

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
XENOMICS, INC., :
 :
 Plaintiff, : 09 CV 10192 (RMB) (KNF)
 :
 v. :
 : (ECF CASE)
 SEQUENOM, INC., :
 :
 Defendant. :
-----X

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO:
(A) DISMISS OR STAY IN LIGHT OF ARBITRATION
AGREEMENT; (B) TRANSFER VENUE OR (C) DISMISS**

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PRELIMINARY STATEMENT

Defendant Sequenom, Inc. (“Sequenom”) submits this memorandum of law in support of its motion to: (a) dismiss or stay this action pursuant to Section 3 of the Federal Arbitration Act because the issues raised in this action are referable to arbitration under a written agreement between the parties or (b) in the alternative, transfer venue to the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1404 or (c) in the alternative, dismiss this action for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). Sequenom asserts these two additional grounds for the motion based on the instructions of the Court to file one motion raising all issues and does not intend to waive its right to require Xenomics to pursue arbitration.

The Complaint asserts claims for breach of contract and fraudulent inducement relating to a License Agreement dated as of October 29, 2008, between Xenomics, Inc. (“Xenomics”) and Sequenom (the “Agreement” or “License Agreement”). Under the Agreement, Xenomics licensed to Sequenom certain proprietary technology relating to genetic testing of fetal nucleic acids present in maternal urine. According to the Complaint, Xenomics was induced into entering the Agreement based on (a) certain public statements that Sequenom made in connection with Sequenom’s own proprietary technology for genetic testing of fetal nucleic acids present in maternal blood and (b) certain other unidentified statements made by unidentified representatives of defendant to unidentified representatives of plaintiff at unidentified times.

The parties expressly agreed in writing that **“any dispute, controversy or claim arising out of, relating to, or in connection with any [] provision of this Agreement”** would be resolved by arbitration. Specifically, under Section 11.2 of the Agreement, if the parties were unable to resolve their dispute informally, Xenomics agreed that the **“dispute shall be finally**

settled . . . if by the request of XENOMICS, by arbitration to be held in San Diego, California . . .” Xenomics filed this lawsuit in breach of the arbitration provision. If Xenomics wishes to resolve this dispute, it has one option under the Agreement – to commence arbitration proceedings in San Diego.

In the event the Court does not dismiss or stay this action in light of the arbitration clause, Sequenom requests that this action be transferred to the Southern District of California. As explained in more detail below, among other factors warranting transfer, most of the non-party witnesses likely to testify in this action reside in San Diego, the events underlying the fraud claims took place in San Diego, Sequenom’s office and a substantial majority of its employees are located in San Diego, Xenomics’s business operations – including its senior management and principal office – are also located in San Diego, and other actions arising out of the same underlying events are presently before the same Judge in the Southern District of California.

Finally, if the Court determines not to dismiss or stay in light of the arbitration agreement and not to transfer venue, Sequenom asks the Court to dismiss the breach of contract claim because the Complaint fails to allege any provision of the Agreement that has been breached. Sequenom also asks that the entire fraud claim be dismissed for failure to plead that the allegedly false statements were made with the intent to induce Xenomics into signing the Agreement and that parts of the fraud claim also be dismissed for failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b) and for failure to plead reliance.

I. THIS ACTION MUST BE DISMISSED OR STAYED IN LIGHT OF THE ARBITRATION PROVISION OF THE LICENSE AGREEMENT

Because the License Agreement contains a broad arbitration provision that covers the instant dispute, and because Xenomics’s breach of that provision is so flagrant, in the interest of

efficiency we address this aspect of the motion first; if the Court grants this portion of the motion, it need not reach the remaining grounds for relief addressed below (at pp. 6-18).

FACTS RELEVANT TO ARBITRATION AGREEMENT

Over several months in 2008, Xenomics and Sequenom negotiated and ultimately executed the Agreement which is the subject of this action. As reflected in Section 11 of the License Agreement, the parties expressly agreed on a procedure for resolving “any dispute, controversy or claim that arises out of or relates to the Agreement.” Declaration of Stephen A. Wieder, Esq., dated February 22, 2010 (“Wieder Dec.”), Ex. B at § 11.1. The first step in that process involves informal discussions between the parties. *Id.* Section 11.2 then provides that if such informal discussions do not resolve the dispute:

upon the written request of either Party, the dispute shall be finally settled (i) if by the request of SEQUENOM, by arbitration to be held in New York, New York, USA, and (ii) if by the request of XENOMICS, by arbitration to be held in San Diego, California, in either case in accordance with the Comprehensive Arbitration Rules and Procedures of JAMS . . .

Id. at § 11.2 (emphasis added).

ARGUMENT RELEVANT TO ARBITRATION AGREEMENT

A. This Case Should Be Dismissed or Stayed Because the Issues Raised in the Complaint Are Subject to an Arbitration Agreement

The License Agreement that Xenomics negotiated and signed provides that any disputes arising out of or relating to the Agreement must be resolved through arbitration. Xenomics filed this action in violation of the arbitration agreement. Sequenom respectfully requests, pursuant to Section 3 of the Federal Arbitration Act (the “FAA”), that the Court dismiss or stay this action.¹

¹“Where all of the issues raised in the complaint must be submitted to arbitration, the Court may dismiss an action rather than stay proceedings.” *Rubin v. Sona Int’l Corp.*, 457 F. Supp. 2d 191, 198 (S.D.N.Y. 2006).

1. Federal Law Favors Arbitration

The FAA reflects the “liberal federal policy favoring arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (internal quotation omitted). Section 2 of the FAA provides that:

A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. “[T]he [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

2. The License Agreement Mandates Arbitration

Section 3 of the Federal Arbitration Act provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . .

9 U.S.C. § 3.

A court asked to stay proceedings pursuant to Section 3 of the FAA must resolve two issues: “first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement.” *Mehler v. Terminix Int’l Co.*, 205 F.3d 44, 47 (2d Cir. 2000) (internal quotation omitted). “Arbitration should be ordered ‘unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” *Eastern Fish Co. v. South Pacific Shipping Co., Ltd.*, 105 F. Supp. 2d 234, 237

(S.D.N.Y. 2001) (Berman, J.) (citation omitted). In this case, the answer to both questions in the analysis supports arbitration.

First, Xenomics agreed to arbitrate. Section 11 of the License Agreement sets out the procedure for resolving “any dispute, controversy or claim that arises out of or relates to this Agreement.” Wieder Dec. Ex. B at § 11.1. If the parties cannot resolve the dispute informally, the dispute:

shall be finally settled (i) if by the request of SEQUENOM, by arbitration to be held in New York, New York, USA, and (ii) if by the request of XENOMICS, by arbitration to be held in San Diego, California, in either case in accordance with the Comprehensive Arbitration Rules and Procedures of JAMS . . .

Id., at § 11.2 (emphasis added).²

Second, the scope of the arbitration clause covers the claims made by Xenomics. The arbitration agreements applies “any dispute, controversy or claim that arises out of or relates to this Agreement.” Wieder Dec. Ex. B at § 11.1 (emphasis added). This is “precisely the kind of broad arbitration clause that justifies a presumption of arbitrability.” *Mehler*, 205 F.3d at 49 (internal quotation omitted). As this Court has recognized, “courts have consistently construed the ‘arising out of or relating to’ language in arbitration clauses as all encompassing.” *Eastern Fish*, 105 F. Supp. 2d at 237 (citation omitted).

In sum, Sequenom and Xenomics unambiguously agreed to arbitrate all disputes arising out of or relating to the Agreement. That agreement is manifested in broad contractual language, clearly encompassing Xenomics’s claims for breach of contract and fraudulent inducement. Accordingly, Sequenom respectfully requests that the Court dismiss or stay this matter. To avoid any confusion, Sequenom does not seek to compel arbitration, nor is it required to do so in order

²Indeed, prior to filing this action, Xenomics engaged in the informal discussions under Section 11.1 of the Agreement that are a condition precedent to commencing arbitration under Section 11.2. Tatman Dec. ¶¶ 15-16, Exs. A & B.

to enforce its rights under the License Agreement. Rather, Sequenom seeks to enforce its rights under the License Agreement and Section 3 of the FAA; namely, that if Xenomics wishes to resolve a dispute under the License Agreement, it commence an arbitration in San Diego.

B. Conclusion

For the foregoing reasons, Sequenom respectfully submits that this action should be dismissed or stayed in light of the arbitration clause in the License Agreement; if the Court grants this request, the Court need not consider the remaining sections of the Memorandum.

II. MOTION TO TRANSFER OR IN THE ALTERNATIVE TO DISMISS

As we explained above, if the Court enforces the arbitration agreement, it need not reach the remaining issues raised below. However, in the event that the Court does not enforce the arbitration agreement, Sequenom respectfully submits that, for the reasons set forth below, this action should be transferred to the Southern District of California or, in the alternative, should be dismissed for failure to comply with Federal Rules of Civil Procedure 9(b) and 12(b)(6).

STATEMENT OF FACTS RELEVANT TO TRANSFER AND DISMISSAL

The Summons and Complaint, which are dated October 15, 2009, allege that Xenomics is a Florida corporation with its principal place of business at 420 Lexington Avenue in New York City. Yet these basic facts are contradicted by Xenomics's filings with the Securities and Exchange Commission (the "SEC"). Thus, in the Form 8-K that Xenomics filed with the SEC on May 4, 2009, Xenomics represented to the SEC and to the public that it was a Florida corporation **whose principal executive offices were in Monmouth Junction, New Jersey.**

Wieder Dec. Ex. C.³ In the same public filing, Xenomics represented that it had hired Dr.

³The facts relevant to that portion of the motion that seeks to dismiss the Complaint are drawn from the allegations of the Complaint and documents attached thereto. *See Weizmann Inst. of Sci. v. Neschis*, 229 F. Supp. 2d 234, 246 (S.D.N.Y. 2002) (Berman, J.) ("In resolving a motion to dismiss, a court may consider documents attached to the complaint as an exhibit or

Thomas Adams as its Chairman of the Board. *Id.* According to publicly available information, Dr. Adams lives in San Diego. Wieder Dec. ¶ 6. Thus, it was not surprising that in the Form 8-K, Xenomics disclosed that it planned on “moving the Company’s executive offices and research facilities to San Diego.” *Id.* at Ex. C, Item 5.02.

Xenomics’s San Diego presence was further cemented in October 2009, when it hired Thomas Heubner as its President and Chief Executive Officer. According to publicly available information, Mr. Heubner – like Dr. Adams – lives in San Diego. Wieder Dec. ¶¶ 7-8, Ex. D. Correspondence from Xenomics further confirms its connection to San Diego. Thus, for example, as recently as January 8, 2010, a letter from Mr. Heubner to Sequenom (and the envelope in which it was sent) listed “11055 Flintkote Avenue, San Diego, Ca. 92121” as his (and Xenomics’s) address. Wieder Dec. ¶ 9, Ex. E.

Sequenom is a Delaware corporation whose principal offices are – like those of Xenomics – also in San Diego. Tatman Dec. ¶ 2. Sequenom’s officers and a substantial majority of its employees all work in San Diego. *Id.*

Sequenom has developed and owns technology that enables doctors to conduct genetic tests using the fetal nucleic acids that are present in maternal blood (the “Blood Test Technology”). *See* Com. Ex. B.⁴ According to the Complaint, Xenomics holds patents covering methods for conducting genetic tests using the fetal nucleic acids present in maternal urine (the “Urine Test Technology”). *See* Com. Ex. A.

incorporated in it by reference . . .) (citation and internal quotations omitted). Those facts which are referenced in the accompanying declarations of Dereck Tatman and Stephen Wieder are relied upon in connection with that portion of the motion that seeks to transfer this action to the Southern District of California.

⁴A copy of the Complaint (and the documents attached thereto) is Exhibit A to the Wieder Declaration.

The Complaint alleges that on June 4, 2008 and September 23, 2008, Sequenom publicly announced positive results in connection with its Blood Test Technology. Com. ¶¶ 12 and 14, Exs. C and E. The Complaint also claims that on June 23, 2008, Sequenom announced that it was raising over \$85 million based in part on the results of the testing of its Blood Test Technology. Com. ¶ 13, Ex. D.

Xenomix alleges that in reliance on these statements and on “the defendant making similar misrepresentations, and other statements made by the defendant’s representatives to the plaintiff, the plaintiff agreed to enter into the [Agreement].” Com. ¶ 15. The discussions between the parties that led to the execution of the Agreement began in April 2008, when representatives of Xenomix traveled to San Diego to meet with representatives of Sequenom. Tatman Dec. ¶ 4. Subsequent negotiations took place by telephone and e-mail. *Id.* at ¶ 5. The work contemplated by the Agreement was to be conducted in San Diego, and to date, all such work has in fact been conducted at Sequenom’s facilities in San Diego. *Id.* at ¶ 6.

The Complaint alleges that on April 29, 2009, Sequenom issued a press release in which it disclosed certain irregularities in connection with the test data and results for the Blood Test Technology. Com. ¶ 17. The Complaint also alleges that a number of Sequenom employees left the company following an internal investigation that was conducted in the wake of the disclosure. Com. ¶ 21. In all, seven employees left Sequenom in the wake of the investigation. Six of these individuals still live in the San Diego area. Tatman Dec. ¶ 10. The seventh lives in Arizona. *Id.* Three of these San Diego-based individuals (as well as three current Sequenom employees) have already been identified in the parties’ Rule 26(a) disclosures and/or discovery requests. Tatman Dec. ¶¶ 11-12; Wieder Dec. ¶¶ 11-12, Exs. G, H & I.

As a result of the disclosure concerning the Blood Test Technology, numerous other lawsuits have been filed against Sequenom. All of those actions are in federal or state court in San Diego. Thus, 13 class-action Complaints have been filed and consolidated before Judge Larry Burns in the United States District Court for the Southern District of California under the caption *In re Sequenom, Inc. Securities Litigation*, No. 09-CV-0921 (LAB) (WMc). Tatman Dec. ¶ 13. Three shareholder derivative actions are also consolidated before the same court under the caption *In re Sequenom, Inc. Derivative Litigation*, 09-CV-1341 (LAB) (WMc). *Id.* at ¶ 14. While a settlement has been announced in the federal class actions, the factual submissions that have been made in connection with seeking the Court’s approval of that settlement, as well as the proceedings in these cases that have taken place over the past year, have given the California district court familiarity with the issues that are raised by Xenomics.

This action was filed in the Supreme Court for the State of New York (New York County) on October 29, 2009. The summons and Complaint were served on Sequenom on December 8, 2009. The action was removed to this Court on December 15, 2009.

ARGUMENT RELEVANT TO TRANSFER AND DISMISSAL

A. This Case Should Be Transferred to the Southern District of California

If the Court determines not to dismiss or stay this action in light of the arbitration provision, Sequenom submits that this action should be transferred to the Southern District of California. Under 28 U.S.C. § 1404, a court may transfer a civil action to any other district where the case might have been brought, if such transfer would serve “the convenience of the parties and witnesses” and “the interests of justice.” The factors that a court may consider include: “(1) the convenience of witnesses; (2) the convenience of the parties; (3) the locus of operative facts; (4) the location of relevant documents and relative ease of access to sources of proof; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the

forum's familiarity with the governing law; (7) the relative financial means of the parties; (8) the weight afforded plaintiff's choice of forum; and (9) trial efficiency and the interests of justice generally." *AEC One Stop Group v. CD Listening Bar, Inc.*, 326 F. Supp. 2d 525, 528 (S.D.N.Y. 2004).

As a preliminary matter, Sequenom's principal place of business is in San Diego, which is located in the Southern District of California. Tatman Dec. ¶ 2. Accordingly, the suit could have been brought in the transferee district. *See* 28 U.S.C. § 1391(a)(1). As set forth immediately below, with respect to the nine factors, the facts here militate in favor of transfer.

1. Convenience of Witnesses

"The convenience of witnesses is generally considered to be the most important factor in the transfer analysis." *Samson Lift Tech. v. Jerr-Dan Corp.*, No. 09 Civ. 2493 (RJH), 2009 U.S. Dist. LEXIS 69099, at *6 (S.D.N.Y. Aug. 7, 2009). In considering this factor, "[t]he convenience of non-party witnesses is accorded more weight than that of party witnesses." *Indian Harbor Ins. Co. v. Factory Mut. Ins. Co.*, 419 F. Supp. 2d 395, 402 (S.D.N.Y. 2005) (citation omitted).

In the wake of the internal investigation referred to above (at p. 8) and referenced in the Complaint (at ¶22), seven individuals left Sequenom. Six of them – including the former President and Chief Executive Officer of the company (Dr. Harry Stylli), the former Chief Financial Officer (Paul Hawran) and the former Vice President of Commercial Development for Sequenom (Steven Owings) – reside in the San Diego area. Tatman Dec. ¶ 10. Dr. Stylli and Messrs. Hawran and Owings have all been identified by Xenomics in its Rule 26(a) disclosures and or discovery requests. Wieder Dec. ¶ 11, Exs. G & H. In addition, Dr. Stylli was one of the

three Sequenom employees responsible for the negotiation of the License Agreement. Tatman Dec. ¶ 11.⁵

It is not clear which Xenomics witnesses would have information about the alleged fraud; however, Xenomics recently announced that it had conducted its own investigation into the fraud, and it is likely that the individuals who would have the most information about that investigation would be Xenomics's senior executives, who reside in San Diego. Wieder Dec. ¶¶ 6, 8. While it is possible that a former Xenomics representative with information concerning the negotiations of the Agreement may reside in New York, Sequenom submits that this is nowhere near sufficient to tip the balance of the convenience factor, and that this fact weighs heavily in Sequenom's favor.

2. Convenience of the Parties

Sequenom is a Delaware corporation whose principal place of business is in San Diego. Tatman Dec. ¶ 2. Sequenom's officers and a substantial majority of its employees work in San Diego. *Id.* Sequenom has no offices, employees, or formal business presence in the Southern District of New York. *Id.* Xenomics is a Florida corporation. At the time it filed this action, Xenomics's principal place of business was in New Jersey. Wieder Dec. ¶ 4, Ex. C. In May 2008, Xenomics announced a reorganization of senior management and in connection with that announcement, disclosed that it was preparing to move its offices and research facilities to San Diego. *Id.* at ¶ 5, Ex. C, Item 5.02. That move now appears to be complete, as Xenomics's Chairman of the Board (Dr. Adams) and President and Chief Executive Officer (Mr. Heubner) both live in San Diego (Wieder Dec. ¶¶ 6, 8) and Xenomics recently opened an office in San Diego. *See* Wieder Dec. ¶¶ 5, 7, 9.

⁵The other two individuals – Clarke Neumann (Sequenom's General Counsel) and Mr. Tatman – are current Sequenom employees and also reside in the San Diego area. Tatman Dec. ¶ 11.

Thus, this factor weighs in favor of transfer.

3. Locus of Operative Facts

“The operative events relating to fraud and misrepresentation are deemed [to] occur in the place where such statements are made.” *Samson Lift*, 2009 U.S. Dist. LEXIS 69099, at *8 (citation omitted). The Complaint alleges that Sequenom made misleading statements in press releases and filings with the SEC. The SEC filings, as well as two of the three press releases allegedly relied upon by Xenomics, were issued from Sequenom’s principal place of business in San Diego. The third press release was issued jointly from San Diego and New York. *See* Com. Exs. C-E. The testing that gave rise to the alleged false statements took place in San Diego. Thus, the locus of operative facts with respect to the fraud claim is San Diego.

Similarly, “[t]he locus of operative facts in a breach of contract case looks at ‘where the contract was negotiated or executed, where it was to be performed, and where the alleged breach occurred.’” *Reinhard v. Dow Chem. Co.*, No. 07 Civ. 3641 (RPP), 2007 U.S. Dist. LEXIS 59242, at *17 (S.D.N.Y. Aug. 13, 2007) (internal quotations omitted). Here, the first meeting between the parties took place in San Diego. Tatman Dec. ¶ 4. The subsequent discussions and negotiations took place by telephone or e-mail. Tatman Dec. ¶ 5. Sequenom’s performance under the Agreement, *i.e.*, its exploitation of the licensed products, was to take place – and has, to date, taken place – in San Diego. Tatman Dec. ¶ 6.⁶ Accordingly, this factor weighs heavily in favor of transfer.

⁶As we explain below in connection with the Rule 12(b)(6) motion, the Complaint does not allege a breach of any provision of the Agreement. Rather, it relies on the alleged fraud in connection with the reporting of the results and data of the Blood Test Technology. *See below* at pp. 16-17. The operative events relating to the Blood Test Technology took place in San Diego. Tatman Dec. ¶ 8. *See Fireman’s Fund Ins. Co. v. Personal Commc’n Devices, LLC*, No. 09-cv-1349 (SHS), 2009 U.S. Dist. LEXIS 57827, at *9-*11 (S.D.N.Y. July 8, 2009) (where issues raised in contract claim were factual and did not implicate interpretation of contract, “locus of

4. Location of Documents and Other Evidence

Xenomics's claims are based on the public statements regarding the results and data concerning the Blood Test Technology. The documents (both in hard copy and electronic format) relating to the alleged irregularities in the Blood Test Technology are located in San Diego. Tatman Dec. ¶ 8. While documents can be moved, this factor favors transfer. *Samson Lift*, 2009 U.S. Dist. LEXIS 69099, at *7 (“Although this factor has lost some of its original significance with the improvements in transportation and communications technology, it should be considered to the extent that it bears on the convenience calculus.”)

5. The Ability to Compel Attendance of Unwilling Witnesses

As described above, a number of witnesses who have been identified in Xenomics's discovery requests are former Sequenom employees who reside in San Diego area. *See above* at p. 10. These witnesses are subject to the subpoena power of the federal court in San Diego, but cannot be compelled to travel to New York to testify. This factor weighs in favor of transfer. *See AEC One Stop*, 326 F. Supp. 2d at 530-31 (fact that non-party witnesses could be compelled to testify in California but not in New York weighed in favor of transfer). *See also ESPN, Inc. v. Quiksilver, Inc.*, 581 F. Supp. 2d 542, 550 (S.D.N.Y. 2008) (same).

6. Familiarity of Transferee Forum with Applicable Law

As explained below, the fraud claim is governed by California law. *See below* at p. 16 n.9. Under Section 12.4 of the License Agreement, the breach of contract claim is governed by Delaware law and is thus equally familiar to this Court and the proposed transferee Court. Thus, this factor weighs slightly in favor of transfer.

operative facts” element of analysis focused on where facts underlying claim took place, and not where Agreement was negotiated).

7. Relative Means of the Parties

When, as here, both parties are corporations, this factor is given little weight. *See, e.g., AEC One Stop*, 326 F. Supp. 2d at 531.

8. Plaintiff's Choice of Forum

Although normally accorded significant weight, “a plaintiff’s choice of forum is given less deference when the forum is ‘neither the [plaintiff’s] home nor the place where the operative facts of the action occurred.’” *Reinhard*, 2007 U.S. Dist. LEXIS 59242, at *11 (citation omitted). This is the case here.

While Xenomics maintains the pretense that its business office is at 420 Lexington Avenue in New York, all indications are that this “office” is little more than a mail drop. As explained above, the evidence developed to date –without the benefit of any discovery – demonstrates that Xenomics’ conducts its operations out of San Diego. See above at pp. 6-7. Indeed, despite repeated requests – both formal and informal – Xenomics has refused to answer a simple question – “what is going on at 420 Lexington Avenue?” Wieder Dec. ¶ 10, Ex. F. This strongly suggests that nothing is going on there. Accordingly, plaintiff’s choice of forum is entitled to little, if any, weight. *See Beckerman v. Heiman*, 2006 U.S. Dist. LEXIS 39685, *12-*13 (S.D.N.Y. June 16, 2006) (granting motion to transfer because, among other things, “plaintiffs provide no information regarding the office’s size, number of employees or function” and office appeared to be nothing more than a “mail drop”).

Plaintiff’s choice of forum is also entitled to less weight here because it runs contrary to the intent of the parties concerning the resolution of disputes under the Agreement. Even if the Court does not enforce the arbitration provision, that provision reflects the parties’ intent and agreement that if one party wanted to commence dispute resolution proceedings, it would do so in the forum chosen by the other party. Thus, if Sequenom wanted to commence a proceeding, it

agreed to do so in New York. And if Xenomics wanted to commence a proceeding, it agreed to do so in San Diego. Wieder Dec. Ex. B at § 11.2; Tatman Dec. ¶ 7.

For these reasons, plaintiff's choice of forum should be given little, if any, weight.

9. Trial Efficiency and General Interests of Justice

“[T]he pendency of a similar or related action in the transferee forum is universally recognized as a powerful reason for granting a motion for a change of venue.” *Grace v. Bank Leumi Trust Co. of New York*, No. 02 Civ. 6612 (RMB), 2004 U.S. Dist. LEXIS 5492, at *12 (S.D.N.Y. Mar. 30, 2004) (citation omitted). There are presently a number of other actions relating to Sequenom's Blood Testing Program that have been filed and consolidated in the Southern District of California. Tatman Dec. ¶¶ 13-14. This includes 13 class actions that have been consolidated under the caption *In re Sequenom Inc., Sec. Litig.*, No. 09-CV-0921 (LAB) (WMc) and three federal derivative actions consolidated under the caption *In re Sequenom, Inc. Derivative Litig.*, No. 09-CV-1341 (LAB) (WMc). These actions arise out of the same alleged fraud – relating to the results and data for the Blood Test Technology – that are at the heart of Xenomics's claims. Tatman Dec. ¶ 13. Judge Burns has dealt with these issues for the past year.

While a settlement has been announced in the class actions (Tatman Dec. ¶ 13), the submissions that have been made in connection with seeking the Court's approval of that settlement have provided Judge Burns with a detailed analysis of the underlying facts regarding the alleged fraud that is also the basis for Xenomics's claim. Thus, the federal court in San Diego is already familiar with the facts underlying this dispute. Public policy “favor[s] the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided.” *Grace*, 2004 U.S. Dist. LEXIS 5294, at *16-*17 (citation omitted). Accordingly, this factor weighs in favor of transfer.

B. In The Alternative, The Complaint Should be Dismissed

Finally, if the Court does not dismiss or stay the action pursuant to Section 3 of the FAA or transfer the action to the Southern District of California, Sequenom requests that the Court dismiss the action.

1. The Contract Claim Should Be Dismissed For Failure to Plead a Breach of the Agreement

Under Delaware law,⁷ “to survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of *an obligation imposed by that contract*; and third, the resultant damage to the plaintiff.” *VLIW Techs. v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003) (emphasis added). *See also Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, CV No. 13911, 1995 Del. Ch. LEXIS 134 (Del. Ch. Nov. 2, 1995) (dismissing contract claims where complaint did not identify any term of the contract that had been breached). The Complaint fails to identify – let alone allege – any provision of the Agreement that was breached. For example, there are no allegations that any payments due under the Agreement have not been made.⁸ Nor are there any allegations that Sequenom has breached the sections of the Agreement dealing with the manner in which the confidentiality of proprietary information shall be maintained.

Instead of identifying a provision of the Agreement that was breached, the Complaint falls back on the argument that Xenomics was fraudulently induced into entering the Agreement. Indeed, in its breach of contract claim, Xenomics simply alleges that the Sequenom “breached the [A]greement entered into between the parties by fraudulently misrepresenting the status of the company, particularly as to its Down Syndrome test, and other misrepresentations and

⁷The Agreement is governed by Delaware law. Wieder Dec. Ex. B at § 12.4.

⁸Under the Agreement, no royalties are due until 2011. Wieder Dec. Ex. B at § 4.3.

fraudulent conduct as set forth above.” Com. ¶ 35. But there are no representations in the Agreement about any Down syndrome test. And the conduct “set forth above” in the Complaint relates to the alleged fraudulent inducement claim. The breach of contract claim should therefore be dismissed.

2. The Fraudulent Inducement Claim Should Be Dismissed

a. The Complaint Fails to Allege Intent

Under California law,⁹ the elements of fraud are: “(a) misrepresentation (false representations, concealment or non-disclosure; (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage. Fraudulent inducement is simply a subspecies of fraud.” *Rotherham v. Am. Red Cross*, No. 04 CV 1172 BEN (LSP), 2007 U.S. Dist. LEXIS, at *19 (S.D. Cal. Mar. 5, 2007) (*citing Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (internal quotations and citations omitted)). The fraud claim should be dismissed for failure to plead intent. Nowhere does Xenomics allege that the Sequenom press releases relating to the Blood Test Technology were made by Sequenom with the intent of inducing Xenomics into signing the Agreement (which, in any event, covered Urine Test Technology, not Blood Test Technology). This fundamental pleading failure mandates dismissal of the fraud claims. *See Privacywear, Inc. v. QTS & CFTC, LLC*, No. EDCV 07-1532-VAP (OPx), 2009 U.S. Dist. LEXIS 74496, at *15 (C.D. Cal. Aug. 20, 2009) (dismissing counterclaim where alleged concealment made in private placement memorandum directed to

⁹As this Court has recognized, “[a] federal court sitting in diversity . . . must apply the choice of law rules of the forum state.” *Weizmann Inst.*, 229 F. Supp. 2d at 249 (citation omitted). In that case, this Court explained that under New York law, in tort cases, the law of the state with the most significant interest in the litigation governs, and that this interest is determined by where the acts giving rise to the tort occurred. *Id.* at 249-250. Sequenom submits that because acts underlying the fraud claim took place in California, California law should govern the fraudulent inducement claim.

potential investors and defendants did not allege how plaintiffs intended to defraud them specifically, as opposed to intent to defraud potential investors).

b. Portions of the Fraudulent Inducement Claim Fail to Comply with Federal Rule of Civil Procedure 9(b)

“To withstand a motion to dismiss, as for all claims sounding in fraud, a claim for fraudulent inducement must comply with the requirements of Rule 9(b), which requires that allegations of fraud be pled with particularity.” *Miller v. Holtzbrinck Publishers, LLC*, No. 08 Civ. 3508 (HB), 2009 U.S. Dist. LEXIS 18973, at *8 (S.D.N.Y. Mar. 3, 2009). As the *Miller* court explained, to comply with Rule 9(b):

a complainant must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which the plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.

Id. (citing *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)). Among other things, Rule 9(b) “afford[s] defendants fair notice of the claims against them and the factual ground upon which such claims are based.” *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993) (citation omitted).

Portions of the fraud claim should be dismissed for failure to comply with Rule 9(b). Specifically, Xenomics alleges that it relied on the press releases attached to the Complaint, as well as on “defendants making similar representations and other statements made by the defendant’s representatives to the plaintiff.” Com. ¶ 15. This latter allegation fails every element of the “where, when, who or how” test. *See Miller*, 2009 U.S. Dist. LEXIS 18973, at *8. It doesn’t say **where** the “similar representations and other statements” were made. It

doesn't allege **when** they were made. It doesn't allege **who** made the statements.¹⁰ And it does not allege what the statements were, let alone **how** they were false. The Complaint fails to provide Sequenom with the information it is entitled to in order to defend itself. Accordingly, insofar as the claim for fraud relies on these unidentified and unattributed statements, it should be dismissed.¹¹

CONCLUSION

For the reasons set forth above, Sequenom respectfully requests that this Court dismiss this action because of the arbitration agreement, or, in the alternative, transfer this action to the United States District Court for the Southern District of California or, in the alternative, dismiss the Complaint.

Dated: New York, New York
February 22, 2010

COOLEY GODWARD KRONISH LLP

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¹⁰“Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged statements to ‘defendants’.” *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) (citation omitted).

¹¹In addition, the Complaint alleges that certain statements made in December 2008 and January and February 2009 – after the Agreement was signed – were fraudulent. Com. ¶ 16. It is unclear from the Complaint whether these statements form part of the basis for the fraudulent inducement claim. To the extent that it does, this portion of the claim should be dismissed for failure to plead reasonable reliance, as statements made *after* a contract is signed could not have induced a party to sign a contract. *Mills*, 12 F.3d at 1175. Counsel’s letter to the Court dated December 30, 2009 (at p. 3) appears to recognize this point; if this is the case, then these statement are not part of the fraud claim and therefore not the subject of the motion.