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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA; and BECTON,  
DICKINSON and COMPANY,  
  
Plaintiffs,  
  
v.  
  
AFFYMETRIX, INC.; and LIFE  
TECHNOLOGIES CORP.,  
  
Defendants.

Case No.: 17-cv-01394-H-NLS

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT OF NON-  
INFRINGEMENT OF THE '799  
PATENT**

[Doc. No. 106.]

On February 23, 2018, Defendants Affymetrix, Inc. and Life Technologies Corp. filed a motion for summary judgment of non-infringement of U.S. Patent No. 9,085,799. (Doc. No. 106.) On April 9, 2018, Plaintiffs the Regents of the University of California, Becton, Dickinson and Company, Sirigen, Inc., and Sirigen II Limited filed an opposition to Defendants' motion for summary judgment. (Doc. No. 153.) On April 16, 2018, Defendants filed their reply. (Doc. No. 164.) A hearing on Defendants' motion is currently scheduled for May 14, 2018. The Court, pursuant to its discretion under Local Civil Rule 7.1(d)(1), determines the matter to be appropriate for resolution without oral argument, submits it on the papers, and vacates the motion hearing. For the reasons below, the Court grants Defendants' motion for summary judgment of non-infringement of the '799 patent.

## Background

### **I. Procedural History**

On July 10, 2017, Plaintiffs Regents and Becton, Dickinson filed a complaint for patent infringement against Defendants Affymetrix and Life Technologies, alleging infringement of U.S. Patent No. 9,085,799, U.S. Patent No. 8,110,673, and U.S. Patent No. 8,835,113. (Doc. No. 1, Compl.) On September 8, 2017, Defendants filed an answer to Plaintiffs' complaint. (Doc. No. 37.)

On October 6, 2017, the Court issued a scheduling order. (Doc. No. 55.) On November 20, 2017, the Court denied Plaintiff Becton, Dickinson's motion for a preliminary injunction without prejudice. (Doc No. 69.) On November 30, 2017, the Court issued an amended scheduling order. (Doc. No. 76.)

On February 7, 2018, the Court granted the parties' joint motion for leave for Plaintiffs to file a first amended complaint and to modify the scheduling order. (Doc. No. 100.) On February 9, 2018, Plaintiffs filed an amended complaint: (1) adding Sirigen and Sirigen II as additional Plaintiffs and adding claims that Defendants' products infringe four Sirigen patents: U.S. Patent No. 9,547,008, U.S. Patent No. 9,139,869, U.S. Patent No. 8,575,303, and U.S. Patent No. 8,455,613; (2) adding infringement allegations against additional accused products; and (3) adding allegations of induced infringement against Defendants. (Doc. No. 101, FAC.)

On February 23, 2018, the Court issued a second amended scheduling order. (Doc. No. 105.) On March 26, 2018, the Court issued a claim construction order, construing the disputed claim terms from the '799 patent, the '673 patent, and the '113 patent. (Doc. No. 138.) By the present motion, Defendants move for summary judgment of non-infringement of the '799 patent. (Doc. No. 118 at 12.)

### **II. The '799 Patent**

The '799 patent is entitled "Methods and compositions for detection and analysis of polynucleotides using light harvesting multichromophores." U.S. Patent No. 9,085,799 (filed Jul. 21, 2015), at (54). The invention disclosed in the '799 patent relates to "methods,

1 articles and compositions for the detection and analysis of polynucleotides in a sample.”  
2 Id. at 1:28-30.

3 The specification of the '799 patent explains: “Methods permitting DNA sequence  
4 detection in real time and with high sensitivity are of great scientific and economic interest.  
5 Their applications include medical diagnostics, identification of genetic mutations, gene  
6 delivery monitoring and specific genomic techniques.” Id. at 1:34-38 (footnotes omitted).  
7 The specification further explains that at the time of the invention, there was a need in the  
8 art for methods of detecting and analyzing particular polynucleotides in a sample, and that  
9 such methods are provided in the '799 patent. Id. at 1:49-58.

10 The specification of the '799 patent describes the method as follows:

11 The method of the invention comprises contacting a sample with an aqueous  
12 solution comprising at least two components; (a) a light harvesting,  
13 polycationic, luminescent multichromophore system such as, for example, a  
14 conjugated polymer, semiconductor quantum dot or dendritic structure that is  
15 water soluble, and (b) a sensor polynucleotide conjugated to a luminescent  
16 signaling chromophore (referred to as “Oligo-C\*”).

17 Id. at 3:18-25.

18 Claim 1 of the '799 patent claims:

19 1. A method comprising:

20 (a) contacting a sample with a light harvesting multichromophore system, the  
21 system comprising:

22 i) a signaling chromophore; and

23 ii) a water-soluble conjugated polymer comprising a delocalized  
24 electronic structure, wherein the polymer can transfer energy from its  
25 excited state to the signaling chromophore to provide a greater than 4  
26 fold increase in fluorescence emission from the signaling chromophore  
27 in the absence of the polymer;

28 (b) applying a light source to the sample; and

1 (c) detecting whether light is emitted from the signaling chromophore.

2 Id. at 21:51-65.

3 **Discussion**

4 **I. Legal Standards**

5 **A. Legal Standards for a Motion for Summary Judgment**

6 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil  
7 Procedure if the moving party demonstrates that there is no genuine issue of material fact  
8 and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp.  
9 v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing  
10 substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc.,  
11 477 U.S. 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt.,  
12 Inc., 618 F.3d 1025, 1031 (9th Cir. 2010). “A genuine issue of material fact exists when  
13 the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
14 Fortune Dynamic, 618 F.3d at 1031 (internal quotation marks and citations omitted);  
15 accord Anderson, 477 U.S. at 248. “Disputes over irrelevant or unnecessary facts will not  
16 preclude a grant of summary judgment.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors  
17 Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).

18 A party seeking summary judgment always bears the initial burden of establishing  
19 the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving  
20 party can satisfy this burden in two ways: (1) by presenting evidence that negates an  
21 essential element of the nonmoving party’s case; or (2) by demonstrating that the  
22 nonmoving party failed to establish an essential element of the nonmoving party’s case that  
23 the nonmoving party bears the burden of proving at trial. Id. at 322-23; Jones v. Williams,  
24 791 F.3d 1023, 1030 (9th Cir. 2015). Once the moving party establishes the absence of a  
25 genuine issue of material fact, the burden shifts to the nonmoving party to “set forth, by  
26 affidavit or as otherwise provided in Rule 56, ‘specific facts showing that there is a genuine  
27 issue for trial.’” T.W. Elec. Serv., 809 F.2d at 630 (quoting former Fed. R. Civ. P. 56(e));  
28

1 accord Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). To carry  
2 this burden, the non-moving party “may not rest upon mere allegation or denials of his  
3 pleadings.” Anderson, 477 U.S. at 256; see also Behrens v. Pelletier, 516 U.S. 299, 309  
4 (1996) (“On summary judgment, . . . the plaintiff can no longer rest on the pleadings.”).  
5 Rather, the nonmoving party “must present affirmative evidence . . . from which a jury  
6 might return a verdict in his favor.” Anderson, 477 U.S. at 256.

7 When ruling on a summary judgment motion, the court must view the facts and draw  
8 all reasonable inferences in the light most favorable to the non-moving party. Scott v.  
9 Harris, 550 U.S. 372, 378 (2007). The court should not weigh the evidence or make  
10 credibility determinations. See Anderson, 477 U.S. at 255. “The evidence of the non-  
11 movant is to be believed.” Id. Further, the Court may consider other materials in the record  
12 not cited to by the parties, but it is not required to do so. See Fed. R. Civ. P. 56(c)(3);  
13 Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010).

#### 14 B. Legal Standards for Patent Infringement

15 A patent infringement analysis proceeds in two steps. Markman v. Westview  
16 Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995). In the first step, the court construes  
17 the asserted claims as a matter of law. See id. In the second step, the factfinder compares  
18 the claimed invention to the accused device. Id. “A determination of infringement,  
19 whether literal or under the doctrine of equivalents, is a question of fact.” Allergan, Inc. v.  
20 Sandoz Inc., 796 F.3d 1293, 1311 (Fed. Cir. 2015).

21 “The patentee bears the burden of proving infringement by a preponderance of the  
22 evidence.” Creative Compounds, LLC v. Starmark Labs., 651 F.3d 1303, 1314 (Fed. Cir.  
23 2011). “To prove literal infringement, the patentee must show that the accused device  
24 contains every limitation in the asserted claims. If even one limitation is missing or not  
25 met as claimed, there is no literal infringement.” Riles v. Shell Exploration & Prod. Co.,  
26 298 F.3d 1302, 1308 (Fed. Cir. 2002). “Accordingly, a court may determine infringement  
27 on summary judgment ‘when no reasonable jury could find that every limitation recited in  
28 the properly construed claim either is or is not found in the accused device.’” Innovention

1 Toys, LLC v. MGA Entm't, Inc., 637 F.3d 1314, 1319 (Fed. Cir. 2011).

2 **II. Analysis**

3 Defendants argue that they are entitled to summary judgment of non-infringement  
4 as to the '799 Patent because the accused products do not use a “multichromophore system”  
5 or a “sample” within the meaning of the '799 patent. (Doc. No. 118 at 5-6.) In response,  
6 Plaintiffs concede, subject to their rights of appeal, that they cannot prove infringement of  
7 the '799 patent under the Court’s claim constructions. (Doc. No. 163 at 1, 5.)

8 Claim 1 of the '799 patent, the only independent claim in the '799 patent, claims in  
9 relevant party: “A method comprising: (a) contacting a sample with a light harvesting  
10 multichromophore system . . . .” '799 Patent at 21:51-53. Because claim 1 is the only  
11 independent claim of the '799 patent, and it includes the “sample” and “multichromophore  
12 system” claim limitations, all of the other claims in the '799 patent, the dependent claims,  
13 also include these two claim limitations. In its claim construction order, the Court  
14 construed the term “sample” as “a biological material that is analyzed for a target  
15 polynucleotide.” (Doc. No. 138 at 12.) In addition, the Court construed the term  
16 “multichromophore system” as “a polycationic multichromophore.” (Id. at 15.)

17 In their motion, Defendants argue that the accused products do not meet the  
18 “sample” limitation because the accused products are not used with polynucleotide  
19 samples. (Doc. No. 118 at 5-6.) Defendants also argue that the accused products do not  
20 meet the “multichromophore system” limitation because the accused products are not  
21 positively-charged (cationic). (Id. at 5.) Further, Defendants have supported these  
22 arguments with citations to evidence in the record stating that the accused products are not  
23 used with target polynucleotide samples, and they are not positively charged. (See id.  
24 (citing Doc. No. 62-11, Burgess PI Decl. ¶¶ 45-48, 56-58).) In response, Plaintiffs concede,  
25 subject to their rights of appeal, that they cannot prove infringement of the '799 patent  
26 under the Court’s constructions of the claim terms “sample” and “multichromophore  
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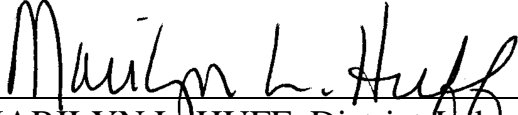
1 system.”<sup>1</sup> (Doc. No. 163 at 1, 5.) In light of Plaintiffs’ concession that they cannot prove  
2 infringement of the ’799 patent under the Court’s claim constructions, the Court grants  
3 Defendants’ motion for summary judgment of non-infringement of the ’799 patent.<sup>2</sup>

4 **Conclusion**

5 For the reasons above, the Court grants Defendants’ motion for summary judgment  
6 of non-infringement of the ’799 patent. The action will proceed on the remaining patents-  
7 in-suit.

8 **IT IS SO ORDERED.**

9 DATED: May 1, 2018

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12 MARILYN L. HUFF, District Judge  
13 UNITED STATES DISTRICT COURT  
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16 \_\_\_\_\_  
17 <sup>1</sup> Although Plaintiff concedes that it cannot prove infringement of the ’799 patent under the Court’s  
18 claim constructions, Plaintiffs argue that the Court’s claim constructions for the terms “sample” and  
19 “multichromophore system” are legally erroneous. (Doc. No. 163 at 5-7.) The Court rejects this  
20 argument.

21 The Court’s March 26, 2018 claim construction order sets forth the Court’s claim constructions  
22 for the terms “sample” and “multichromophore system.” (Doc. No. 138 at 7-15.) Plaintiffs have not  
23 moved for reconsideration of the Court’s claim constructions. Further, even if Plaintiffs had filed a motion  
24 for reconsideration of the Court’s claim constructions, the Court would deny Plaintiffs’ motion. In arguing  
25 that the Court’s claim constructions are legally erroneous, Plaintiffs present the same arguments that they  
26 already made in their claim construction briefs and at the Markman hearing. This is not a proper basis for  
27 reconsideration of a prior order. See Exxon Shipping Co. v. Baker, 554 U.S. 471, 486 n.5 (2008) (A  
28 motion for reconsideration “may not be used to relitigate old matters, or to raise arguments or present  
evidence for the first time that reasonably could have been raised prior to entry of [the order].”); Marlyn  
Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).

<sup>2</sup> In their motion, Defendants also argue that they are entitled to summary judgment of non-  
infringement as to the ’799 patent because the accused products do not meet the “greater than 4-fold”  
limitation. (Doc. No. 118 at 6-9.) Because the Court grants Defendants’ motion for summary judgment  
of non-infringement of the ’799 patent on the basis that the accused products do not meet the “sample”  
and “multichromophore system” limitations, the Court declines to address this additional argument set  
forth in Defendants’ motion.