

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**E8 PHARMACEUTICALS LLC and  
MASSACHUSETTS INSTITUTE OF  
TECHNOLOGY,**

**Plaintiffs**

**vs.**

**AFFYMETRIX, 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 Affymetrix, Inc. 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 Affymetrix, Inc. for infringement of United States Patent No. 6,703,228 (the “‘228 patent”) through Affymetrix’s use, manufacture, and sale of GeneChip® products and services that use the pioneering technology claimed in the ‘228 patent as well as Affymetrix’s inducement and contribution to its customers’ use of the pioneering technology claimed in the ‘228 patent. Through the actions complained of herein, Affymetrix, Inc. has willfully and knowingly exploited that 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, MA. 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, MA 02138-4826. E8 has licensed the ‘228 patent from M.I.T. and has the exclusive right to grant sublicenses under the ‘228 patent. 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 Affymetrix, Inc. (“Affymetrix”) is a Delaware corporation with its principal place of business at 3420 Central Expressway, Santa Clara, California.

### **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.

**Affymetrix's Subsequent Commercialization of the Methods**

10. Dr. R. Sapolsky of Affymetrix on September 10, 2004 filed a patent application (serial number 10/942,479) with the U.S. Patent and Trademark Office ("PTO") claiming priority to an earlier 1994 application..
11. On March 9, 2005, Affymetrix filed new claims with the PTO corresponding to the claims of the '228 patent and thereby asserted the patentability of and ownership of the methods claimed in what is now the '228 patent. Because both Affymetrix and M.I.T. were claiming the same methods and claimed that each was first to develop the methods, the PTO instituted an interference on April 13, 2006, Interference No. 105,439.
12. After more than a year of formal proceedings, the U.S. Patent Office on May 2, 2007 adjudicated that the Housman group at M.I.T. was the first to invent the claimed methods and was therefore entitled to the patent.

**Affymetrix's Willful Infringement Of The '228 Patent**

13. Affymetrix is making, having made, using, offering to sell, and/or selling GeneChip® products and directing its customers to use them according to the methods of the '228 patent.
14. Affymetrix is directly infringing, actively inducing others to infringe, and/or contributing to the infringement of the '228 patent by making, using, offering to sell, and/or selling within the United States products and directing customers, including customers located in

this district, to use those products in the methods covered by the '228 patent.

Affymetrix's customers are directly infringing the '228 patent by practicing the patented method in accordance with Affymetrix's guidance. They will continue to so infringe unless enjoined by this Court.

15. Affymetrix has significant contacts with this venue. For example, Affymetrix manufactured GeneChip® instrumentation products at its manufacturing facility in Bedford, Massachusetts. Affymetrix's wholly owned subsidiary, Genetic Microsystems, Inc., is or has been incorporated in Massachusetts and is or has been a manufacturer of instruments for fabricating and analyzing DNA arrays used in life sciences R&D applications.
16. Affymetrix's infringement is continuing despite knowledge of the '228 patent from at least Affymetrix's filing at the PTO seeking initiation of Interference No. 105,439. Affymetrix's express knowledge of the patent and attempts to acquire ownership of the claims confirm that Affymetrix either knew or should have known it faced an unjustifiably high risk of harm since at least the time of the PTO filing seeking initiation of Interference No. 105,439. Affymetrix's willful infringement is confirmed by Affymetrix's failure to take any further steps to address this known risk that its ongoing activities constituted infringement of the valid '228 patent.
17. Affymetrix has caused and will continue to cause Plaintiffs damage by infringing the '228 patent. Affymetrix's customers have caused and will continue to cause Plaintiffs damage by infringing the '228 patent in accordance with Affymetrix's guidance.

**WHEREFORE**, Plaintiffs pray that this Court:

- A. Enter judgment that Affymetrix has infringed the '228 patent;

B. Award Plaintiffs their damages resulting from the patent infringement of both Affymetrix and its customers pursuant to 35 U.S.C. § 284;

C. Find that Affymetrix'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 Affymetrix continues to infringe Plaintiffs' patented technology, yet refuses to take a license, either award Plaintiffs an ongoing royalty sufficient to compensate adequately for Affymetrix's ongoing infringement or issue a permanent injunction prohibiting Affymetrix 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.

Respectfully submitted,

Dated: July 1, 2008

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  
Phone: 857.488.4200  
Fax: 857.488.4201  
[MRGottfried@duanemorris.com](mailto:MRGottfried@duanemorris.com)

WILEY REIN LLP

James Wallace, Jr. (to be admitted *pro hac vice*)  
John B. Wyss (to be admitted *pro hac vice*)  
Mark A. Pacella (BBO # 600255)  
Kevin P. Anderson (to be admitted *pro hac vice*)  
Swati A. Kabaria (to be admitted *pro hac vice*)  
1776 K Street, N.W.  
Washington, D.C. 20006  
Phone: 202.719.7000  
Fax: 202.719.7049  
[JWallace@wileyrein.com](mailto:JWallace@wileyrein.com)  
[JWyss@wileyrein.com](mailto:JWyss@wileyrein.com)  
[MPacella@wileyrein.com](mailto:MPacella@wileyrein.com)  
[KAnderson@wileyrein.com](mailto:KAnderson@wileyrein.com)  
[SKabaria@wileyrein.com](mailto:SKabaria@wileyrein.com)

ATTORNEYS FOR PLAINTIFFS