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

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 vs.

14 BRETT A. COHEN AND DAVID V. MYERS,

15 Defendants.

Case No. **'10CV2514 L WMC**

**COMPLAINT FOR VIOLATIONS OF
THE FEDERAL SECURITIES LAWS**

16 Plaintiff Securities and Exchange Commission (“Commission”) alleges as follows:

17 **SUMMARY**

18 1. This case involves unlawful insider trading in the securities of two molecular
19 diagnostics companies, Sequenom, Inc. (“Sequenom”) and Exact Sciences Corporation
20 (“EXAS”). Tipper A, a patent agent employed by Sequenom, learned material nonpublic
21 information about the development of one of Sequenom’s diagnostic products, and separately
22 about Sequenom’s proposed acquisition of EXAS, and illegally tipped his brother, Tipper B.
23 Tipper B in turn tipped defendant Brett A. Cohen (“Cohen”), his fraternity brother, who tipped
24 defendant David V. Myers (“Myers”), Cohen’s uncle. Myers traded on the basis of Tipper A’s
25 material nonpublic information and realized illicit profits of approximately \$607,640 on the
26 purchase and sale of EXAS securities, and the purchase and sale of put options on Sequenom,
27 and unrealized profits on 1,000 shares of EXAS stock.
28

1 Nasdaq Global Market under the symbol “SQNM.” Sequenom’s options trade on multiple
2 exchanges, including the Chicago Board Options Exchange.

3 8. EXAS is a Delaware corporation located in Madison, Wisconsin. EXAS is a
4 molecular diagnostics company that focuses on the early detection and prevention of colorectal
5 cancer. EXAS’ common stock is registered with the Commission pursuant to Section 12(b) of
6 the Exchange Act, and its shares are traded on The Nasdaq Capital Market.

7 **THE DEFENDANTS’ FRAUDULENT CONDUCT**

8 **I. Tipper A’s Duty of Confidentiality to Sequenom**

9 9. Tipper A has been a patent agent at Sequenom since 2002, and works in the
10 company’s legal department on intellectual property matters. As an employee of Sequenom,
11 Tipper A had a duty not to disclose any confidential information he learned in the course of his
12 employment and not to use the information for his benefit or the benefit of others. At all times
13 during his employment at Sequenom, Tipper A was aware of this duty of confidentiality.

14 10. In 2002, at the time Tipper A was hired by Sequenom, he signed an
15 “Acknowledgment of Receipt of Employee Handbook,” in which he agreed to familiarize
16 himself with the information in the Handbook and to observe the policies set forth in it, including
17 Sequenom’s Insider Trading Policy.

18 11. Sequenom made available to employees its Insider Trading Policy on its internal
19 internet site and periodically required employees to acknowledge in writing their knowledge and
20 awareness of the Insider Trading Policy. The Policy explicitly warned that “[f]ailure to comply
21 with these procedures could result in a serious violation of the securities laws by you and/or
22 Sequenom and can involve both civil and criminal penalties.” The Policy defined the term
23 “insider”: “An ‘insider’ is a person who possesses, or has access to, material information
24 concerning Sequenom that has not been fully disclosed to the public.” The Policy explained that
25 a “person can be an insider for a limited time with respect to certain material information even
26 though he or she is not an officer or director. For example, a secretary who knows that a large
27 contract has just been received or that an acquisition is about to occur may be an insider with
28 respect to that information until the news has been fully disclosed to the public.” The Policy

1 states that “information should be regarded as material if there is a likelihood that it would be
2 considered important by an investor in making a decision regarding the purchase or sale of
3 Sequenom stock.”

4 12. Sequenom’s 2008 Code of Business Conduct and Ethics reiterated the duty of
5 confidentiality owed by employees and the restrictions on use of material nonpublic information
6 by Sequenom employees. The 2008 Code explicitly stated, with regard to Insider Trading:
7 “Employees who have access to confidential (or ‘inside’) information are not permitted to use or
8 share that information for stock trading purposes, or for any other purpose except to conduct
9 Company-related business.” It further stated: “To use material non-public information in
10 connection with the buying or selling of securities, including ‘tipping’ others who might make an
11 investment decision on the basis of this information, is not only unethical, it is illegal.”

12 13. From time to time throughout his employment, Tipper A received written copies
13 of these policies and/or was required to review them on Sequenom’s internal internet site, and
14 Tipper A acknowledged his obligation to comply with these policies and maintain the
15 confidentiality of Sequenom’s confidential information, which included information regarding
16 proposed acquisitions and new project or product announcements.

17 **II. The Insider Tipping and Trading**

18 **A. Insider Tipping and Trading in EXAS Securities**

19 14. In mid 2008, Sequenom explored the acquisition of EXAS. In late September
20 2008, Sequenom executives flew to EXAS’ headquarters to conduct due diligence. Around the
21 same time, Tipper A began conducting due diligence on EXAS’ intellectual property. Other than
22 Sequenom’s directors and executive officers, Tipper A was one of the few Sequenom employees
23 aware of the potential acquisition due to his position as a patent agent and his assignment to
24 conduct due diligence on EXAS’ intellectual property. Tipper A knew that the subject of the
25 proposed acquisition was confidential. Internal Sequenom documents regarding the potential
26 acquisition were marked “CONFIDENTIAL,” and the EXAS acquisition was given a code name
27 to maintain its confidentiality.
28

1 15. On October 22, 2008, at approximately 4:41 p.m.,¹ Sequenom’s general counsel
2 sent EXAS a letter of intent expressing Sequenom’s interest in acquiring EXAS which included
3 pricing and other acquisition terms. Earlier the same day, Tipper A had provided the general
4 counsel with a list of EXAS intellectual property to attach to the letter of intent.

5 16. Also on October 22, 2008, at approximately 11:40 a.m., Tipper A sent an email to
6 his brother Tipper B, asking him to call Tipper A at his home telephone number. At 11:58 a.m.,
7 Tipper A placed a two minute call to his brother Tipper B. At 12:05 p.m., Tipper B made a one
8 minute call to Cohen, followed immediately afterwards by another call to Tipper A at 12:06 p.m.
9 At 1:17 p.m., Cohen called Myers. Shortly after the call from Cohen, Myers transferred \$50,000
10 from his bank account to his brokerage account.

11 17. On the next day, October 23, 2008, Cohen called Tipper A at 10:47 a.m., and the
12 two talked for approximately seven minutes. A few hours after the call, at 2:29 p.m., Tipper B e-
13 mailed Cohen and wrote, “[a]ny word related to Blu H@rsesh0e? La Jolla says the times are
14 ripe.” In the movie, *Wall Street*, the phrase, “Blue Horseshoe loves Anacot Steel,” is used as an
15 insider trading code. Tipper A lived and worked near La Jolla, California. Cohen responded
16 that, “[h]e’s probably coming this way for the holidays—call me if you want to chat.” Cohen’s
17 response apparently is referring to his uncle, Myers, as “Blu H@resh0e” because Myers traveled
18 to see Cohen over Thanksgiving.

19 18. Between October 23 and 26, 2008, there were at least 12 telephone calls between
20 and among Tipper A, Tipper B, Cohen, and Myers.

21 19. On October 27, 2008, Myers made his first-ever purchase of EXAS securities.
22 Myers bought 15,000 shares of EXAS at prices between \$0.69 and \$0.74 per share, at a total cost
23 for the 15,000 shares of \$11,025.90, including commissions. This was Myers’ first stock
24 purchase in his brokerage account since at least January 2007.

25 20. Between October 28 and October 31, 2008, the defendants, Tipper A, and Tipper
26 B exchanged multiple phone calls, including no less than nine phone calls on October 30 within
27

28 ¹ All times are EST unless otherwise indicated.

1 a two-hour time span. On October 30, 2008, at 3:40 p.m. Tipper A made a one-minute phone
2 call to Tipper B, followed immediately by a one-minute phone call from Tipper B to Cohen at
3 3:41 p.m., which was then followed by multiple phone calls between Tipper A, Tipper B, and
4 Cohen over the next 15 minutes. At 3:56 p.m., Cohen placed a 14-minute call to Myers. After
5 the defendants, Tipper A, and Tipper B exchanged additional calls on the evening of October 30
6 and the morning of October 31, 2008, Myers purchased another 5,000 shares of EXAS on
7 October 31, 2008, at a price of \$0.50 per share, for a total cost of \$2,512.95, including
8 commissions.

9 21. Between November 1 and November 11, multiple calls were made between and
10 among the defendants, Tipper A, and Tipper B. On November 12, 2008, at 11:27 a.m., Cohen
11 and Myers had a 25-minute telephone conversation. At 11:53 a.m., immediately after the call
12 between Cohen and Myers, Tipper B called Cohen and they talked for 10 minutes. As soon as
13 Cohen was off the phone with Tipper B, he made two calls to Myers: a two-minute call at 12:02
14 p.m., and a six-minute call at 12:09 p.m. Shortly thereafter, at 12:17 p.m. on November 12,
15 Myers purchased another 15,000 shares of EXAS stock, at prices of \$0.49 and \$0.50 per share,
16 for a total cost of \$7,492.95, including commissions.

17 22. On January 9, 2009, after the markets closed, Sequenom publicly announced that
18 it planned to acquire EXAS. On January 10, 2009, EXAS' stock price rose 50% by the close of
19 the markets on increased trading volume of 466%. On January 12, 2009, EXAS announced that
20 it had rejected Sequenom's offer. On January 13, 2009, at approximately 10:11 a.m., Myers and
21 Cohen had two phone conversations totaling eight minutes. Over the next two and a half hours,
22 Myers, Cohen, and Tipper B exchanged four phone calls.

23 23. At 1:28 p.m. on January 13, Myers sold 15,000 shares of EXAS for gross
24 proceeds of \$24,910.66, and net proceeds after commissions of \$24,687.55. On January 29,
25 Myers sold another 15,000 shares of EXAS for gross proceeds of \$23,672.32, and net proceeds
26 after commissions of \$23,455.33. On February 3, Myers sold another 1,000 shares of EXAS for
27 gross proceeds of \$1,510, and net proceeds after commissions of \$1,497.04. On February 4,
28 Myers sold 800 shares of EXAS for gross proceeds of \$1,200, and net proceeds after

1 commissions of \$1,187.04. On February 12, Myers sold 2,200 EXAS shares for gross proceeds
2 of \$3,300, and net proceeds after commissions of \$3,271.05.

3 24. Myers made an illegal profit of approximately \$34,102.99 on the purchase and
4 sale of 34,000 shares of EXAS stock, and retained 1,000 shares of EXAS stock purchased while
5 in possession of material nonpublic information, which was worth at least \$1,500.00 as of
6 February 12, 2009. Myers' total illegal profit on the purchase and sale of EXAS stock is in
7 excess of \$35,100.00.

8 25. On March 25, 2009, defendants, Tipper A, and Tipper B again exchanged
9 multiple phone calls within the span of a few hours. On March 27, 2009, two separate money
10 orders totaling \$1,900 addressed to Tipper A were purchased from a post office in the same zip
11 code as Tipper B's Harley-Davidson dealership. The memo section of one of the money orders
12 read, "H-D Rules." The "From" section of the money orders did not include any information
13 about the identity of the purchaser. Tipper A eventually deposited one money order into his
14 bank account in April 2009, and deposited the second one in May 2009.

15 **B. Insider Tipping and Trading in Sequenom Securities**

16 26. In April 2009, Sequenom's most promising product was a diagnostic screening
17 test which could detect whether a fetus had Down syndrome using only a maternal blood draw
18 (the "Down Syndrome Test," or the "Test"). Sequenom had made a series of public
19 announcements beginning in June 2008, indicating that the Test was close to 100% accurate, and
20 that the company planned to launch the Test in June 2009. In response to the announcements,
21 Sequenom's stock price had increased dramatically over the course of several months.

22 27. In April 2009, as the company was preparing for the June 2009 Down Syndrome
23 Test launch, certain Sequenom employees discovered that the Test did not perform as well as had
24 been publicly reported. Sequenom's board of directors launched a formal investigation into the
25 matter on Sunday, April 26, 2009, and the scientists who had worked on the Test (the
26 "Scientists") were put on administrative leave on the same day. The company did not make a
27 public announcement regarding problems with the Test until after the markets had closed on
28 April 29, 2009, and only a handful of Sequenom employees were aware of the problems with the

1 Test prior to the company's public announcement.

2 28. Tipper A was the patent agent working on the Down Syndrome Test. On
3 Monday, April 27, 2009, Tipper A was directed by Sequenom's general counsel to collect and
4 account for all of the Scientists' lab notebooks. When the Scientists were put on administrative
5 leave, Sequenom disabled the Scientists' e-mail accounts, and as a result, an error message was
6 generated in response to any e-mail sent to the Scientists' e-mail accounts. On April 28, 2009,
7 Tipper A had additional conversations with Sequenom's general counsel, as well as the vice
8 president of quality control and regulation regarding the lab notebooks.

9 29. On the evening of April 27, 2009, Tipper A made two one-minute calls to Tipper
10 B, followed by another one-minute call on the morning of April 28. The two exchanged one-
11 minute calls during the afternoon of April 28, 2009, and Tipper A and Tipper B had a nine-
12 minute call at 3:37 p.m. Shortly after that call ended, Tipper B had a four-minute call with
13 Cohen beginning at 3:50 p.m.

14 30. Very early on the morning of April 29, 2009, Cohen and Myers exchanged eight
15 text messages between 6:11 and 6:36 a.m. At 12:31 p.m. on April 29, Sequenom sent an e-mail
16 to all employees regarding a mandatory meeting that would occur that afternoon at 4:30 p.m.
17 Shortly thereafter, at 12:54 p.m., Tipper A sent Tipper B an e-mail the subject of which was
18 "Swine flu." In the e-mail, Tipper A informs Tipper B that he will "act quickly at the first signs
19 of any symptoms... ."

20 31. Less than two hours later on April 29, beginning at approximately 2:15 p.m.,
21 Tipper A made a series of one-minute phone calls to Tipper B from Tipper A's home phone.
22 After Tipper A called Tipper B at least five times, Tipper B called Tipper A at 3:25 p.m., then
23 immediately called Cohen at 3:27 p.m. At 3:33 p.m., Cohen used his father-in-law's cellular
24 phone to call Myers and the two spoke for 7 minutes.

25 32. Less than ten minutes after completing the call with Cohen, at 3:49 p.m. on April
26 29, 2009, Myers began buying put options on Sequenom. A "put option" is an option contract
27 that gives the holder the right to sell a certain quantity of an underlying security to the option
28 writer at a specified price (the "strike price") up to a specified date (the "expiration date"). As

1 the price of the underlying security decreases relative to the strike price, the value of the put
2 option increases. Sequenom stock was trading above \$14 per share on April 29, 2009, and
3 closed that day at \$14.90 per share. In the 12 minutes before the market closed on April 29,
4 2009, Myers purchased a total of 650 short-term, risky, out-of-the-money put option contracts on
5 Sequenom. Myers purchased 350 May 14 Sequenom put options, which expired in May and had
6 a strike price of \$14 per share. Myers purchased 100 May 11 Sequenom put options, which
7 expired in May and had a strike price of \$11 per share. Myers purchased 200 May 12.50
8 Sequenom put options, which expired in May and had a strike price of \$12.50 per share. In total,
9 in the last 12 minutes that the market was open on April 29, 2009, Myers spent \$39,960.00
10 (40,474.35, including commissions), to purchase 650 put option contracts that would pay off if
11 the price of Sequenom stock decreased before the options expired in May.

12 33. On April 29, as Myers was purchasing risky, short-term put options on
13 Sequenom, Cohen called Myers twice from a pay phone down the street from Cohen's office:
14 first at 3:54 p.m., and again at 4:05 p.m. Finally, at 4:29 p.m., Cohen called Tipper B. At
15 approximately 4:30 p.m., after the markets had closed, Sequenom announced that the Test would
16 not be launched in June 2009 due to "mishandling" of Test data.

17 34. Later that night, at 10:37 p.m., Tipper B responded to Tipper A's "Swine flu" e-
18 mail with the following message:

19 "Yeah, [my wife] and I were worried too. Our original plan was to fly to Florida for
20 \$100,00. [sic] But, we decided the best we can do is drive. The price is only 75,00 [sic]
21 – but at least we will be there for sure and it is worth avoiding the germ-spreading
airplanes. Hope that is okay. Oink oink."

22 35. On April 30, 2009, in response to Sequenom's announcement regarding the
23 mishandling of Test data, the company's stock price dropped approximately 76% compared to
24 the prior day's closing price, on increased trading volume of 619%. By 9:45 a.m. on April 30,
25 Myers had sold all of his put options in Sequenom for gross proceeds of \$612,500.00. Myers
26 made illegal profits of approximately \$572,540 on his sale of Sequenom put options.

27 36. On April 30, 2009, after Myers sold his Sequenom options, the defendants, Tipper
28 A, and Tipper B exchanged at least six additional calls, including an additional call from a

1 payphone made from Cohen to Myers.

2 **CLAIM FOR RELIEF**

3 **FRAUD IN CONNECTION WITH THE**
4 **PURCHASE OR SALE OF SECURITIES**

5 **Violations of Section 10(b) of the Exchange Act**
6 **and Rule 10b-5 Thereunder**

7 37. The Commission realleges and incorporates by reference paragraphs 1 through 36
8 above.

9 38. Each of the defendants, by engaging in the conduct described above, directly or
10 indirectly, in connection with the purchase or sale of a security, by the use of means or
11 instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities
12 exchange, with scienter:

- 13 a. employed devices, schemes, or artifices to defraud;
- 14 b. made untrue statements of a material fact or omitted to state a
15 material fact necessary in order to make the statements made, in
16 light of the circumstances under which they were made, not
17 misleading; or
- 18 c. engaged in acts, practices or courses of business which operated or
19 would operate as a fraud or deceit upon other persons.

20 39. Tipper A learned material nonpublic information concerning at least two
21 corporate announcements described above in the course of his employment at Sequenom. As a
22 Sequenom employee, Tipper A owed a fiduciary duty to Sequenom's shareholders, as well as a
23 duty of trust or confidence to Sequenom as his employer, to maintain such information in
24 confidence until it was publicly disseminated.

25 40. Tipper A breached his fiduciary duty to Sequenom's shareholders when he tipped
26 Tipper B with material nonpublic information just prior to Sequenom's April 29, 2009
27 announcement regarding the Test. Similarly, Tipper A breached his duty of trust or confidence
28 to Sequenom when he tipped Tipper B and Cohen with inside information regarding the potential

1 acquisition of EXAS.

2 41. Tipper B tipped Cohen, who knew or should have known that the information
3 regarding EXAS and Sequenom had been communicated to him in breach of a fiduciary duty.

4 42. Cohen tipped defendant Myers, who knew or should have known that the
5 information regarding EXAS and Sequenom had been communicated to him in breach of a
6 fiduciary duty, and Myers wrongfully purchased securities while in possession of such
7 information.

8 43. Either directly or indirectly, Cohen gained, or expected to gain, a personal benefit
9 by tipping Myers with the inside information.

10 44. Defendants Cohen and Myers acted with scienter.

11 45. By engaging in the conduct described above, each of the defendants violated, and
12 unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act, 15
13 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, the Commission respectfully requests that the Court:

16 **I.**

17 Issue findings of fact and conclusions of law that the defendants committed the alleged
18 violations.

19 **II.**

20 Issue judgments, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining
21 defendants and their officers, agents, servants, employees, and attorneys, and those persons in
22 active concert or participation with any of them, who receive actual notice of the judgment by
23 personal service or otherwise, and each of them, from violating Section 10(b) of the Exchange
24 Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

25 **III.**

26 Order each defendant to disgorge, with prejudgment interest, illicit trading profits or
27 other ill-gotten gains received as a result of the conduct alleged in this complaint, including, as to
28 each defendant, their own illegal trading profits or other ill-gotten gains, and, as to each tipper,

1 the illicit trading profits or other ill-gotten gains of their direct and indirect tippees.

2 **IV.**

3 Order each defendant to pay civil penalties under Section 21(A) of the Exchange Act, 15
4 U.S.C. § 78u-1.

5 **V.**

6 Retain jurisdiction of this action in accordance with the principles of equity and the
7 Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and
8 decrees that may be entered, or to entertain any suitable application or motion for additional
9 relief within the jurisdiction of this Court.

10 **VI.**

11 Grant such other and further relief as this Court may determine to be just and necessary.

12
13 DATED: December 8, 2010

s/ Sara D. Kalin

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