

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

E8 PHARMACEUTICALS LLC and
MASSACHUSETTS INSTITUTE OF
TECHNOLOGY,

Plaintiffs,

v.

NAVIGENICS, INC.,

Defendant.

Civil Action No. _____

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs E8 Pharmaceuticals LLC and Massachusetts Institute of Technology by their attorneys complain of Defendant Navigenics, Inc. (“Navigenics”) as follows:

Nature of the Action

1. This is an action for patent infringement under 35 U.S.C. § 271, *et seq.*, by Plaintiffs against Navigenics, Inc. for infringement of United States Patent No. 6,703,228 (the “‘228 patent”). Navigenics uses the pioneering technology claimed in the ‘228 patent to provide commercial genetic counseling and clinical testing services using GeneChip® products manufactured by Affymetrix, Inc. Through the actions complained of herein, Navigenics has willfully and knowingly exploited the ‘228 patent technology in defiance of the rights of Plaintiffs.

The Parties

2. Plaintiff Massachusetts Institute of Technology (“M.I.T.”) is a Massachusetts corporation with its principal place of business at 77 Massachusetts Avenue, Cambridge, Massachusetts. M.I.T. is the assignee of the ‘228 patent, which is entitled “Methods and

Products Related to Genotyping and DNA Analysis.” A copy of the ‘228 patent is attached at Exhibit A.

3. E8 Pharmaceuticals LLC (“E8”) is a Delaware limited liability company with its principal place of business at 35 Foster Street, Cambridge, Massachusetts. E8 has licensed the ‘228 patent from M.I.T. and has the exclusive right to commercially exploit the ‘228 patent, including the exclusive right to grant commercial sublicenses. E8 was co-founded by M.I.T. Ludwig Professor of Biology Dr. David Housman, co-inventor of the ‘228 patent, and Dr. Richard Mulligan, Mallinckrodt Professor of Genetics at Harvard Medical School.
4. Defendant Navigenics, Inc. (“Navigenics”) is a Delaware corporation with its principal place of business at 1001 E. Hillsdale Blvd, Suite 550, Foster City, California. Navigenics provides personal genetics testing services to customers nationwide, including customers residing in this judicial District, through an interactive Internet website which enables customers to input personal information, purchase the offered services, and receive test results and other personalized information from Navigenics. Navigenics has transacted business in this judicial District by selling and offering to sell the accused infringing services to residents of this judicial District through its interactive website.

Jurisdiction and Venue

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).
6. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and 1400(b).

The ‘228 Patent—A Pioneering Discovery Relating to Genotyping and DNA Analysis

7. The pioneering technology claimed in the '228 patent enables users to perform accurate, reproducible and cost-effective genetic analysis, using minute amounts of sample DNA and a small number of reactants to generate results that were previously impossible, even in specialized high throughput centers using many thousands of different reactants.
8. Dr. David Housman and his colleagues at M.I.T. developed the pioneering methods disclosed and claimed in the '228 patent.
9. On March 9, 2004 the U.S. Patent Office issued the '228 patent assigned to M.I.T. with the Housman group as the named inventors.

Navigenics's Willful Infringement Of The '228 Patent

10. Navigenics has directly infringed the '228 patent by providing, selling and offering to sell, on a nationwide basis, genetic counseling services that use certain GeneChip® products manufactured by Affymetrix, Inc., including but not limited to the Affymetrix 6.0 Array and associated reagents, in the patented methods claimed in the '228 patent.
11. In February 2009, Navigenics purchased from Affymetrix substantially all of the assets of Affymetrix's microarray- and TaqMan-based clinical testing services business performed at Affymetrix's CLIA facility located in West Sacramento, California. Prior to Navigenics's purchase of the CLIA facility, Affymetrix provided, sold and offered to sell services at that facility that directly infringe the '228 patent. As part of its purchase of the CLIA facility, Navigenics has taken over infringing activities that were previously performed by Affymetrix and has continued to provide, sell and offer to sell services that directly infringe the '228 patent.
12. Navigenics's infringement is continuing despite knowledge of the '228 patent since at least October 2008. Navigenics's willful infringement is confirmed by its failure to take

any further steps to address this known risk that its ongoing activities constituted infringement of the valid '228 patent and its insistence on certain contractual provisions regarding the '228 patent and this litigation as part of its purchase of Affymetrix's CLIA facility and takeover of Affymetrix's clinical testing services business.

13. Navigenics has caused and will continue to cause Plaintiffs damage by infringing the '228 patent.

WHEREFORE, Plaintiffs pray that this Court:

- A. Enter judgment that Navigenics has infringed the '228 patent;
- B. Award Plaintiffs their damages resulting from the patent infringement of Navigenics, pursuant to 35 U.S.C. § 284;
- C. Find that Navigenics's infringement has been willful and increase the damages awarded to Plaintiffs to three times the amount assessed, pursuant to 35 U.S.C. § 284;
- D. Award Plaintiffs their prejudgment interest on their damages and their costs, pursuant to 35 U.S.C. § 284;
- E. To the extent that Navigenics continues to infringe Plaintiffs' patented technology, yet refuses to take a license, either award Plaintiffs an ongoing royalty sufficient to compensate adequately for Navigenics's ongoing infringement or issue a permanent injunction prohibiting Navigenics from continued unlicensed infringement;
- F. Find that this is an exceptional case and award Plaintiffs their reasonable attorney fees, pursuant to 35 U.S.C. § 285; and
- G. Award Plaintiffs any such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated: May 19, 2009

DUANE MORRIS LLP

/s/ Michael R. Gottfried

Michael R. Gottfried (BBO # 542156)
Christopher S. Kroon (BBO # 660286)
470 Atlantic Avenue, Suite 500
Boston, Massachusetts 02210-2600
(857) 488-4200 (phone)
(857) 488 -4201 (facsimile)
mrgottfried@duanemorris.com
cskroon@duanemorris.com

WILEY REIN LLP

James Wallace, Jr.
John B. Wyss
Mark A. Pacella (BBO # 600255)
Kevin P. Anderson
1776 K Street, NW
Washington, DC 20006
(202) 719-7000 (phone)
(202) 719-7049 (fax)
jwallace@wileyrein.com
jwyss@wileyrein.com
mpacella@wileyrein.com
kanderson@wileyrein.com

ATTORNEYS FOR PLAINTTIFS