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INVITAE CORPORATION

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNIVERSITY OF UTAH RESEARCH FOUNDATION, et al., Plaintiffs, vs. INVITAE CORPORATION, Defendant.	INVITAE CORPORATION'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND SUPPORTING MEMORANDUM [ORAL ARGUMENT REQUESTED] Case No. 2:13-cv-1049

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I. MOTION, RELIEF SOUGHT AND GROUNDS FOR MOTION.

Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure and Civil Rule 7-1 of the District of Utah Rules of Practice, defendant INVITAE CORPORATION ("Invitae") hereby respectfully submits this Motion to Dismiss for Lack of Personal Jurisdiction and Supporting Memorandum (the "Motion"), and requests that this action be dismissed for the reasons explained herein.

On November 25, 2013, plaintiff Myriad Genetics, Inc. ("Myriad" or "plaintiff"), as well as several other parties, filed this action against Invitae, alleging Invitae's infringement of eleven United States Patents (the "Asserted Patents").[1] If the merits of Myriad's claims were reached, they should be rejected. But before the Court reaches the merits, Invitae hereby moves the Court to dismiss the action for the threshold reason that the Court lacks personal jurisdiction over Invitae.

Contrary to Myriad's conclusory – and inaccurate – allegations regarding Invitae's contacts with Utah (*see* Complaint, ¶ 3), Invitae has no contacts with Utah. Invitae, a Delaware corporation, is a genetic diagnostics company based in San Francisco, California. As explained in the accompanying Declaration of Sean E. George, Ph.D., Invitae's services are not provided in Utah or to Utah-based physicians; nor does Invitae have any other Utah contacts. Absent such necessary minimum contacts, the Court's exercise of personal jurisdiction over Invitae would offend traditional notions of fair play and substantial justice. This action must therefore be dismissed.

Although this action should be dismissed, Invitae intends for the parties' dispute to be resolved. The day after Myriad filed this action, Invitae filed a declaratory judgment action (for a declaration of patent non-infringement and invalidity) against Myriad in the United States

[1] The asserted patents are: U.S. Patent Nos. 5,747,282; 5,753,441; 6,033,857; 6,051,379; 6,951,721; 7,250,497; 7,470,510; 7,622,258; 7,838,237; 7,670,776; and 7,563,571.

District Court for the Northern District of California, a district with which both Myriad and Invitae have sufficient minimum contacts and thus one in which each is subject to jurisdiction. *See* Declaration of Colin T. Kemp, Ex. A (*Invitae Corp. v. Myriad Genetics, Inc.*, Case No. 3:13-cv-5495-JST (N.D. Cal., filed November 26, 2013) (the "California Action")). In fact, Myriad has already entered an appearance in the California Action. *See id.*, Ex. B (California Action docket report).

This Motion is based on the following memorandum of relevant facts, supporting authority and arguments; the concurrently filed declarations of Dr. George and Mr. Kemp; the pleadings and other documents filed with the Court; and such other matters and evidence as may be presented to and properly considered by the Court. Furthermore, pursuant to Civil Rule 7-1(f), Invitae respectfully requests oral argument on this Motion.

II. RELEVANT BACKGROUND FACTS.

A. The Parties.

Myriad alleges that it is a Delaware corporation with its principal place of business in Salt Lake City, Utah, and that it is the owner or exclusive licensee of the Asserted Patents. *See* Complaint, filed Nov. 25, 2013 ("Comp."), ¶ 9. The Asserted Patents allegedly relate to Breast Cancer Susceptibility Gene 1 and/or Breast Cancer Susceptibility Gene 2 (together "BRCA1/2") or to the mutY homolog gene ("MUTYH"). *See generally* Complaint. Myriad alleges that Invitae infringes the Asserted Patents. *See id.*

Invitae is a Delaware corporation with its principal place of business in San Francisco, California. *See* Declaration of Sean E. George, Ph.D., filed herewith ("George Decl."), ¶¶ 1-6. Invitae is a genetic diagnostics company that offers to perform next-generation sequencing-based genetic tests as ordered by certified healthcare professionals for their patients. *See id.*, ¶ 7.

B. Invitae's Services are Not Available in the State of Utah.

In the United States, only certified healthcare professionals from certain states (not including Utah) can order Invitae's genetic tests. *See id.*, ¶ 8. To do so, a healthcare professional must submit one of Invitae's requisition forms, as well as a patient blood sample, to Invitae's San Francisco headquarters, which is where Invitae performs its genetic testing services in the United States. *See* George Decl., ¶ 8. None of Invitae's activities related to its genetic testing services is performed in Utah. *See id*.

If a healthcare professional in Utah were to attempt to order genetic testing services from Invitae, such an attempt would be prevented: It would either be blocked by measures Invitae established to prevent website orders from Utah, or by other preventative measures Invitae established to block the acceptance of tests ordered from Utah by phone or fax. *See id.*, ¶¶ 8-13. In fact, Invitae has rejected the only two requests that it has received from Utah-based individuals for genetic tests (and neither of those tests related to BRCA1/2 or MUTYH in any event). *See id.*, ¶ 14. Indeed, Invitae's website explicitly states that "OUR SERVICE IS NOT AVAILABLE IN ALL STATES." *See id.*, ¶ 10, Ex. A.

C. In Addition, Invitae Has No Traditional Business Dealings in or Contacts with the State of Utah.

Invitae has never been organized under the laws of or incorporated in Utah, been authorized to transact business within Utah, registered any "DBAs" within Utah, or had offices, facilities, or any business operations in Utah. *See* George Decl., ¶ 18.

Invitae does not own, lease or control any property in Utah, nor has it ever owned or otherwise controlled any assets in Utah. *See id.*, ¶ 19. Invitae has never had any bank accounts, applied for a loan or paid taxes in Utah. *See id.*, ¶ 20. Invitae has never maintained phone or fax listings within Utah. *See id.*, ¶ 21.

None of Invitae's officers, directors or employees reside in Utah, and none has traveled to Utah on Invitae's behalf. *See id.*, ¶ 22. None of Invitae's stockholders reside in Utah (to the best of Invitae's ability to determine). *See id.*, ¶ 22. Invitae does not have any agents that operate out of or travel to Utah on Invitae's behalf. *See id.*, ¶ 23. Invitae has never had an agent authorized to accept service of process on Invitae's behalf in Utah. *See id.*, ¶ 24.

Other than this action, Invitae has never been involved in litigation in Utah. *See id.*, ¶ 25.

Invitae has never (to the best of its ability to determine) entered into any material contracts with any Utah company, business or individual, nor has Invitae ever entered into any material contract calling for the application of Utah law. *See id.*, ¶ 26.

Finally, as noted above, Invitae has never accepted an order from a Utah-based individual for a genetic test. *See id.*, ¶¶ 14, 27.

III. ARGUMENT.

A. Myriad has the Burden of Establishing that the Court has Personal Jurisdiction Over Invitae.

As the plaintiff, Myriad has the "burden of establishing personal jurisdiction over [Invitae]." *Bathcrest, Inc. v. Safeway Safety Step, Inc.*, 417 F. Supp. 2d 1236, 1239 (D. Utah 2006) (finding no personal jurisdiction even though defendant BCI sent newsletters to plaintiff in Utah and made $22,500 worth of product sales to plaintiff).

The court in *Xactware, Inc. v. Symbility Solution Inc.*, 402 F. Supp. 2d 1359 (D. Utah 2005) ("*Xactware*"), laid out the analytical framework applicable here. There, in dismissing the infringement action for lack of personal jurisdiction, the court stated that "whether personal jurisdiction exists in a patent infringement case is ordinarily measured by a two-part test: (1) 'does jurisdiction exist under the state long-arm statute?' and (2) 'if such jurisdiction exists, would its exercise be consistent with the limitations of the due process clause?'" *Xactware*, 402

F. Supp. 2d at 1362 (quoting *Trintec Indus., Inc. v. Pedre Promotional Products, Inc.*, 395 F.3d 1275, 1279 (Fed. Cir. 2005)).[2]

Utah's long-arm statute "must be interpreted broadly 'so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment of the United States Constitution." *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1296, 1297 (10th Cir. 1999) (quoting Utah Code Ann. § 78-27-22)).[3] Indeed, "any set of facts that satisfies due process will also satisfy the long-arm statute." *SII MegaDiamond, Inc. v. Am. Superabrasive Corp.*, 969 P.2d 430, 433 (Utah 1998). Thus, the first part of the test – the long-arm statute – is satisfied if the second part – due process – is satisfied. *See, e.g.*, *iAccess, Inc. v. WEBcard Techs., Inc.*, 182 F. Supp. 2d 1183, 1185-86 (D. Utah 2002).

Due process, in turn, recognizes two types of personal jurisdiction:

> General personal jurisdiction permits a court to exercise power over a defendant without regard to the subject of the claim asserted. For such jurisdiction to exist, the defendant must be conducting substantial and continuous local activity in the forum state. In contrast, specific personal jurisdiction gives a court power over a defendant only with respect to claims arising out of the particular activities of the defendant in the forum state. Specific personal jurisdiction exists when a nonresident defendant purposefully establishes minimum contacts with the forum state, the cause of action arises out of those contacts, and jurisdiction is constitutionally reasonable.

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[2] "Whether a district court has personal jurisdiction over a defendant in a patent infringement case is determined under applicable Federal Circuit case law." *Xactware*, 402 F. Supp. 2d at 1362 (citing *Trintec Indus., Inc.*, 395 F.3d at 1279); *see also Akro Corp. v. Luker*, 45 F.3d 1541, 1543 (Fed. Cir. 1995) ("We apply the law of the Federal Circuit, rather than that of the regional circuit in which the case arose, when we determine whether the district court properly declined to exercise personal jurisdiction over an out-of-state accused infringer" (citing *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed. Cir. 1994))).

[3] Although Federal Circuit law controls the overall personal jurisdiction inquiry here, "in interpreting the meaning of state long-arm statutes, [the Federal Circuit] defer[s] to the interpretations of the relevant state and federal courts, including their determinations regarding whether or not such statutes are intended to reach to the limit of federal due process." *Graphic Controls Corp. v. Utah Medical Products, Inc.*, 149 F.3d 1382, 1386 (Fed. Cir. 1998).

iAccess, Inc., 182 F. Supp. 2d at 1186 (emphasis added) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 476-77 (1985); *Akro Corp.*, 45 F.3d at 1545-46).[4]

Because Myriad cannot prove either general or specific jurisdiction, this action must be dismissed.

B. Myriad Cannot Establish that the Court has General Jurisdiction over Invitae.

The hurdle Myriad must overcome to prove general jurisdiction is insurmountable: Myriad must prove that Invitae is "conducting substantial and continuous local activity in [Utah]." *Bathcrest, Inc.*, 417 F. Supp. 2d at 1239. General jurisdiction requires contacts well beyond the "sporadic and insubstantial." *Grober v. Mako Products, Inc.*, 686 F.3d 1335, 1346 (Fed. Cir. 2012) (finding no general jurisdiction even though defendant had made an unspecified number of product shipments to forum and had attended a trade show in forum); *see also Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984) (finding no general jurisdiction notwithstanding more than $4 million in purchases from forum-based company, a trip by defendant's CEO to negotiate/conclude transaction in forum, and employee training trips to forum); *Campbell Pet Co. v. Miale*, 542 F.3d 879, 881-884 (Fed. Cir. 2008) (finding no general jurisdiction on the basis of twelve sales yielding about $14,000 in revenue, conference attendance in forum where products are demonstrated and orders taken, and a generally accessible website). These cases – where the defendants did have at least some forum contacts and yet the courts found no general jurisdiction – highlight the lack of general jurisdiction here. There is nothing remotely close to Invitae conducting activities in Utah; it does nothing, and has no contacts, here.[5]

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[4] Technically, the due process clause of the *Fifth* Amendment – not the *Fourteenth* Amendment – is at issue here because this action purportedly exists by virtue of a federal question (not diversity of citizenship). *See Akro Corp.*, 45 F.3d at 1544-45. The analysis, however, is the same. *See id.*

[5] Of course, cases finding general jurisdiction also highlight the inappropriateness of such a finding here. For example, in *LSI Indus. Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (continued…)

This conclusion is reinforced by considering the following traditional general jurisdiction factors, which ask whether Invitae is:

> (1) engaged in business in this state; (2) licensed to do business in this state; (3) owning, leasing, or controlling property or assets in this state; (4) maintaining employees, offices, agents, or bank accounts in this state; (5) shareholders reside in this state; (6) maintaining phone or fax listings within this state; (7) advertising or soliciting business in this state; (8) traveling to this state by way of salespersons; (9) paying taxes in this state; (10) visiting potential customers in this state; (11) recruiting employees in the state; and (12) generating a substantial percentage of its national sales through revenue generated from in-state customers[?]

Bathcrest, Inc., 417 F. Supp. 2d at 1240.

As Dr. George's declaration makes clear, the answer to each inquiry is "no" – Invitae is doing none of these things. *See* George Decl., ¶¶ 8-27; *see also* Section II, above.

Myriad's unfounded allegations in Paragraph 3 of its Complaint are insufficient to establish jurisdiction or survive this motion. "Only the well pled facts of [Myriad's] complaint, as distinguished from mere conclusory allegations, must be accepted as true." *Ten Mile Indus. Park v. Western Plains Serv.*, 810 F.2d 1518, 1524 (10th Cir. 1987) (affirming dismissal for lack of personal jurisdiction); *see also Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 868 (5th Cir. 2001) (rejecting appellant/plaintiff's argument that the district court erred by not accepting as true, and by rejecting as conclusory, their jurisdictional allegations; and affirming dismissal for lack of personal jurisdiction).

Moreover, Dr. George's declaration establishes that Myriad's jurisdiction allegations are inaccurate. For example, paragraph 3 of the Complaint asserts that Invitae "regularly conducts

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(…continued)
(Fed. Cir. 2000), the Federal Circuit found sufficient forum contacts based on "[defendant's] millions of dollars of sales of lighting products in Ohio over the past several years and its broad distributorship network in Ohio." *See also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448-49 (1952) (exercise of general jurisdiction would not violate due process where, although company was not a resident of the forum (Ohio), its president "carried on in Ohio a continuous and systematic supervision of the necessary limited wartime activities of the company" (emphasis added)).

business in this district and has committed acts in this judicial district which give rise to this action." But that is not accurate. *See* George Decl., ¶¶ 8-27; *see also* Section II, above.[6]

C. Myriad Also Cannot Establish that the Court has Specific Jurisdiction over Invitae.

The hurdle Myriad must overcome to prove specific jurisdiction is also insurmountable. *Xactware* also laid out the analytical framework applicable here:

> Where, as in Utah, it is clear that the state long arm statute is intended to reach the limit of federal due process, the Federal Circuit has established a three part test to determine personal jurisdiction, as follows: "(1) whether the defendant purposefully directed activities at residents of the forum, (2) whether the claim arises out of or relates to those activities, and (3) whether assertion of personal jurisdiction is reasonable and fair."

Xactware, 402 F. Supp. 2d at 1362 (quoting *3D Sys., Inc. v. Aarotech Lab., Inc.*, 160 F.3d 1373, 1378 (Fed. Cir. 1998)).

Myriad has the burden of proof on the first two elements.[7] It cannot prove either.

1. Invitae has not purposefully directed activities at residents of Utah.

"Courts have emphasized 'purposeful availment' thusly: '[i]n first focusing on the defendant's interest, courts look for a purposeful act by which defendant avails himself of the privileges and protections of the forum.'" *Xactware*, 402 F. Supp. 2d at 1363 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (internal brackets in original)). "In other words, [for Myriad] to meet the first test in the case at bar, [Invitae] must have 'intentionally directed' or 'expressly aimed' its activity at Utah residents." *Id.* (internal quotations and citation omitted).

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[6] Myriad's additional allegation in paragraph 3 of the Complaint that, "[o]n information and belief," Invitae "sells, offers for sale, and has sold genetic testing products to residents of this jurisdiction" is similarly exposed by Dr. George's declaration as inaccurate. *See* George Decl., ¶¶ 14, 27.

[7] "The plaintiff has the burden of proving parts one and two of the test, and then the burden shifts to the defendant to prove that personal jurisdiction is unreasonable." *Grober*, 686 F.3d at 1346.

Here, there is simply no evidence that Invitae has engaged in any activity expressly aimed or intentionally directed at Utah residents. Indeed, the evidence demonstrates that Invitae has done no such thing. *See* George Decl., ¶¶ 8-27. Not only does Invitae lack all traditional contacts with Utah (*e.g.*, not authorized to do business here; no offices, facilities, business operations here (*see id*.; *see* Section III.B, above)), but it has made no sales in Utah or to Utah-based individuals. *See* George Decl., ¶¶ 14, 27. In fact, Invitae's website reinforces the conclusion that Invitae has not availed itself of the privileges and protections of this jurisdiction, explaining "OUR SERVICE IS NOT AVAILABLE IN ALL STATES" (and Utah is one of the states in which its service is unavailable). *See* George Decl., ¶ 10, Ex. A.

Invitae's publicly accessible website does not alter the outcome of the analysis. Again, *Xactware* is on point.

In *Xactware,* plaintiff Xactware, a Utah corporation, sued Symbility, a Canadian corporation, for patent infringement in this District. Symbility moved to dismiss for lack of personal jurisdiction. Xactware's main "purposeful availment" argument was that Symbility was operating two websites that Utah residents were able to visit and use. *See Xactware*, 402 F. Supp. 2d at 1363-64. The court rejected that argument.

First, the court explained that jurisdiction on the basis of a website is analyzed under a framework of three general categories lying along a sliding scale:

> [A]t one end of the spectrum business is clearly conducted through the entering of contracts requiring repeated transmission of files over the Internet. These active websites subject the host provider to the user's jurisdiction. At the opposite end are passive websites which do little more than provide available information to the interested user and do not present proper grounds for the exercise of personal jurisdiction. The middle ground contains interactive websites where users can exchange information with the host computer. Jurisdiction in these cases depends on the level of interactivity and commercial nature of the exchange of information that occurs on the website.

Xactware, 402 F. Supp. 2d at 1363.

Then, the court found that Symbility's "interactive" website, which was available to – but not directed at – Utah residents, was insufficient to confer jurisdiction. *See id.*, at 1364.[8] "Xactware's argument that the mere availability of Symbility's website to Utah residents is sufficient to establish purposeful acts, was rejected by the Federal Circuit, which stated that 'the ability of [Utah] residents to access defendant's websites . . . does not by itself show any persistent course of conduct by defendants in [Utah].'" *Id.*, at 1365 (quoting *Trintec Indus. Inc.*, 395 F.3d at 1281 (bracketed text and ellipse in original)). Accordingly, the court held that "plaintiff [had] not established that defendant intentionally directed or expressly aimed its internet activities at Utah residents." *Id.*, at 1366 (internal quotations and citations omitted).

The same is true here. Even if Invitae's website were available for customer orders from Utah healthcare professionals – and it is not – the "website is not directed at customers in [Utah], but instead is available to all customers throughout the country who have access to the Internet." *Trintec Indus. Inc.*, 395 F.3d at 1281 (emphasis added); *see also* George Decl., ¶¶ 9-13, 27. Thus, Myriad can do no better than the losing plaintiff in *Xactware* and the losing plaintiff in *iAccess*: Myriad cannot "prove a nexus between forum residents and [Invitae's] website[.]" *iAccess*, 182 F. Supp. 2d at 1188.

In fact, because Invitae's website is not available for customer orders from Utah, it is arguably only a "passive" website under the sliding scale analysis when applied to evaluating Invitae's alleged minimum contacts with this jurisdiction. *Accord Xactware*, 402 F. Supp. 2d at 1365. Invitae has implemented procedures to ensure that Utah-based healthcare professionals (as well as healthcare professionals based in the other areas in which Invitae's service is not available) are not even able to submit a test request to the company. *See* George Decl., ¶¶ 8-14. Accordingly, rather than there being the requisite "nexus" between its website and Utah

[8] Symbility's other website was passive and therefore also not a basis for jurisdiction. *See Xactware*, 402 F. Supp. 2d at 1365.

residents, Invitae has erected a roadblock. *See iAccess*, 182 F. Supp. 2d at 1186. The website therefore does "little more than provide available information to the [Utah] user." *Xactware*, 402 F. Supp. 2d at 1363. And even if Invitae's website did somehow do more, the "mere existence of a moderately interactive website was not sufficient to create personal jurisdiction." *Id.*, at 1365.

2. Myriad's claims do not arise out of Invitae's alleged forum contacts.

"The second step in the Federal Circuit's analysis presents an even higher hurdle for [Myriad] to overcome." *Id.*, at 1366. This step requires Myriad to make a prima facie showing that "the litigation results from alleged injuries that arise out of or relate to [Invitae's purposefully directed] activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985); *see also Xactware*, 402 F. Supp. 2d at 1366. Myriad cannot do this.

As explained immediately above in Section III.C.1., Invitae has not purposefully directed its activities into Utah. *See also* George Decl., ¶¶ 8-27. It therefore necessarily follows that Myriad's supposed infringement claims do not and cannot arise out of any such supposed activities.

Furthermore, contrary to its allegations in paragraph 3 of the Complaint, Myriad cannot, as it must, demonstrate that Invitae provided allegedly infringing genetic testing services in Utah or to Utah-based healthcare professionals. *See id.*, ¶¶ 14, 27.[9] Indeed, Myriad does not even attempt to assert this in its Complaint. Rather, Myriad only wishfully asserts that Invitae has contacts with Utah because of supposed sales/offers for sales of "genetic testing products." Comp., ¶ 3. Not only do the actual facts contradict Myriad's generic assertions that Invitae made/offered sales in Utah (*see* George Decl., ¶¶ 14, 27), but paragraph 3 of the Complaint makes no reference to any genetic tests that could actually give rise to any injury (*i.e.*, BRCA1/2 or MUTYH-related genetic tests). Nor could it. *See id.*, ¶¶ 14, 27.

[9] For these reasons, Myriad also cannot – contrary to its assertion in paragraph 3 of its Complaint – demonstrate that Invitae committed a tortious act in Utah by supposedly selling infringing genetics tests in Utah via its website. *See Xactware*, 402 F. Supp. 2d at 1367.

3. Moreover, the assertion of personal jurisdiction here would be unreasonable and unfair.

As demonstrated above, Invitae does not have sufficient contacts with Utah to warrant the exercise of personal jurisdiction. Because of this, the exercise of jurisdiction would necessarily be unreasonable and the case should be dismissed. *See Xactware*, 402 F. Supp. 2d at 1366 ("Because plaintiff has not sufficiently established either of the first two prongs of the Federal Circuit's analysis, this court finds under the third prong that the assertion of personal jurisdiction would be unreasonable and unfair….").

In any event, a review of the factors courts examine in this "reasonableness" prong of the specific jurisdiction test demonstrates that the exercise of jurisdiction would be unreasonable and unfair here. When examining this prong, "[a] court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).[10]

The first factor – "burden on the defendant" – weighs against the exercise of jurisdiction. Invitae is a small start-up company based in San Francisco, California; it has no contacts to this District; and no Invitae witnesses or documents are here. It would be a substantial disruption to the business of this nascent company to force it to litigate this case in Utah, where it has no contacts. *See Xactware*, 402 F. Supp. 2d at 1366; *Bathcrest, Inc.*, 417 F. Supp. 2d at 1245.

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[10] A court "must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" *Asahi Metal Indus. Co.*, 480 U.S. at 113 (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (citations omitted)). As shown below (page 13), the first of these two additional factors favors dismissal – statistics from the Administrative Office of the United States Courts demonstrate that, on average, civil cases in the Northern District of California go to trial more quickly than such cases in this District. *See also* Kemp Decl., ¶ 4, Ex. C. Thus, based these statistics, between this action and the California Action, the California Action is likely to go to trial first. On the other hand, the second of these two factors (the States' shared interests in fundamental social policies) does not appear to bear on the analysis – such policies are not likely to be implicated in this patent case, whether adjudicated here or in another forum.

The second factor – "the interests of the forum State" – also weigh against the exercise of jurisdiction. Courts in this District have recognized that its interest in adjudicating disputes is directly proportional to the scope and extent of the defendant's forum contacts. Thus, in *Bathcrest, Inc.*, the court held that "Utah has little interest in resolving this dispute because of Defendants' limited contacts with Utah." *Bathcrest, Inc.*, 417 F. Supp. 2d at 1245.[11] That rule applies with greater force here, where, unlike the defendants in *Bathcrest, Inc.*, Invitae has no forum contacts.

The third factor – "plaintiff's interest in obtaining convenient and effective relief" – does not save Myriad's suit here. Even if Myriad's interests would be served by an action against Invitae in this District, that cannot overcome the jurisdictional defects demonstrated above. In any event, there is good reason to believe Myriad can obtain in the California Action (where Myriad has already made its appearance[12]) any effective relief to which it claims to be entitled. For example, the Administrative Office of the United States Courts' Federal Court Management Statistics demonstrate that the median time from "file to trial" of civil actions in the Northern District of California is shorter than in this District. *See* Kemp Decl., ¶ 4, Ex. C (*compare* 30.9 month to trial *with* 38.0 months to trial, for the 12-month period ending June 30, 2013).[13]

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[11] Of course, any state (such as Utah) "has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp.* 471 U.S. at 473 (1985). But this truism cannot be used to turn the specific jurisdiction analysis on its head, especially where there is a compelling argument against the exercise of personal jurisdiction.

[12] *See* Kemp Decl., ¶ 3, Ex. B.

[13] Invitae is aware that Myriad has brought several other patent infringement actions in this District, and that Myriad has also filed a motion with the Judicial Panel on Multidistrict Litigation seeking centralized pre-trial treatment of those actions (and several other actions, including the California Action). Whatever the merits of those actions and that motion may be, they have no bearing on the threshold issue here – this Court's lack of personal jurisdiction over Invitae.

IV. CONCLUSION.

For the foregoing reasons, Invitae respectfully requests that this Court dismiss this action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction. Furthermore, pursuant to Civil Rule 7-1(f), Invitae respectfully requests oral argument on this Motion if the Court is not to grant it on the papers.

Dated: December 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2013, I cause a true and correct copy of the foregoing INVITAE CORPORATION'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND SUPPORTING MEMORANDUM to be served via the Federal District Court for the District of Utah's CM/ECF System and by U.S. Mail postage prepaid on the following:

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