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether the claims of the '909 patent are invalid.

102. A judicial declaration is necessary and appropriate so that the validity of the claims of the '909 patent and Arctic's rights related thereto may be determined.

COUNT VIII
(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '524 PATENT)

103. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 of this Complaint as if set forth in their entirety.

104. Upon information and belief, Sequenom purports to have the rights to assert the claims of the '524 patent.

105. Arctic's Macula Risk[®] product and Arctic's activities related thereto have not and do not directly infringe any valid and enforceable claim of the '524 patent.

106. Arctic has not induced, and does not induce, infringement of any valid and enforceable claim of the '524 patent.

107. Arctic has not contributorily infringed, and does not contributorily infringe, any valid and enforceable claim of the '524 patent.

108. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether Arctic's Macula Risk[®] product and Arctic's activities related thereto infringe the claims of the '524 patent.

109. Arctic is entitled to a judicial determination and declaration that its Macula Risk[®] product and activities related thereto have not and do not infringe any valid and enforceable claim of the '524 patent.

COUNT IX
(DECLARATORY JUDGMENT OF INVALIDITY OF THE '524 PATENT)

110. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 and 104 through 109 of this Complaint as if set forth in their entirety.

111. The claims of the '909 Patent are invalid for failure to meet the requirements of patentability under 35 U.S.C. §§ 102, 103 and/or 112.

112. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether the claims of the '909 patent are invalid.

113. A judicial declaration is necessary and appropriate so that the validity of the claims of the '909 patent and Arctic's rights related thereto may be determined.

COUNT X
(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '579 PATENT)

114. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 of this Complaint as if set forth in their entirety.

115. Upon information and belief, Sequenom purports to have the rights to assert the claims of the '579 patent.

116. Arctic's Macula Risk[®] product and Arctic's activities related thereto have not and do not directly infringe any valid and enforceable claim of the '579 patent.

117. Arctic has not induced, and does not induce, infringement of any valid and enforceable claim of the '579 patent.

118. Arctic has not contributorily infringed, and does not contributorily infringe, any valid and enforceable claim of the '579 patent.

119. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether Arctic's Macula Risk[®] product and Arctic's activities related thereto infringe the claims of the '579 patent.

120. Arctic is entitled to a judicial determination and declaration that its Macula Risk[®] product and activities related thereto have not and do not infringe any valid and enforceable claim of the '579 patent.

COUNT XI
(DECLARATORY JUDGMENT OF NON- INVALIDITY OF THE '579 PATENT)

121. Arctic incorporates by reference the allegations in Paragraphs 1 through 62 and 115 through 120 of this Complaint as if set forth in their entirety.

122. The claims of the '579 Patent are invalid for failure to meet the requirements of patentability under 35 U.S.C. §§ 102, 103 and/or 112.

123. An actual and justiciable case or controversy exists, within the meaning of 28 U.S.C. §§ 2201 and 2202, between Arctic and Sequenom as to whether the claims of the '579 patent are invalid.

124. A judicial declaration is necessary and appropriate so that the validity of the claims of the '579 patent and Arctic's rights related thereto may be determined.

WHEREFORE, Arctic prays that the Court:

- (a) Enter a judgment that Defendants have infringed, either directly, by contribution and/or active inducement, one or more claims of the '592 patent;
- (b) Preliminarily and permanently enjoin Defendants and those in privity with Defendants from further acts of direct infringement, contributory infringement and active inducement of infringement of the '592 patent;
- (c) Award Arctic damages adequate to compensate for Defendants' infringement of the '592 patent;
- (d) Declare that Defendants' infringement of the '592 patent has been knowing and willful;

- (e) Treble the award of any damages pursuant to 35 U.S.C. § 284 and in view of the willful nature of Defendants' infringement of the '592 patent;
- (f) Enter a judgment that Arctic's Macula Risk® product and activities related thereto do not infringe any claim of the '190 patent;
- (g) Enter a judgment that the claims of the '190 patent are invalid;
- (h) Enter a judgment that Arctic's Macula Risk® product and activities related thereto do not infringe any claim of the '727 patent;
- (i) Enter a judgment that the claims of the '727 patent are invalid;
- (j) Enter a judgment that Arctic's Macula Risk® product and activities related thereto do not infringe any claim of the '909 patent;
- (k) Enter a judgment that the claims of the '909 patent are invalid;
- (l) Enter a judgment that Arctic's Macula Risk® product and activities related thereto do not infringe any claim of the '524 patent;
- (m) Enter a judgment that the claims of the '524 patent are invalid;
- (n) Enter a judgment that Arctic's Macula Risk® product and activities related thereto do not infringe any claim of the '579 patent;
- (o) Enter a judgment that the claims of the '579 patent are invalid;
- (p) Declare this to be an exceptional case pursuant to 35 U.S.C. § 285;
- (q) Award Arctic its attorneys' fees, costs and expenses in this action; and
- (r) Award Arctic pre-judgment and post-judgment interest, and such further relief as the Court deems just and proper.

JURY TRIAL DEMAND

Arctic requests a trial by jury of all issues so triable to a jury raised in this Complaint.

/s/ Jason W. Cook

Jason W. Cook (TX Bar No. 24028537)

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