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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PARAGON BIOTECK, INC.,

Plaintiff,

vs.

ALTAIRE PHARMACEUTICALS, INC. and SAWAYA AQUEBOGUE, LLC

Defendants.

No. 3:15-CV-00189-PK

ALTAIRE PHARMACEUTICALS, INC. AND SAWAYA AQUEBOGUE, LLC'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE

ORAL ARGUMENT REQUESTED

ALTAIRE PHARMACEUTICALS, INC. AND SAWAYA AQUEBOGUE, LLC'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE

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LOCAL RULE 7-1(A) CERTIFICATION

Pursuant to L.R. 7-1(a), defendants certify that, through its counsel, they made a good faith effort to resolve the issues contained in the Motion through a telephone conference with plaintiff's counsel on March 19, 2015; however, the parties are unable to resolve this dispute without the Court's assistance.

MOTION

Defendants hereby move this Court for an order granting a Motion to Dismiss the above-captioned Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). In the alternative, Defendants move for transfer of the above-captioned action to the Eastern District of New York. Additionally Saw Aque also moves to dismiss all of the claims against it for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

MEMORANDUM

Defendants Altaire Pharmaceuticals, Inc. ("Altaire") and Sawaya Aquebogue, LLC ("Saw Aque") (collectively "Defendants") respectfully submit this memorandum of law in support of their Motion to Dismiss the above-captioned Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). In the alternative, Defendants move for transfer of the above-captioned action to the Eastern District of New York. Saw Aque also submits this memorandum of law in support of its Motion to Dismiss all of the claims against it for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

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PRELIMINARY STATEMENT

The only connection this Court has to the Complaint of Plaintiff Paragon Bioteck, Inc. ("Paragon") is that Paragon's principal place of business is in Oregon. As discussed below and in the Declaration of Assad Sawaya ("Sawaya Decl."), no other connections to the forum State exist. Because a plaintiff's location, without more, is insufficient to satisfy the requirements under federal law to establish personal jurisdiction and venue over a defendant, Paragon's Complaint must be dismissed. Even if the Court determines that Paragon has met both the personal jurisdiction and venue hurdles, the above-captioned case should be transferred to the Eastern District of New York because there is a valid forum-selection clause that establishes venue in that forum.

Further, even if the Court does not dismiss Paragon's Complaint on personal jurisdiction or venue grounds, it should dismiss the Complaint as to Saw Aque for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Nowhere in its Complaint does Paragon allege that Saw Aque has engaged in any wrongful conduct at all, let alone conduct sufficient to withstand a motion to dismiss Paragon's Complaint. Paragon's Complaint as to Saw Aque, therefore, should be dismissed with prejudice.

FACTUAL BACKGROUND

Altaire is a New York corporation with its principal place of business in Aquebogue, New York, which is located in Suffolk County of that State.[1] Sawaya Decl. ¶ 2. All of Altaire's employees, shareholders, officers and directors are located in New York. *Id.* Altaire is a pharm-

[1] The U.S. District Court for the Eastern District of New York has jurisdiction over Suffolk County, New York. United States District Court Eastern District of New York, https://www.nyed.uscourts.gov (last visited Mar. 18, 2015).

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aceutical manufacturer that compounds, fills and packages liquid and semi-solid pharmaceutical (both prescription and over-the-counter) and homeopathic products, including ophthalmic products. *Id.* ¶ 3. The entire manufacturing process takes place in New York and the products are stored in New York until they are shipped to purchasers. *Id.*

Saw Aque is a limited liability company organized in New York, with its only office in Aquebogue, New York. *Id.* ¶ 4. All of Saw Aque's employees, shareholders, officers and directors are located in New York. *Id.*

Neither Altaire nor Saw Aque is licensed to do business in Oregon, nor do they own any property or maintain any facilities in Oregon. *Id.* ¶¶ 5-6. Neither Altaire nor Saw Aque has ever sent any employees to Oregon for any purpose. *Id.* ¶ 7. Indeed, before Paragon contacted Altaire to propose a business relationship in 2011, neither Altaire nor Saw Aque had any connection to Oregon at all. *Id.* ¶ 8.

In early 2011, Patrick Witham, an employee of Paragon, contacted Altaire to propose a business arrangement whereby Paragon would take steps to file New Drug Applications ("NDAs") with the Food and Drug Administration for certain ophthalmic products. *Id.* ¶¶ 9, 13; Compl. ¶ 8. Paragon and Altaire negotiated a written Agreement (the "Agreement") in New York pursuant to which Paragon would file the NDAs and Altaire would provide certain input necessary to file the NDAs. Sawaya Decl. ¶¶ 10, 13; Compl. ¶ 8. Altaire would then become the exclusive manufacturer and supplier of the products, and Paragon would be the exclusive marketer and distributor. Ex. 1 to Sawaya Decl. at 1. The Agreement was signed on May 30, 2011. Sawaya Decl. ¶ 10; Compl. ¶ 8. Paragon and Altaire agreed that if any disputes arose with respect to the Agreement, venue would be proper in New York federal or state court and

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that the Agreement would be construed under New York law. Sawaya Decl. ¶¶ 11-12; Ex. 1 at 5.

As contemplated, given the nature of its business, all of the activities in which Altaire engaged pursuant to the Agreement (or otherwise) have taken place in New York. Sawaya Decl. ¶¶ 13, 15, 16, 17, 20. While Paragon's employees have visited Altaire in New York on a number of occasions, from 2011 and continuing through 2014, no one from Altaire or Saw Aque has ever traveled to Oregon to meet with Paragon, and no person from either Altaire or Saw Aque has attended any Paragon shareholder meetings in Oregon. *Id.* ¶¶ 7, 16, 22. The products that Altaire ships to Paragon are shipped to Paragon's facilities in Florida and Pennsylvania. *Id.* ¶ 15.

In 2013, Paragon entered into a commercialization and distribution agreement with Bausch & Lomb, which is incorporated in New York, with its headquarters in New Jersey. *Id.* ¶ 20; Compl. ¶ 22. Pursuant to that agreement, Bausch & Lomb has from time to time made payments to Altaire in New York against Altaire's invoices issued to Paragon for the sale of Altaire's products and as instructed by Paragon. Sawaya Decl. ¶ 20.

Saw Aque is not a party to the Agreement between Paragon and Altaire. *Id.* ¶ 21. Pursuant to the Agreement, Altaire provided consideration to Saw Aque. *Id.* ¶ 21; Ex. 1 to Sawaya Decl. at 1. Saw Aque has no obligations to Altaire pursuant to the Agreement or otherwise. Ex. 1 to Sawaya Decl.

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ARGUMENT

I. PARAGON'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION IN THIS COURT

A. Personal Jurisdiction Standards

Personal jurisdiction is governed by the law of the forum state in the absence of a federal statute. *Emmert Indus. Corp. v. Copeland Equip. Parts, Inc.*, No. 09-229-PK, 2009 WL 2447550, at *3 (D. Or. Aug. 7, 2009). Because Oregon's long-arm statute confers jurisdiction to the extent permitted by due process, this Court may exercise personal jurisdiction so long as a defendant has "minimum contacts with the relevant forum such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The Court may exercise general or specific jurisdiction over a defendant. *Id.*

Recently, the United States Supreme Court established that corporations are subject to general jurisdiction, absent exceptional circumstances, only where they are incorporated or have their principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Because Paragon's Complaint does not allege that either Altaire or Saw Aque is incorporated in or has its principal place of business in Oregon, general jurisdiction is not at issue in this case.

The Ninth Circuit uses a three-part test to determine whether a non-resident defendant has sufficient minimum contacts to be subject to specific personal jurisdiction. *Gullette v. Lancaster & Chester Co.*, No. 3:14-cv-00537-HZ, 2014 WL 3695515, at *3 (D. Or. July 23, 2014) (citing *Brayton Purcell LLP v. Recordon & Recordon,* 606 F.3d 1124, 1128 (9th Cir. 2010)). First, the non-resident defendant "must purposefully direct his activities or consummate

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some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum." *Brayton Purcell*, 606 F.3d at 1128. Second, the claim must arise out of or relate to the defendant's forum-related activities. *Id.* Third, the exercise of jurisdiction must be "reasonable." *Id.*

In addition to *Daimler*, last year, the United States Supreme Court also addressed specific personal jurisdiction in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and in particular, clarified the "minimum contacts" standard. In *Walden*, the Supreme Court explained that the specific personal jurisdiction inquiry must focus on "the relationship among the [non-resident] defendant, the forum, and the litigation," and that the defendant's suit-related conduct "must create a substantial connection with the forum State." *Id.* at 1121. As the Supreme Court held and this Court has recognized, this connection depends on two aspects: (1) "'the relationship must arise out of contacts that the defendant *himself* creates with the forum State;'" and (2) the "minimum contacts" analysis looks to the non-resident defendant's contacts with the forum State itself, rather than the defendant's contacts with the resident plaintiff. *Gullette*, 2014 WL 3695515, at *3 (quoting *Walden*, 134 S. Ct. at 1121).

Under Ninth Circuit law, Paragon bears the burden to show that it has met the first two prongs of the specific jurisdiction test. *Id.* Because Paragon cannot satisfy even the first prong, the Court should dismiss Paragon's Complaint for lack of personal jurisdiction. *Id.* Even if Paragon met its burden to show that (1) Defendants had "purposefully availed" themselves of conducting activities in the forum and (2) Paragon's claims arise out of Defendants' "forum-related activities," however, Defendants can show that the exercise of jurisdiction in this Court would not be reasonable.

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B. Defendants Are Not Subject To Personal Jurisdiction In This Court

1. Paragon Has Not Demonstrated That Defendants Purposefully Availed Themselves Of Conducting Activities in This Forum

Because Paragon's claims arise out of a contract between Paragon and Altaire, the Court must analyze whether Defendants "purposefully availed [themselves] of the privilege of conducting activities in the forum." *Id.* (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).[2] This analysis examines "whether the defendant's contacts are attributable to his own actions or are solely the actions of the plaintiff." *Gullette*, 2014 WL 3695515, at *4. As the Supreme Court in *Walden* noted, the relationship with the forum "must arise out of contacts that the defendant *himself* creates with the forum." 134 S. Ct. at 1122 (citations omitted).

In this case, Paragon has failed to plead any facts that show that Altaire or Saw Aque purposefully conducted activities in Oregon. Paragon contacted Altaire to enter into a business relationship, and the Agreement between Paragon and Altaire is Defendants' only connection to Oregon. This District has held that a contract between a resident plaintiff and a non-resident defendant can create sufficient contacts for specific personal jurisdiction over a defendant only where the contract establishes a "continuing relationship" with the forum state. *Emmert*, 2009 WL 2447550, at *4. Paragon has failed to demonstrate that the Agreement between Paragon and Altaire establishes such a relationship, because a "continuing relationship is not established by

[2] As discussed *infra* in Section IV, Paragon makes no allegations whatsoever regarding Saw Aque's conduct. Paragon therefore clearly has failed to meet its burden with respect to establishing personal jurisdiction over Saw Aque in this forum. *See, e.g.*, *Gullette*, 2014 WL 3695515, at *6 (dismissing parent company defendant for lack of personal jurisdiction where parent company was not a party to the contract and never had a contractual relationship with the plaintiff).

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a contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside, but otherwise created no substantial connection or ongoing obligations there." *Id.* at *5 (citations omitted). Similarly, although Paragon asserts that personal jurisdiction is appropriate because Altaire placed telephone calls into Oregon and sent documents to Oregon, "[r]epeated communication with residents of another state cannot alone establish a continuing relationship." *Id.* Because Paragon makes no other allegations of contacts between either of the Defendants and Oregon, it fails to satisfy the first prong of the specific personal jurisdiction test.

2. Paragon Fails To Show That Its Claims Arise out of Defendants' Forum-Related Activities

Because Paragon has failed to satisfy the purposeful availment analysis, its claims should be dismissed for lack of personal jurisdiction. If the Court determines, however, that Paragon has met its burden on the first prong of the specific personal jurisdiction test, Paragon still has not sufficiently demonstrated that its claims arise out of Defendants' activities in this forum. In making this determination, the Ninth Circuit follows a "but-for" test, asking whether "but for Defendants' contacts with Oregon, would the claims against Defendants have arisen?" *Gullette*, 2014 WL 3695515, at *6. This District has held that a contract with an Oregon resident is insufficient on its own to satisfy this prong. *Id.* Because Paragon has alleged no other contacts with Oregon besides those stemming from the Agreement that Paragon initiated, Paragon fails to meet the second prong of the specific personal jurisdiction test.

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3. It Would Be Unreasonable To Require Defendants To Litigate in This Forum

Even if the Court finds that Paragon has satisfied the first two prongs of the specific personal jurisdiction test, it should dismiss Paragon's Complaint for lack of personal jurisdiction because the Court's exercise of jurisdiction over Defendants would be unreasonable. To determine whether the exercise of jurisdiction is reasonable, this District balances seven factors:

> (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Gullette, 2014 WL 3695515, at *6. No one factor is dispositive; instead, all seven must be weighed together. *Id.*

The outcome of each of the above factors weighs against exercising personal jurisdiction against Defendants in this case. First, as stated above, Paragon has failed to establish that Defendants' presence in Oregon resulted from their own conduct. Second, the burden on Defendants to litigate in Oregon would be substantial given that all of Defendants' potential witnesses are located in New York. Third, with respect to conflicts, there is a forum-selection and choice of law provision in the Agreement, which weighs in favor of exercising jurisdiction in New York. Fourth, any interest Oregon has in adjudicating disputes involving its own residents is outweighed by the fact that Paragon's residence (although not its state of incorporation) is the sole contact this case has with Oregon. The remaining three factors all

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weigh in favor of dismissal because of the venue and choice of law provisions to which both parties agreed.

Because Paragon has failed to plead facts sufficient to show that it has met the requirements for specific personal jurisdiction over Defendants, the above-captioned case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

II. PARAGON'S COMPLAINT SHOULD BE DISMISSED BECAUSE VENUE IS IMPROPER IN OREGON

Not only does Paragon's Complaint fail to establish personal jurisdiction over Defendants in this Court, but venue is improper as well; thus dismissal is appropriate pursuant to Federal Rule of Civil Procedure 12(b)(3). In diversity cases, venue is proper in the district where all defendants reside or "where substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b). Paragon has the burden of showing that venue is properly laid. *Piedmont Label Co. v. Sun Garden Packing*, 598 F.2d 491, 495 (9th Cir. 1979); *Gaston v. Facebook, Inc.*, No. 3:12-CV-0063-ST, 2012 WL 629868, at *6 (D. Or. Feb. 2, 2012), *report and recommendation adopted*, No. 3:12-CV-00063-ST, 2012 WL 610005 (D. Or. Feb. 24, 2012). "When there are multiple parties and/or multiple claims in an action, the plaintiff must establish that venue is proper as to each defendant and as to each claim." *Multimin USA, Inc. v. Walco Internation, Inc.*, No. CV F 06-0226 AWI SMS, 2006 WL 1046964, at *2 (E.D. Cal. Apr. 11, 2006); *accord SoccerSpecific.com v. World Class Coaching, Inc.*, No. CIV. 08-6109-TC, 2008 WL 4960232, at *1 (D. Or. Nov. 18, 2008).

Paragon attempts to meet its burden with the bare assertion that a "substantial part of the events or omissions giving rise to this action occurred in this District." Compl. ¶ 7. Such

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bald allegation is not only legally inadequate, *Schwarzenegger*, 374 F.3d at 800 ("[P]laintiff cannot 'simply rest on the bare allegations of its complaint.'"); *Jaliwa v. Concerned Citizens of S. Cent. Los Angeles*, No. 06CV2617BTMLSP, 2007 WL 2021818, at *4 (S.D. Cal. July 10, 2007) (holding that plaintiff's "bare assertion" regarding venue was insufficient to establish venue was proper), it is entirely without factual merit.

As the discussion above demonstrates, no part of "the events or omissions giving rise to the claim[s]"occurred in Oregon. *See supra* 1-2. Thus, dismissal is appropriate under 12(b)(3) for improper venue in Oregon.

III. AS AN ALTERNATIVE TO DISMISSAL, VENUE SHOULD BE TRANSFERRED TO THE EASTERN DISTRICT OF NEW YORK

Even if this Court finds that it has personal jurisdiction over Paragon's claims and that venue in this forum is proper, Defendants request transfer to the Eastern District of New York under 28 U.S.C. § 1404(a). Section 1404(a) permits a district court to "transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented" if such transfer is in the "interest of justice." Generally, courts afford plaintiff's choice of forum a degree of deference when considering whether transfer is appropriate under § 1404(a). *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013). A plaintiff's selection in filing, however, is immaterial in cases where the parties have agreed to a valid forum-selection clause. *Id.* at 582. "[P]roper application of § 1404(a) requires that a forum-selection clause be given controlling weight in all but the most exceptional cases." *Id.* at 579 (internal quotation marks omitted). Thus, where a forum-selection clause applies, plaintiffs shoulder the burden of showing either that the forum-selection clause is

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not valid or that the relevant factors recognized under § 1404(a) make transfer inappropriate. *Rowen v. Soundview Commc'ns, Inc.*, No. 14-CV-05530-WHO, 2015 WL 899294, at *3 (N.D. Cal. Mar. 2, 2015) (granting motion to transfer); *see also Atl. Marine Const.*, 134 S. Ct. at 581.

A. The Agreement's Venue Provision Controls Plaintiff's Claims and Is Presumptively Valid

As stated above and in the attached Declaration, the Agreement from which Paragon's causes of actions arise contains a venue provision. The provision states as follows:

> VENUE
> The parties to this Agreement agree that jurisdiction and venue of any action brought pursuant to this Agreement, to enforce the term hereof or otherwise with respect to the relationships between the parties created or extended pursuant hereto, shall properly lie in the Court(s) of the State of New York or the Court(s) of the United States having jurisdiction over Suffolk County, New York.

Sawaya Decl. ¶ 11; Ex. 1 to Sawaya Decl. at 5. Paragon makes no allegations that challenge the validity of the provision.[3] Nor does Paragon challenge the provision's existence or relevance to its asserted actions. Compl. ¶ 7 ("The contract that is the subject of this action has a . . . venue provision.").[4] Instead, without attaching the Agreement to its Complaint or identifying the

[3] Absent a showing by the party seeking to avoid the forum-selection clause that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching," the clause is presumptively valid. *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 5, 17 (1972) (describing the opposing party's burden in establishing invalidity as "heavy"); *accord Ingenieria Alimentaria Del Matatipac, S.A. de C.V. v. Ocean Garden Products Inc.*, 320 F. App'x 548, 549 (9th Cir. 2009). Indeed, the invalidating party must "show that trial in the contractual forum would be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Bremen*, 407 .S. at 18.

[4] The Agreement's venue provision applies to both Altaire and Saw Aque with respect to all claims brought by the Plaintiff, as the claims constitute "action[s] brought pursuant to th[e] Agreement," Ex. 1 to Sawaya Decl. at 5. "[F]orum selection clauses can be equally applicable to contractual and tort causes of action," *Manetti Farrow, Inc. v. Gucci Am.*, Inc., 858 F.2d 509, 513-14 (9th Cir. 1988) (holding that a forum-selection clause, which covered "disputes regarding 'interpretation' or 'fulfillment' of the contract," applied to plaintiff's contract and tort claims

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specific language from the provision, Paragon baldly asserts that the venue provision is "permissive." *Id.* Beyond lacking any factual support, Paragon's characterization is inconsistent with the law.

Federal common law governs the enforceability of forum-selection clauses in diversity actions. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). Ninth Circuit precedent requires that a forum-selection clause must be enforced as to venue where venue is specified with mandatory language. *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) (ruling that the following venue provision was mandatory rather than permissive: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia"); *see also Guenther v. Crosscheck Inc.*, No. C 09-01106 WHA, 2009 WL 1248107, at *1-2 (N.D. Cal. Apr. 30, 2009) (ruling that the following venue provision was mandatory rather than permissive: "Venue: . . . The parties agree that any action arising out of the negation, execution or performance of the terms and conditions of this agreement shall be brought in the courts of Sonoma County, California").

Applying *Docksider*, this District concluded that forum-selection clauses need not "contain language requiring exclusive jurisdiction and an exclusive forum," to be mandatory, *Mead Investments, Inc. v. Garlic Jim's Franchise Corp.*, No. 08-922-HU, 2008 WL 4911911, at *4 (D. Or. Nov. 13, 2008), and observed that the word "shall" generally "indicates a mandatory

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because the "claims relate[d] in some way to rights and duties enumerated in the . . . contract" and could not "be adjudicated without analyzing whether the parties were in compliance with the contract"), and to third-party beneficiaries of the agreement, *id.* at 514 n.5 (rejecting argument that the forum-selection clause applied only to the parties who signed the contract).

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intent," *id.* (quoting *Sterling Forest Assoc. Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 251 (4th Cir.1988)). The forum-selection clause at issue in *Mead Investments* contained the following language: "This Agreement shall be deemed to have been made and entered into in the State of Washington and all rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Washington. Venue shall lie in the Superior Court of King County, State of Washington." *Id.* at *3. The court determined that because the defendants were residents of Washington and the venue clause designated Washington, "interpreting the phrase 'shall be' as permissive would make the clause meaningless and redundant, because federal jurisdiction and venue statutes provide as a matter of law that Washington is a proper venue for this action." *Id.* at *4.

Similar to *Docksider*, *Guenther*, and *Mead Investments*, the venue provision in the instant case clearly governs "venue" and contains mandatory language that any action brought under the Agreement "*shall*" be in the courts of a particular county, specifically, in this case, the federal courts having jurisdiction over Suffolk County, New York. Moreover, Altaire is a New York corporation with its principal place of business in Suffolk County, New York. Sawaya Decl. ¶ 2. Altaire's primary business activities take place in New York, including the manufacturing, storing, and shipping of its products. *Id.* ¶ 3. Saw Aque is a limited liability company organized in New York, with its principal and only office in Suffolk County, New York. *Id.* ¶ 4. Saw Aque's employees, shareholders, officers and directors are all located in New York. *Id.* Therefore, if Paragon is correct in asserting that the Agreement's venue provision is permissive, the clause would be rendered entirely "meaningless and redundant," as venue would otherwise be permis-

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sible in Suffolk County under §§ 1391(b)(1), (c), (d).[5] Accordingly, this Court should interpret the Agreement's venue provision as mandatory, and give it controlling weight when considering the appropriateness of transfer under § 1404(a).

B. Public Interest Factors Do Not Overwhelmingly Disfavor Transfer Under § 1404(A)

Having shown above that a valid forum-selection clause applies to Paragon's claims, this Court must adjust the "usual § 1404(a) analysis in three ways." *Atl. Marine Const.*, 134 S. Ct. at 581.

> First, the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. . . . Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests. . . . A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum. . . . Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.

Id. at 581-82.

The public interest factors generally considered on a transfer motion include the following: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; and (3) the interest in having the trial of a diversity case in a forum that is at home with the law. *Id.* at 581 n.6. Such factors "rarely defeat a transfer motion," and plaintiffs "bear the burden of showing that public-interest factors overwhelmingly disfavor a transfer." *Id.* at 583. Applying the foregoing analysis to the instant case

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[5] *See also Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 842 (9th Cir. 1986) (courts analogize other business associations to corporations in making venue determinations).

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requires transfer to the Eastern District of New York consistent with the Agreement's venue provision, as not a single factor overwhelmingly disfavors transfer.

First, there is nothing to suggest that Paragon's case would be subject to any more administrative difficulties if it were transferred to New York, certainly no difficulties that rise to the level of "overwhelmingly disfavor[ing]" transfer. *See, e.g.*, *Premier Cmty. Bank v. First Am. Title Ins. Co.*, No. 3:14-CV-00913-PK, 2014 WL 5018814, at *6 (D. Or. Sept. 25, 2014) ("Administrative considerations such as docket congestion are given little weight in this circuit in assessing the propriety of a § 1404(a) transfer." (quoting *Allstar Mktg. Grp., LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1134 (C.D. Cal. 2009))).

With respect to the second factor, there is strong local interest for adjudication of the case in New York, as it is the location in which the claim arose. Under Ninth Circuit law, a breach of contract claim arises in "the place of intended performance . . . because the place of performance is determined at the inception of the contract and therefore the parties can anticipate where they may be sued," and moreover, "the place of performance is likely to have a close nexus to the underlying events." *Premier Cmty. Bank*, 2014 WL 5018814, at *4 (quoting *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 842 (9th Cir. 1986)).

Here, performance was clearly intended to occur in New York, as it is the location from where all Chemistry, Manufacturing and Controls sections for the NDA were researched and developed (Sawaya Decl. ¶ 13) and the product was manufactured, stored, and shipped to locations other than Oregon. *Id.* ¶¶ 13, 15; *see also supra* Section I. Conversely, nothing in the Agreement indicates that performance was intended in Oregon. Altaire never shipped any product to Oregon; all shipments went to Florida and Pennsylvania. *Id.* ¶ 15.

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Finally, the third public interest factor weighs in favor of transfer given the Agreement's New York governing law provision. Sawaya Decl. ¶ 12; Ex. 1 to Sawaya Decl. at 5.

C. Private Factors Weigh in Favor of Transfer Under § 1404(A)

Even if this Court was to find that the Agreement's venue provision is permissive, transfer would be appropriate under § 1404(a). In the absence of a forum-selection clause, courts consider private interest factors to evaluate whether transfer serves the convenience of the parties and witnesses and otherwise promotes the interest of justice, in addition to the various public-interest considerations discussed above. *Atl. Marine*, 134 S. Ct. at 581.

As a threshold matter, venue is proper in New York. The Agreement's venue provision, at a minimum, establishes proper venue for the "Courts of the United States having jurisdiction over Suffolk County, New York." Sawaya Decl. ¶ 11; Ex. 1 to Sawaya Decl. at 5; Compl. ¶ 7. The United States District Court for the Eastern District of New York has such jurisdiction.[6] Further, as discussed above, venue would be proper in New York in the absence of the Agreement's venue provision. *Supra* 14.

Turning to the private interest analysis, courts in the Ninth Circuit may consider the following factors to determine whether transfer serves the convenience of the witnesses and promotes the interest of justice: (1) the location where the relevant agreements were negotiated and executed; (2) the state that is most familiar with the governing law; (3) the plaintiff's choice of forum; (4) the respective parties' contacts with the forum; (5) the contacts relating to the plaintiff's cause of action in the chosen forum; (6) the differences in the costs of litigation in the

[6] *Supra* note 1.

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two forums; (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and (8) the ease of access to sources of proof. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir.2000). The only one of these factors that weighs in favor of retaining venue in Oregon is the plaintiff's choice of forum. The remaining factors all weigh in favor of transfer to the Eastern District of New York.

Factor (1) weighs in favor of transfer to New York. While the agreement was executed by Altaire in New York and by Paragon in Oregon, it was negotiated by the parties in New York. Sawaya Decl. ¶ 10; Ex. 1 to Sawaya Decl. at 5.

As discussed above, factor (2) weighs in favor of transfer. The Agreement identified New York law as governing its "validity, construction, and enforcement." Sawaya Decl. ¶ 12; Ex. 1 to Sawaya Decl. at 5. This factor thus weighs in favor of transfer because New York district court judges likely are more familiar with the governing law. *See Premier Cmty. Bank*, 2014 WL 5018814, at *6 (weighing the law governing the action factor in favor of Washington "[b]ecause a federal district court in Washington is more familiar with Washington law, this factor weighs in favor of transfer").

Factors (4) and (5) also weigh strongly in favor of transfer. As discussed at length with respect to Defendants' request for dismissal for want of personal jurisdiction, Defendants lack even minimum contacts with Oregon, while Paragon, in contrast, has had regular contact with New York. The limited contact between Paragon's claims and the chosen forum is also well covered in the discussions above. All Defendants' alleged acts or omissions relating to the performance of the contract occurred in New York. Other than Paragon's office location in

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Oregon, the Agreement makes no mention of Oregon or Oregon law, while the Agreement specifically contemplates venue in New York. Ex. 1 to Sawaya Decl. at 5.

Factors (6), (7), and (8) support transfer as well. Most of the key witnesses in this case likely reside in the northeastern United States, if not New York. Defendants anticipate key witnesses will be their employees, all of whom reside in New York, and those individuals from Bausch & Lomb responsible for the negotiation and fulfillment of the contract between Paragon and Bausch & Lomb. Most critically, Bausch & Lomb maintains its headquarters in New Jersey and is incorporated and has an office in New York. As such, Defendants expect that all relevant witnesses from the company will reside in one of the two states and thus, would likely fall within the subpoena power of the Eastern District of New York. In contrast, the only witnesses likely to be located in Oregon are Paragon's employees.

Similarly, all relevant documents that would be provided by Defendants are located in New York and given Bausch & Lomb's place of incorporation and corporate headquarters, it could be reasonably expected that their relevant documents would be located in New York or New Jersey.

Furthermore, the nature of Paragon's allegations suggest that a site visit to Altaire's New York manufacturing facility may be necessary as a means of discerning the quality of Altaire's product, the conditions associated with the product's research and development, the facility's storage conditions or capacity, or Altaire's manufacturing capabilities.

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IV. THE CLAIMS AGAINST SAW AQUE SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(6)

Even if the Court determines that it has personal jurisdiction and venue over Defendants, Paragon's claims against Saw Aque should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Paragon does not directly allege that Saw Aque breached any contract or engaged in tortious conduct. Indeed, in its 87-paragraph Complaint, Paragon barely mentions Saw Aque. Paragon's only complaint against Saw Aque is that Paragon's provision of consideration to Saw Aque in the course of the Agreement between Paragon and Altaire and that Saw Aque is therefore a third-party beneficiary of the Agreement. Such an allegation is not sufficient to withstand a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

A motion to dismiss for failure to state a claim may be granted when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a plausible claim for relief on the face of the complaint. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). A complaint must contain enough facts to raise a plaintiff's right to relief above the "speculative level," which requires more than a statement of facts "that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must include non-conclusory factual content from which the court can draw a reasonable inference that the plaintiff has plausibly suggested a claim entitling it to relief and that the defendant is liable for the misconduct alleged. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009)).

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None of Paragon's claims for relief mention Saw Aque, let alone implicate it in any respect. Paragon alleges breach of contract and tortious interference with contract and seeks a declaration from the Court that Paragon is entitled to terminate the Agreement due to Altaire's alleged breaches. Paragon does not assert, however, that Saw Aque breached the Agreement, nor does it even assert that Saw Aque is a party to the Agreement.[7] Similarly Paragon makes no allegations that Saw Aque tortiously interfered with any contract.

In order to state a claim for breach of contract under New York law, a plaintiff must establish the following elements: (1) a valid and enforceable contract; (2) the plaintiff's performance of the contract; (3) breach by the defendant; and (4) damages. *Noise in Attic Prods., Inc. v London Records*, 10 A.D.3d 303, 307 (N.Y. App. Div. 2004).[8] Paragon has not even begun to satisfy its burden with respect to Saw Aque. The breach of contract claim against Saw Aque therefore must be dismissed.

Similarly, Paragon cannot satisfy its pleading burden with respect to Saw Aque on the tortious interference or fraud claims. As with the breach of contract claims, Paragon's allegations of tortious interference and fraud are solely directed at Altaire, with no mention of Saw Aque at all. Paragon's tortious interference claim must therefore be dismissed as to Saw Aque for the same reason as its breach of contract claim.

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[7] Paragon failed to attach the Agreement to its Complaint.

[8] Defendants cite New York law because of the choice-of-law provision in the Agreement. The elements for breach of contract are identical under Oregon law. *Commerce & Industry Insurance Co. v. HR Staffing, Inc.*, No. 3:14-cv-00559-HZ, 2015 WL 133677, at *2 (D. Or. Jan. 8, 2015).

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Even if Paragon had alleged specific facts against Saw Aque with respect to the fraud claim, which it has not, its claim would still be subject to dismissal because Paragon cannot meet the higher pleading burden for fraud claims pursuant to Federal Rule of Civil Procedure 9(b). While the Court applies the substantive law of the forum state to common law fraud claims, Rule 9(b) is a federally imposed rule that requires fraud claims to be "stated with particularity." *Blincoe v. W. States Chiropractic Coll.*, No. CV 06-998-PK, 2007 WL 2071916, at *4 (D. Or. July 14, 2007). A pleading is only sufficient to withstand a motion to dismiss under Rule 9(b) if it "identifies the circumstances constituting fraud so that the defendants can prepare an adequate answer from the allegations." *Id.* (citations omitted). Examples of relevant circumstances include details of the alleged fraudulent activity, including times, dates, places and benefits received from the fraudulent conduct. *Id.* Because Paragon makes no assertions of fraudulent conduct with respect to Saw Aque, let alone assertions sufficient to satisfy the strict pleading standard of Rule 9(b), Paragon's fraud claim also must be dismissed.

CONCLUSION

For all of the reasons set forth above, Defendants respectfully request that the Court grant its Motion to Dismiss Paragon's claims for lack of personal jurisdiction and improper venue. In the alternative, Defendants respectfully request that the Court transfer the above-captioned

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case to the Eastern District of New York. Defendant Saw Aque also requests the Court to dismiss Paragon's claims against it pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated this 23rd day of March, 2015.

Respectfully submitted,
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