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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF ORANGE**

13 STEVEN AND REBECCA MALIN,  
14 individually and on behalf of all others  
15 similarly situated,  
16 Plaintiffs,  
17 vs.  
18 AMBRY GENETICS CORPORATION, a  
19 Delaware corporation  
20 Defendant  
21

**CASE NO. 30-2018-00994841-CU-SL-CXC**  
Before the Hon. Glenda Sanders  
**SECOND AMENDED COMPLAINT FOR  
VIOLATION OF THE CALIFORNIA  
CORPORATIONS CODE**  
**CLASS ACTION**  
**JURY TRIAL DEMANDED**  
CX-101

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of Orange  
**03/04/2019** at 05:53:00 PM  
Clerk of the Superior Court  
By Georgina Ramirez, Deputy Clerk

1 Plaintiffs Steven and Rebecca Malin, individually and on behalf of all others  
2 similarly situated, by their undersigned attorneys, for their complaint allege the following  
3 based upon personal knowledge as to themselves and their own acts, and information and  
4 belief as to all other matters. Plaintiffs believe that substantial discoverable evidentiary  
5 support exists for the allegations set forth herein, which will be obtained after a reasonable  
6 opportunity for discovery:

7 **INTRODUCTION**

8 1. This is a class action that arises from two share repurchase offers in which  
9 Ambry Genetic Corporation (“Ambry”) repurchased shares from certain shareholders in  
10 June, July and August of 2015 (the “Repurchase Offers”). The class (the “Class”) consists  
11 of all shareholders who sold shares back to Ambry pursuant to the Repurchase Offers and  
12 to whom Ambry is liable pursuant to Cal. Corp. Code §25501.

13 2. In a June 2015 letter to the company’s shareholders (the “June Shareholders  
14 Letter”), Ambry, through its president, Charles Dunlop, stated that “we face heavy  
15 expenditures for the next year, and anticipate no dividends of any kind.” Mr. Dunlop also  
16 stated that “we are not in a position operationally to move for a sale or IPO, the timing is  
17 simply not right.” He went on to state that “[b]ecause of accrued revenues that finally were  
18 received this last month, we have some financial latitude to make a tender offer of  
19 approximately \$351 per share up to a total of approximately ten million dollars.” An Offer  
20 to Purchase, dated June 1, 2015 (the “First Repurchase Offer”) offering to purchase up to  
21 28,500 shares for \$351.59 per share accompanied the June Shareholder Letter.

22 3. In a letter to the company’s shareholders, dated July 8, 2015 (the “July  
23 Shareholders Letter”), Ambry, through its president, Charles Dunlop, stated “[d]ue to  
24 overwhelming response to the tender offer we just completed, and our desire to enable  
25 more of you to liquidate your shares, the Board has authorized an additional tender offer.”  
26 An Offer to Purchase, dated July 8, 2015 (the “Second Repurchase Offer”) offering to  
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1 purchase up to 57,500 shares for \$351.59 per share accompanied the July Shareholder  
2 Letter.

3 4. The First Repurchase Offer and the Second Repurchase Offer were  
4 substantially the same, except for a requirement in the Second Repurchase Offer that  
5 shareholders must tender all their shares to participate. In both the First Repurchase Offer  
6 and the Second Repurchase Offer, Ambry stated:

7 “We currently have no plans, proposals or negotiations underway that relate  
8 to or would result in:

- 9
- 10 • any extraordinary transaction, such as a merger...
  - 11 • any material change in our present dividend rate or policy...
  - 12 • the acquisition ... by any person ... of a material amount of our  
13 securities outside of our ordinary course of business...”

14 5. On information and belief, these statements in the June Shareholders Letter  
15 and the First and Second Repurchase Offer regarding plans not to pay dividends and plans  
16 not to sell the company were untrue when made and Ambry omitted to state material facts  
17 that made those statements misleading. Ambry knew each of these statements was untrue  
18 or misleading when made.

19 6. In the year following the Repurchase Offers, Ambry declared special  
20 dividends of \$30.00 per share. These dividends were more than Ambry had paid in total in  
21 the past several years and over five times the dividends per share that Ambry had declared  
22 in the year prior to the Repurchase Offers.

23 7. In the year after the repurchases, Ambry commenced executing a plan to  
24 sell the company that culminated with Ambry retaining Intrepid Investment Bankers, LLC  
25 (“Intrepid”) to assist in the process of selling the company. In the year following the  
26 engagement of Intrepid, that process resulted in an agreement to merge with an indirect  
27 subsidiary of Konica Minolta for a price of up to \$1.0 billion.

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**FACTUAL ALLEGATIONS**

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19. Ambry was formed by Charles Dunlop and his brother James Dunlop in 1999 as a California corporation and has maintained its headquarters in Aliso Viejo, California since then.

20. Charles Dunlop served as the company's, president and board member since the company's formation. In addition, he served as CEO from 1999 to 2016.

21. Ambry is in the business of developing and providing genetic tests to screen patients for diseases and other conditions. Over the years, the number of Ambry's genetic tests has increased into the hundreds that range in cost from a few hundred dollars to several thousand dollars. In addition, Ambry has developed a genome research services business that applies new technologies to the genome services market.

22. Plaintiffs Steven and Rebecca Malin purchased 1,000 shares of Ambry common stock for \$12.00 per share in or around 2004.

23. In June of 2013, the U.S. Supreme Court held that isolated DNA involved a naturally occurring segment of DNA, precluding patent eligibility, but that synthetically created DNA known as complementary DNA (cDNA) was not naturally occurring, and was eligible for patent protection. The following month, Ambry's competitor Myriad Genetics Inc. sued Ambry for violating Myriad's patents.

24. In 2014, Ambry began construction of a 65,000 square foot Superlab to conduct genetic tests. The Superlab was completed in February 2016 and greatly expanded Ambry's volume of genetic testing.

25. In December 2014, Ambry sent a letter to shareholders, stating that the company had initiated a process to sell the company but then stopped. The letter went on to say that Ambry was not considering a sale of the company until the patent litigation with Myriad was over. That letter enclosed a dividend check for \$6.00 per share, and stated that the company did not expect another dividend "for some time after this one" because

1 Ambry faced “significant expenses” due to the patent litigation and the build-out of a  
2 Superlab.

3 26. On January 15, 2015, Ambry reincorporated in Delaware through a merger  
4 of Ambry into a new Delaware corporation. The merger had been previously approved by  
5 written consent on December 29, 2014, without a meeting of the company’s shareholders.  
6 On information and belief, the Ambry shareholders authorizing the consent consisted of  
7 Mr. Dunlop together with a small number of other insider shareholders.

8 27. Ambry’s new certificate of incorporation in Delaware contained a broad  
9 exculpatory clause to protect directors from breaches of fiduciary duty. It also designated  
10 the Delaware Court of Chancery as the exclusive forum for (1) any derivative claims, (2)  
11 any action asserting breach of fiduciary duty by an officer or director, (3) any claim against  
12 the corporation under the Delaware Corporate Code or the Certificate of Incorporation or  
13 bylaws, or (4) any claims against the corporation governed by the internal affairs doctrine.

14 28. On information and belief, Ambry changed its state of incorporation from  
15 California to Delaware in order to facilitate the sale of the company or an IPO (initial  
16 public offering) as of the time of the repurchase programs.

17 29. In connection with the reincorporation, Ambry adopted new bylaws (which  
18 otherwise required a super-majority vote to alter) and eliminated certain rights of the  
19 company’s minority stockholders, including the right to call a special meeting of Ambry’s  
20 stockholders. Unlike the California bylaws, the new bylaws purportedly empowered the  
21 Board to impose transfer restrictions on shares of the company’s common stock. The  
22 Board subsequently limited the transferability of less than 100% of a stockholder’s shares.  
23 By empowering the Board to eliminate sales to third parties altogether and by representing  
24 that Ambry did not have plans to pursue a sale or IPO, Ambry made the Repurchase Offers  
25 harder to refuse.

26 30. In the June Shareholder Letter Ambry explained that (1) the Myriad patent  
27 case had “concluded successfully for Ambry,” (2) Ambry faced “heavy expenditures for

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1 the next year due to the Superlab expansion, and anticipate[d] no dividends of any kind,”  
2 (3) “we are not in a position operationally to move for a sale or IPO; the timing is simply  
3 not right,” and (4) “[b]ecause of accrued revenues that finally were received this last  
4 month, we have some financial latitude to make a tender offer of approximately \$351 per  
5 share up to a total of ten million dollars... The price was set by a third party with expertise  
6 in valuation.”

7 31. In the Repurchase Offers, Ambry stated that the repurchase price was based  
8 on a valuation of Ambry as of April 30, 2015. However, Ambry did not disclose to the  
9 shareholders the name of the independent valuation firm, the valuation opinion letter itself  
10 or the material assumptions used to determine the fair market value (including, for  
11 example, that a 25% discount had been applied for a lack of marketability). Importantly,  
12 Ambry also did not disclose that the same valuation firm, GlobalView Advisors, had  
13 performed prior valuations of Ambry reflected in written reports on a regular basis and that  
14 the valuations on a per-share basis over the course of the prior nine months were as  
15 follows:

- |    |                      |          |
|----|----------------------|----------|
| 16 | • September 30, 2014 | \$103.40 |
| 17 | • December 31, 2014  | \$171.34 |
| 18 | • March 31, 2015     | \$289.62 |

19 32. In addition, although Ambry stated that the repurchase price was based on a  
20 valuation of Ambry as of April 30, 2015, Ambry omitted to state that the April 2015  
21 valuation was based on outdated financial information and projections. Specifically, while  
22 Ambry regularly updated the financial projections it provided to Globalview Advisors  
23 (projections on which the valuations were, at least in part, based), Ambry did not update its  
24 projections for the April 30, 2015 valuation report – thereby knowingly providing stale  
25 projections to Globalview Advisors.

26 33. There were 1,134,456 shares of common stock outstanding as of June 2015  
27 before the First Repurchase Offer. Ambry repurchased 28,526 shares at \$351.59 per share

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1 for a total of approximately \$10 million, which was paid in July 2015. The share price  
2 offered by the company implied that Ambry was worth approximately \$400 million then.

3 34. In the July Shareholder Letter, Ambry, through its president, Charles  
4 Dunlop, stated “[d]ue to overwhelming response to the tender offer we just completed, and  
5 our desire to enable more of you to liquidate your shares, the Board has authorized an  
6 additional tender offer.” The July Shareholder Letters made clear that the Second  
7 Repurchase offer was merely an extension of the First, except for the new requirement that  
8 shareholders must tender all their shares to participate. The July Shareholder Letter went  
9 on to announce the Second Repurchase Offer for up to 57,000 additional shares at the same  
10 \$351.59 share price.

11 35. Both the First Repurchase Offer and the Second Repurchase Offer included  
12 the following statement:

13 “We currently have no plans, proposals or negotiations underway that relate  
14 to or would result in:

- 15 • any extraordinary transaction, such as a merger...
- 16 • any material change in our present dividend rate or policy...
- 17 • the acquisition ... by any person ... of a material amount of our  
18 securities outside of our ordinary course of business...”

19 36. In both the First Repurchase Offer and Second Repurchase Offer, Ambry  
20 went on to caution “We will utilize a portion of our existing cash in connection with the  
21 Offer and, as a result, will have reduced liquidity. Reduced liquidity could have certain  
22 material adverse effects on us, including, but not limited to, the following: (i) our available  
23 liquidity in the future for acquisitions, working capital, capital expenditures and general  
24 corporate or other purposes could be impaired, and additional financing may not be  
25 available on terms acceptable to us; (ii) our ability to withstand competitive pressures may  
26 be decreased; and (iii) our reduced level of liquidity may make us more vulnerable to

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1 economic downturns and reduce our flexibility in responding to changing business,  
2 regulatory and economic conditions.”

3 37. In the Second Repurchase Offer, Ambry ultimately repurchased 76,286  
4 shares (more than the target number of 57,000 shares) for a total of approximately \$26.8  
5 million and paid these amounts in August 2015.

6 38. On information and belief, the repurchase programs gave Mr. Dunlop  
7 control over Ambry. Prior to the Repurchase Offers, Mr. Dunlop owned 39.7% of  
8 Ambry’s shares and his immediate family owned an additional 8.5%. After the  
9 repurchases made pursuant to the Repurchase Offers, Mr. Dunlop owned 44.3% of the  
10 Ambry’s shares and his immediate family owned 9.8%.

11 39. On information and belief, after the Repurchase Offers, Ambry repurchased  
12 an additional 23,086 shares from former employees in late 2015 or the first half of 2016 at  
13 an average price per share of \$404.49 for approximately \$9.2 million.

14 40. After the Repurchase Offers, Ambry paid much higher and more frequent  
15 dividends as follows:

- 16 • \$5 per share on December 4, 2015
- 17 • \$5 per share on March 2, 2016
- 18 • \$10 per share on May 4, 2016
- 19 • \$10 per share on July 26, 2016
- 20 • \$4 per share on February 1, 2017

21 From June 2009 up until the First Repurchase Offer, Ambry had paid, in total, only \$11.28  
22 per share in dividends.

23 41. After the Repurchase Offers, Ambry continued to have GlobalView  
24 Advisors perform valuations of Ambry that were reflected in written reports on a per-share  
25 basis as follows:

- 26 • June 30, 2015 \$373.43
- 27 • September 30, 2015 \$458.19



1 Offers in June, July and August of 2015 and to whom Ambry is liable pursuant to Cal.  
2 Corp. Code §25501.

3 48. The members of the Class are so numerous that joinder of all members is  
4 impracticable. There are more than 100 shareholders who sold their shares back to Ambry  
5 pursuant to the Repurchase Offers.

6 49. There are common issues among the shareholders who sold their shares  
7 back to Ambry in connection with the Repurchase Offers as to:

- 8
- 9 • whether Ambry made an untrue written statement of material facts in  
10 connection with the Repurchase Offers;
  - 11 • whether Ambry omitted to state a material fact to make the written  
12 statements made, in light of the circumstances under which they were made,  
13 not misleading;
  - 14 • whether the Class members were damaged by Defendant's conduct; and
  - 15 • the calculation of damages suffered by the Class members.

16 50. Damages will be calculated in the same manner for each Class member  
17 pursuant to Cal. Corp. Code Section 25501 as the difference between (1) the value of the  
18 Ambry common stock at the time of the filing of the complaint plus the amount of any  
19 income received by Ambry on its common stock and (2) the price at which the Ambry  
20 common stock was sold plus interest at the legal rate from the date of sale, according to  
21 proof at trial.

22 51. A claimant need not establish reliance or causation in order to prove a  
23 violation of Corp. Code. §25401. Lynch v. Cook, 148 Cal.App.3d 1072 (1983) (reliance);  
24 Bowden v. Robinson, 67 Cal.App.3d 705 (1977) (causation). Accordingly, the fact that  
25 shareholders may have sold their shares back to Ambry for different reasons is not relevant  
26 to Ambry's liability for violation of Section 25401.

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1 52. A class action will be superior to all available methods for the fair and  
2 efficient resolution of this controversy since joinder of all members is impractical. There  
3 will be no difficulty in the management of this action as a class action.

4 **FIRST CAUSE OF ACTION**

5 **(against Ambry for violation of Cal. Corp Code §25401)**

6 53. Plaintiffs reallege and incorporate by reference each of the allegations set  
7 forth in paragraphs 1 to 52 of this Complaint.

8 54. This First Cause of Action is asserted against Ambry under Cal. Corp. Code  
9 §25401.

10 55. Plaintiffs and the Class sold Ambry's shares to Ambry in connection with  
11 the Repurchase Offers. Ambry repurchased 104,812 share from the Plaintiffs and the Class  
12 pursuant to the Repurchase Offers for approximately \$36.8 million at a \$351.59 per share  
13 price.

14 56. On information and belief, the Repurchase Offers were made by means of  
15 written communications which included untrue statements of material facts and omitted to  
16 state material facts to make the statements made, in light of the circumstances under which  
17 they were made, not misleading. The false and/or misleading statements generally fall into  
18 three categories: (1) statements relating to the \$351.59 per share valuation and its fairness;  
19 (2) statements relating to Ambry's plans not to pay dividends or materially alter its  
20 dividend policy; and (3) statements relating to Ambry's plans not to sell the company.

21 **A. The \$351.59 Per Share Valuation and its Fairness**

22 57. In the Repurchase Offers, Ambry represented that the fair market value of  
23 Ambry's shares was \$351.59 per share as of April 30, 2015 and that \$351.59 represented a  
24 fair price for Ambry's shareholders. Indeed, the Repurchase Offers explicitly state that  
25 after "careful consideration of the valuation firm's analysis and determination" Ambry has  
26 "concluded that a Purchase Price of \$351.59 per share to be the fair market value of the  
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1 common stock, and is a fair and motivating price to our stockholders for the shares subject  
2 to the Offer.”

3 58. In representing in the Repurchase Offers that \$351.59 per share was the fair  
4 market value for Ambry’s shares and a fair price, Ambry omitted to state a number of  
5 material facts necessary to make those statements not misleading, including but not limited  
6 to the following omissions:

- 7 • Ambry failed to disclose the per-share values from the valuations performed  
8 before the April 2015 valuation, which showed the rapidly increasing  
9 valuations leading up to the Repurchase Offers;
- 10 • Ambry knew that its April 2015 valuation was based on outdated financial  
11 information and projections. Specifically, while Ambry regularly updated  
12 the financial projections it provided to Globalview Advisors (projections on  
13 which the valuations were, at least in part, based), Ambry did not update its  
14 projections for the April 30, 2015 valuation report – thereby knowingly  
15 providing outdated projections to Globalview Advisors.
- 16 • Because of the company’s rapidly accelerating value, Ambry knew that the  
17 April 30, 2015 value was stale when it was disclosed in June and July as  
18 part of the Repurchase Offers.
- 19 • In stating that the valuation represented the fair market value of the shares,  
20 Ambry failed to disclose the key inputs, assumptions and methods used to  
21 calculate the value – including the fact that the valuation company had  
22 applied an aggressive 25% discount to the share value based on a lack of  
23 marketability.

24 59. On information and belief, when Ambry made the statements about the  
25 \$351.59 per share valuation, the fair market value of Ambry’s shares and the fairness of the  
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1 \$351.59 price, Ambry knew the statements were untrue or that it had omitted to state  
2 material facts that made those statements misleading.

3 **B. Dividends**

4 60. In the Repurchase Offers, Ambry made untrue statements of material fact  
5 regarding its plans to pay dividends and omitted to state material facts regarding its plans  
6 to pay dividends that would have made the statements not misleading.

7 61. On information and belief, when Ambry made the following material  
8 written statements regarding its plans to pay dividends, Ambry knew they were untrue or  
9 that it had omitted to state material facts that made those statements misleading:

- 10 • “we face heavy expenditures for the next year, and anticipate no dividends of  
11 any kind”
- 12 • “we currently have no plans, proposals or negotiations underway that relate  
13 to or would result in... any material change in our present dividend rate or  
14 policy, our indebtedness or capitalization, our corporate structure or our  
15 business ...”
- 16 • “We will utilize a portion of our existing cash in connection with the Offer  
17 and, as a result, will have reduced liquidity. Reduced liquidity could have  
18 certain material adverse effects on us, including, but not limited to, the  
19 following: (i) our available liquidity in the future for acquisitions, working  
20 capital, capital expenditures and general corporate or other purposes could be  
21 impaired, and additional financing may not be available on terms acceptable  
22 to us; (ii) our ability to withstand competitive pressures may be decreased;  
23 and (iii) our reduced level of liquidity may make us more vulnerable to  
24 economic downturns and reduce our flexibility in responding to changing  
25 business, regulatory and economic conditions.”

26 62. In the year following the Repurchase Offers, Ambry declared special  
27 dividends of \$30.00 per share. These dividends were more than Ambry had paid in total

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1 from June 2009 until the First Repurchase Offer and over five times the dividends per  
2 share that Ambry had declared in the year prior to the Repurchase Offers.

3 **C. Sale of Company**

4 63. In the Repurchase Offers, Ambry made untrue statements of material fact  
5 regarding its plans to sell the company and omitted to state material facts regarding its  
6 plans to sell the company that would have made the statements not misleading.

7 64. On information and belief, when Ambry made the following material  
8 written statements regarding its plans to not sell the company, Ambry knew they were  
9 untrue or that it had omitted to state material facts that made those statements misleading:

- 10 • “we are not in a position operationally to move for a sale or IPO, the timing  
11 is simply not right.”
- 12 • “we currently have no plans, proposals or negotiations underway that relate  
13 to or would result in: Any extraordinary transaction, such as a merger,  
14 reorganization or liquidation, involving us or any of our subsidiaries;... or  
15 the acquisition ... by any person ... of a material amount of our securities  
16 outside of our ordinary course of business...”

17 \* \* \*

18 65. In the year after the Repurchase Offers, Ambry commenced executing a  
19 plan to sell the company culminating in Ambry engaging the investment bank Intrepid to  
20 assist in the process of selling the company. In the year following the engagement of  
21 Intrepid, that process resulted in an agreement to merge with an indirect subsidiary of  
22 Konica Minolta for a price of up to \$1.0 billion.

23 66. The untrue statements and omissions made by Ambry in the Repurchase  
24 Offers were material because there is a substantial likelihood that, under all the  
25 circumstances, a reasonable investor would consider them important in reaching a decision  
26 regarding whether to tender shares in response to the Repurchase Offers.

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DATED: February 15, 2018 KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP

SYMONS LAW GROUP APC

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