IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ASSOCIACÃO BRASILEIRA DE MEDICINA DE GRUPO d/b/a ABRAMGE, Plaintiff, v. BOSTON SCIENTIFIC CORPORATION, ARTHREX, INC. AND ZIMMER BIOMET HOLDINGS, INC., Defendants.	CIVIL ACTION NO. 1:16-CV-01184-GMS

OPENING BRIEF OF ZIMMER BIOMET HOLDINGS, INC.
IN SUPPORT OF ITS MOTION TO DISMISS

Dated: April 13, 2017

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I. NATURE AND STAGE OF THE PROCEEDINGS

In January 2015, Brazilian news media reported that medical device distributors were offering bribes and/or kickbacks to doctors in Brazil to induce them to use certain brands of medical devices. Shortly thereafter, the Brazilian government launched an investigation. Plaintiff filed three federal lawsuits (including this one) and three state court suits against various medical device manufacturers approximately one year later.[1] The original Complaint in this action was filed on December 14, 2016, and the Amended Complaint ("AC") was filed on February 6, 2017. (D.I. 1; D.I. 5.)

The pleadings in the three federal cases are near-verbatim copycats of each other. Plaintiff Associacão Brasileira de Medicina de Grupo d/b/a Abramge ("Abramge"), a Brazilian not-for-profit association composed of Brazilian private health insurers, seeks damages and injunctive relief on behalf its 142 members for separate schemes allegedly carried out by medical device manufacturers and their Brazilian subsidiaries and/or local Brazilian distributors to pay bribes and kickbacks to Brazilian doctors in the Brazilian private health system, to induce them to use Defendants' medical devices regardless of medical need or lower cost options. The Defendants in this action are Boston Scientific Corporation ("Boston Scientific"), Arthrex, Inc. ("Arthrex"), and Zimmer Biomet Holdings, Inc. ("Zimmer"). There is no allegation that any Defendants colluded or conspired with each other.

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[1] The other two federal actions are: *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. Abbott Laboratories, Inc.*, No. 16-cv-11326 (N.D. Ill.); and *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. Stryker Corporation*, No. 16-cv-01366-RJJ-RSK (W.D. Mich.). Defendants in these two actions have moved to dismiss all claims against them. The state actions are: *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. Biotronik SE & Co. KG and Biotronik, Inc.*, No. 16-cv-41003 (Ore. Cir. Ct. Cty. of Clackamas Dec. 12, 2016); *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. Orthofix Int'l N.V. and Orthofix, Inc.*, No. 16-09575-393 (Tex. Dist. Ct. Cty. of Denton Nov. 18, 2016); *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. St. Jude Med., Inc.*, No. 27-cv-16-18061 (Minn. Dist. Ct. Cty. of Hennepin Dec. 14, 2016).

Abramge attempts to manufacture out of whole cloth claims against Zimmer of a purported scheme to bribe doctors in Brazil's private health system. These are "me-too" claims, following a Brazilian news report and government investigation, and lack any plausible factual connection to Zimmer. There is no allegation that Zimmer was mentioned in the Brazilian news reporting or the target of the Brazilian government's investigation. While Abramge's AC added allegations about a 2012 Deferred Prosecution Agreement ("DPA") between Zimmer and the U.S. Department of Justice ("DOJ") (which was replaced with a new DPA in January 2017), as Abramge admits in the AC, the DPAs addressed an entirely separate set of conduct than the present lawsuit: the DPAs resolved alleged violations of the Foreign Corrupt Practices Act ("FCPA") related to conduct involving Brazil's public health system, whereas in the present action Abramge brings state common law claims related to an alleged fraud on its private health insurer members. The AC focuses on the Brazil investigation and DPAs to create the appearance of factual heft, but those facts are immaterial and do not support Abramge's claims.

The remainder of the AC contains only conclusory allegations. Many of the AC's allegations are improperly directed to "Defendants" generally, without specific facts to distinguish between them. Further, Abramge does not allege that Zimmer (or its predecessor, Biomet, Inc. ("Biomet")) directly bribed Brazilian doctors. Instead, the primary actors carrying out the alleged scheme – who are referenced countless times throughout the AC, but never identified by name let alone included as defendants – are "local Brazilian distributors." Zimmer sells its products directly to independent distributors in Brazil, who in turn decide the prices to charge doctors. Without any factual support, Abramge attempts to hold Zimmer vicariously liable for the actions of these unnamed local Brazilian distributors by alleging in conclusory fashion that, from its U.S. headquarters, Zimmer exerted control over and conspired with them.

Given the lack of any specific factual allegations against Zimmer, the AC fails to state any claims. Without more, Abramge's "me too" allegations do not state plausible claims for relief. Even if sufficient facts were included, Abramge's claims still suffer from multiple legal deficiencies requiring dismissal, with prejudice. Granting leave to amend after Abramge already filed one amended pleading would be futile. In the alternative to dismissal on the merits, or if any part of the action remains following adjudication of the arguments under Rules 12(b) and 9(b), Zimmer moves for dismissal on the basis of *forum non conveniens* under 28 U.S.C. § 1404(a), in favor of a Brazilian forum.

II. SUMMARY OF THE ARGUMENT

Abramge's parasitic claims cannot proceed under *Twombly* and *Iqbal*. The only attempt to plead any facts pertaining to Zimmer relates to its DPAs to resolve alleged FCPA violations in the Brazilian public health system – which, as Abramge acknowledges in the AC, is different than the state law claims pleaded here related to conduct affecting the private health system. Abramge relies exclusively on the government investigation in an effort to bootstrap its claims, and offers nothing more. The Court should reject this type of parasitic pleading outright.

Further, the AC should be dismissed pursuant to Rules 12(b)(1), 12(b)(6), and 9(b):

- The claims for damages in Counts I to X should be dismissed because Abramge lacks standing to sue for damages on behalf of its members.
- The fraud and fraud-based claims in Counts I to V should be dismissed for failure to plead the circumstances constituting fraud with particularity under Rule 9(b). Additionally, these claims should be dismissed to the extent that Zimmer is not alleged to have made any fraudulent statements directly to Abramge's members.
- The negligent misrepresentation claim (Count IX) fails because there is no such cause of action under Indiana law.[2]

[2] This Court applies the choice of law rules of the forum state. *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006). Delaware has adopted the most significant relationship test to resolve choice of law questions. *Underhill Inv. Corp. v. Fixed Income Disc. Advisory Co.*,

- Abramge cannot state a claim for tortious interference with contractual relations (Count VI) because the purpose and intended effect of the alleged scheme was not to induce a breach of contract.

- The vicarious liability claims (Counts II, IV, and VII) should be dismissed because the underlying tort claims are not viable, and because the conclusory allegations fail to even name the local Brazilian distributors for whom the AC seeks to hold Zimmer vicariously liable.

- The civil conspiracy claims (Counts V and VIII) should be dismissed because there is no separate cause of action under Indiana law for civil conspiracy, the underlying tort claims are not viable, and Abramge fails to plead the civil conspiracy for fraud claim with particularity under Rule 9(b).

- The unjust enrichment claim (Count X) should be dismissed for failure to plead with particularity as required by Rule 9(b). Additionally, this claim should be dismissed because Abramge's members did not directly confer a benefit upon Zimmer.

- The claim for injunctive relief (Count XI) should be dismissed because injunctive relief is a remedy and not a standalone claim. And, Abramge is not entitled to injunctive relief as a remedy for its other claims, which each lack merit; if the proper parties with standing had sued, then money damages would be adequate relief.

Abramge already has amended the complaint once but failed to fix these deficiencies; thus, it would be futile to allow Abramge to re-plead, and the claims should be dismissed with prejudice.

In the alternative to dismissal on the merits, or if any part of the action remains following adjudication of the arguments under Rules 12(b) and 9(b), the Court may dismiss this action under the doctrine of *forum non conveniens*. This is an inherently Brazilian dispute with little connection to Delaware. Delaware is merely the place of incorporation for Defendants (but not their principal place of business). In contrast, nearly all of the relevant acts – the alleged

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319 F. App'x 137, 140-41 (3d Cir. 2009) (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 41, 47 (Del. 1991)). Applying that test here, Indiana law most likely applies because that is the place where the alleged conduct causing the injury occurred. *Rudisill v. Sheraton Copenhagen Corp.*, 817 F. Supp. 443, 448 n.7 (D. Del. 1993). As noted throughout this brief, however, dismissal on the merits likewise is appropriate if the Court were to apply the law of the forum state, Delaware, or appropriate on *forum non conveniens* grounds in the alternative if the Court were to apply the law of the place of the alleged injury, Brazil. Zimmer reserves the right to revisit choice of law issues upon development of a factual record.

kickbacks, the allegedly improper medical treatment, and the alleged overpayment by Brazilian private insurers – occurred in Brazil. Similarly, nearly all of the relevant actors – including the local Brazilian distributors carrying out the alleged scheme, and the doctors and patients affected by it – are located in Brazil. Under these circumstances, and as further discussed in the Declaration of Keith S. Rosenn in Support of Defendants' Motion to Dismiss the Complaint for *Forum Non Conveniens* ("Rosenn Decl."),[3] dismissal under the doctrine of *forum non conveniens* is appropriate.

III. STATEMENT OF THE PERTINENT FACTS

Plaintiff Abramge is a Brazilian "association comprised of [142] private group medical service providers, which are entities who provide health insurance in Brazil." (AC ¶ 2; Ex. A to AC (D.I. 5-1).) Abramge claims that it has authority under Brazilian law to represent the interests of its members in court. (AC ¶¶ 3-4.)

Defendant Zimmer, a Delaware corporation with its principal place of business in Indiana, manufactures and markets orthopedic products, including artificial joints and dental prostheses. (*Id.* ¶ 7.)

In January 2015, the Brazilian news media reported that medical device distributors were promoting use of their products by paying doctors with improper bribes and kickbacks. (*Id.* ¶¶ 51-57.) Following the news reporting, the Brazilian government launched an investigation and, in certain instances, filed criminal charges. (*Id.* ¶¶ 58-59, 64-65, 76-81.) There is no allegation that Zimmer was the target of this government investigation or mentioned in the news reporting. (*See id.* ¶¶ 51-59, 64-65, 76-81.) Instead, the AC attempts to manufacture claims against

[3] Keith Rosenn is a Professor of Law Emeritus at the University of Miami. (Rosenn Decl. ¶ 2.) He has taught courses in Latin America law and comparative law, studied and published extensively about Brazilian law, and previously been qualified as an expert in Brazilian law. (*Id.* ¶¶ 2, 5-9 & Ex. A to Rosenn Decl.)

Zimmer by referencing a prior U.S. DOJ investigation of Zimmer and legacy Biomet pertaining to alleged FCPA violations in the public (not private) health system in Brazil, and Zimmer's voluntary entry into a DPA to resolve same. (*Id.* ¶¶ 155, 176-94.) Abramge admits, however, that the FCPA investigation and DPA pertained to different conduct. (*Id.* ¶ 190.) Abramge does not include the FCPA-related allegations to provide an actual factual basis for its claims, but instead, to attempt to show a general "pattern" of behavior by Zimmer. (*Id.* ¶ 195.)

The AC alleges that from its U.S. headquarters in Indiana, Zimmer planned and directed a scheme under which "local Brazilian medical device distributors" made improper payments to Brazilian doctors in the private health system, in order to induce them to use Zimmer products regardless of medical need or lower cost options. (*Id.* ¶¶ 10, 14-15, 17-20, 157-58, 164-70, 194.) The goal was to increase Zimmer's market share in Brazil. (*Id.* ¶¶ 10, 49-51, 171, 195-96.) The local Brazilian medical device distributors are not included as defendants, even though they are the primary actors carrying out the alleged scheme. Indeed, the AC fails to even name any of the local Brazilian distributors with whom Zimmer is alleged to have conspired or exerted control over.[4] (*Id.* ¶¶ 157-58.)

The AC also fails to identify, with respect to Zimmer: (1) any of the doctors to whom bribes or kickbacks were paid; (2) the medical devices involved; (3) the particular dates or timeframe when bribes or kickbacks allegedly were made (the AC instead generally alleges that the scheme took place from "2006 to the present"); (4) the amount(s) of the alleged bribes or kickbacks; (5) the locations or hospitals where the alleged bribes or kickbacks took place; (6)

[4] The only local Zimmer Brazilian distributor named, "on information and belief," is Tellus – but that entity is alleged only to have been involved in the separate FCPA investigation related to the Brazilian public health system, not the alleged scheme in the private health system that forms the basis for this dispute. (*Id.* ¶ 187.) There is no allegation that Zimmer conspired with, or exerted control over, Tellus for the alleged conduct related to the private health system that is the subject of this lawsuit.

any other facts about how the alleged bribes or kickbacks were made; (7) the details of any surgeries in which the medical devices allegedly were unnecessary or more expensive than other options; (8) any Zimmer employees or executives who allegedly participated in or directed the supposed scheme; (9) the names of local Brazilian distributors allegedly offering the bribes or kickbacks; and (10) the names of any employees or executives of those Brazilian distributors. (*Id.* ¶¶ 14, 154-96.) The absence of these facts is telling. Certain of these facts are presumably discoverable from medical records and invoices accessible to Abramge's members; yet, Abramge already amended the complaint and failed to include any of these facts.

Abramge alleges that private health insurers, like its members, "pay for medical devices implanted in their insureds either by directly paying the device supplier (generally a Brazilian subsidiary of the device manufacturer or a Brazilian distributor) or by paying the hospitals that implant the medical devices, who in turn pay the distributors or subsidiaries." (*Id.* ¶ 11; *see also id.* ¶¶ 12, 45, 48.) There is no allegation that Abramge's members directly pay Zimmer for any of the unspecified medical devices involved. (*See id.*)

Abramge claims that as a result of the alleged scheme, Brazilian private health insurers such as its members paid for medical devices that were not necessary, or were overcharged for devices that were necessary. (*Id.* ¶¶ 10, 22-23, 27.) The AC contains no allegations about the amounts, nature, and extent of the harm, if any, suffered by each of Abramge's 142 private health insurer members. (*See id.*)

On behalf of its members, Abramge brings the following claims for damages and a standalone claim for injunctive relief (Count XI): fraud (Counts I and III); vicarious liability for fraud (Counts II and IV); civil conspiracy for fraud (Count V); tortious interference with contractual relations (Count VI); vicarious liability for same (Count VII); civil conspiracy for

same (Count VIII); negligent misrepresentation (Count IX); and unjust enrichment (Count X). For the reasons explained below, each claim should be dismissed with prejudice, or, in the alternative, this action should be dismissed under the doctrine of *forum non conveniens*.

IV. ARGUMENT

A. All Claims in the AC Should Be Dismissed With Prejudice

1. Legal Standards Under Rules 12(b)(1), 12(b)(6), and 9(b)

Under Rule 12(b)(1), a court must grant a motion to dismiss if it lacks subject matter jurisdiction. *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). "A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter." *Cmty. Legal Aid Soc'y, Inc. v. Coupe*, No. 15-688-GMS, 2016 WL 1055741, at *2 (D. Del. Mar. 16, 2016) (Sleet, J.) (alteration in original) (citation omitted). "In evaluating whether a complaint adequately pleads the elements of standing, courts apply the standard . . . pursuant to a Rule 12(b)(6) motion to dismiss." *Schering Plough*, 678 F.3d at 243.

A motion to dismiss under Rule 12(b)(6) must be granted where the complaint fails to allege facts sufficient to establish each element of the claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555-56 (2007). To meet minimal pleading requirements, a plaintiff must plead a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint's allegations must rise above the "speculative," "conceivable," or "possible," and instead must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 547, 555, 563, 570; *see also Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Thornton v. Chandler*, No. 11-860, 2012 WL 113005, at *2 (D. Del. Jan. 12,

2012) (Sleet, J.) (quoting *Iqbal*, 556 U.S. at 679, and Rule 8(a)(2)). A complaint must include more than "labels and conclusions . . . a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. While well-pleaded allegations of fact are accepted as true, legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not. *Iqbal*, 556 U.S. at 678.

Abramge's claims for fraud, civil conspiracy to commit same, and unjust enrichment are subject to the more stringent pleading requirements of Rule 9(b), which requires that "the circumstances constituting fraud" must be "state[d] with particularity." Fed. R. Civ. P. 9(b); *see also Lum v. Bank of Am.*, 361 F.3d 217, 228 (3d Cir. 2004). "The purpose of Rule 9(b) is to provide notice of the 'precise misconduct' with which defendants are charged and to prevent false or unsubstantiated charges." *Rolo v. City Investing Co. Liquidating Tr.*, 155 F.3d 644, 658 (3d Cir. 1998) (citation omitted). Under Rule 9(b), "the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007).

2. <u>Abramge's "Me-Too" Claims, Without More, Cannot Proceed</u>

"[S]imply saying me too after a government investigation does not state a claim." *Superior Offshore Int'l, Inc. v. Bristow Grp. Inc.*, 738 F. Supp. 2d 505, 517 (D. Del. 2010) (citation and internal quotation marks omitted) (dismissing claims that were based solely on "initiation of the DOJ's investigation and Defendants' receipt of document subpoenas," which "do not enhance the plausibility of Plaintiff's claim and do not warrant subjecting Defendants to the burdens of . . . discovery"), *order amended on reconsideration*, No. 1:09-CV-00438-LDD,

2010 WL 11470613 (D. Del. Dec. 1, 2010);[5] *see also In re Tableware Antitrust Litig.*, 363 F. Supp. 2d 1203, 1205 (N.D. Cal. 2005) (stating that court should "reject out-of-hand" plaintiff's attempt to invoke prior government investigation to state claim, which would improperly expose "the targets of such investigations to free-ranging civil discovery"); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1258 (W.D. Wash. 2009) (dismissing claims because plaintiffs provided no link between criminal prosecution and civil claims at issue); *Geron v. Odfjell Asa (In re Parcel Tanker Shipping Servs. Antitrust Litig.*), 541 F. Supp. 2d 487, 492 (D. Conn. 2008) (dismissing conspiracy claims based on criminal guilty plea because "those charges involved conduct on a different trade route" and different legal theories).

Abramge's opportunistic claims do not satisfy its pleading burden. Abramge attempts to manufacture claims against Zimmer based on nothing more than a (1) a Brazilian news report and government investigation into a purported scheme to bribe doctors in the private health system – but the AC does not allege that Zimmer was mentioned in the news reporting or the target of the investigation (AC ¶¶ 49-67); and (2) a U.S. government investigation related to alleged FCPA violations in the Brazilian public health system, not the private system at issue here (*id.* ¶¶ 154-96). Abramge hopes this is enough to sneak past the pleading gate and that, later on, it will be able to take discovery to fish for some factual basis for its bootstrapped claims. Zimmer should not be subjected to the burden and expense of civil discovery based on only "me too" allegations. The Court should reject Abramge's parasitic pleading outright and dismiss the AC for failure to plausibly state any claims against Zimmer.

[5] Following dismissal, plaintiff moved for reconsideration based on newly discovered evidence and sought leave to amend the complaint. The court granted the motion and clarified that the prior dismissal was without prejudice to amend. This ruling does not impact the holding that "me-too" claims following a government investigation, without more, cannot state a claim.

3. Abramge Does Not Have Representational Standing to Sue for Damages for Its Members

Abramge brings Counts I to X, which seek damages, on behalf of its 142 members in its "capacity as a civil association under Brazilian law." (*Id.* ¶¶ 3, 224, 245, 263, 281, 296, 307, 321, 333, 343, 354-355; Ex. A to AC.) Under United States law, however, Abramge lacks representational standing to sue for damages on behalf of its members.

In order for an association to sue on behalf of its members, "neither the claim asserted nor the relief requested" may "require[] the participation of individual members in the lawsuit," among other requirements. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *accord Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 279 (3d Cir. 2014). This requirement is not satisfied where, as here, the plaintiff association seeks damages on behalf of its members because proving damages involves individualized factual issues specific to each member. *Hunt*, 432 U.S. at 343 (stating that "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been" a "declaration, injunction, or some other form of prospective relief" (citation omitted)); *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) ("[A]n association's action for damages running solely to its members would be barred for want of the association's standing to sue." (citing *Hunt*, 432 U.S. at 343)); *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) ("[T]he damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof."); *Viet. Veterans of Am., Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951,

966-67 (D. Del. 1986) (holding that association lacked standing to sue for damages for its members because that would require "proof unique to each individual plaintiff").[6]

Abramge's request for damages presents individualized issues as to the fact, extent, and nature of the harm allegedly suffered by Abramge's various 142 members. For example, the AC does not plead that all 142 members were harmed and does not specify which members (if any) were harmed. (AC ¶¶ 22-23 (alleging that "Brazilian health insurers" generally – but not each of Abramge's 142 members in particular – were harmed).) The nature and extent of the alleged harm also differs across Abramge's various 142 members: some paid for medical devices when none were necessary; some paid for medical procedures when none were necessary; and/or some paid for necessary medical devices at inflated prices. (*Id.*) Accordingly, because the damages sought are peculiar to each of Abramge's 142 members and would require specific proof from each member, Abramge does not have representational standing to sue for damages[7] on behalf of its members.

Abramge cannot avoid the standing requirements by pleading, in a single sentence, that it is the "assignee of the claims of, and attorney-in-fact for" the claims of 35 of its 142 members. (AC ¶ 4; Ex. B to AC (D.I. 5-2).) Abramge offers no supportive factual allegations concerning these assignments. The AC does not plead the terms of the assignments, where and when they occurred, or whether they were made for ordinary business purposes. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 292 (2008) (stating that if assignments are not "made for ordinary business purposes. . . . prudential questions," barring standing, "might perhaps arise").

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[6] *See also Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) ("We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members.").

[7] Nor is Abramge entitled to injunctive relief, for the reasons set forth in Section IV.A.10 below, and because the underlying claims fail which means Abramge is not entitled to any remedy.

The AC thus fails to allege a valid assignment to support Abramge's claims. *See Llano Fin. Grp., LLC v. Lendzion*, No. 15 c 7091, 2016 WL 930660, at *4 (N.D. Ill. Mar. 11, 2016) (party "failed to plead with the clarity necessary to establish that it is actually the assignee of the claims it alleges and that every link in the chain of assignments validly transferred the right of action").

Abramge's alleged attorney-in-fact relationship also does not confer standing. *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 108 (2d Cir. 2008) (holding that investment advisor lack standing to sue on behalf of clients because advisor's "mere power-of-attorney—i.e., an instrument that authorizes the grantee to act as . . . an attorney-in-fact for the grantor—does not confer standing to sue . . . because a power-of-attorney does not transfer an ownership interest in the claim."); *In re Herley Indus. Inc. Sec. Litig.*, No. 06-2596, 2009 WL 3169888, at *5 (E.D. Pa. Sept. 30, 2009) ("While Second Circuit decisions are not binding authority, the Court finds *Huff* persuasive and will apply its reasoning to this case."). Therefore, the Court should dismiss Counts I to X for damage for lack of standing.

4. The Fraud Claims Must Be Dismissed

a. The Fraud Claims Are Not Pleaded with the Requisite Particularity Under Rule 9(b)

Abramge's claims for fraud (Counts I and III), and related claims for vicarious liability and civil conspiracy for fraud (Counts II, IV, and V), fail to allege any of the "who, what, when, where, and how," or otherwise inject "precision or some measure of substantiation" required by Rule 9(b). *Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 270, 276 (3d Cir. 2006) (citation omitted); *Frederico*, 507 F.3d at 200. The Third Circuit routinely holds that fraud claims premised on such bare-bones allegations must be dismissed.

For example, in *Saporito v. Combustion Eng'g Inc.*, 843 F.2d 666 (3d Cir. 1988), the Third Circuit affirmed dismissal of plaintiff's fraud claims pursuant to Rule 9(b) because, even

though the complaint "indicate[d] the general content of the misrepresentations," it did "not indicate who the speakers were," other than a vague reference to "defendants and/or persons acting under their direction and control," and also failed to identify "who received the information." *Id*. at 675; *see also Klein v. Gen. Nutrition Cos.*, 186 F.3d 338, 345 (3d Cir. 1999) (affirming dismissal of fraud claims under Rule 9(b) where plaintiff failed to attribute misrepresentations to any specific member of defendant's management because Rule 9(b) "requires, at a minimum, that the plaintiff identify the speaker of allegedly fraudulent statements"); *Barnard v. Verizon Commc'ns, Inc.*, 451 F. App'x 80, 85 (3d Cir. 2011) (affirming dismissal of fraud claims where complaint did not plead who made alleged misrepresentation and did not plead facts as to how, when, or why).

Likewise, here, the AC lumps together all Defendants, and then accuses them of fraud based only on conclusory allegations that "local Brazilian medical device distributors acting as Defendants' agents" made improper payments to unnamed doctors. (*E.g.*, AC ¶ 14; *see also id.*¶¶ 164, 201-96). No specific facts are alleged against Zimmer, as opposed to any other Defendant. The AC omits, with respect to Zimmer, at least the following essential categories of specific information: (1) identity of the doctors to whom bribes or kickbacks allegedly were paid; (2) the medical devices involved in each alleged instance; (3) the particular dates or timeframe when bribes or kickbacks allegedly were made (the AC instead generally alleges that the scheme took place from "2006 to the present"); (4) the amount(s) of any alleged bribe or kickback; (5) the locations or hospitals where the alleged bribes or kickbacks took place; (6) any details about how the alleged bribes or kickbacks were made; (7) the details of any surgeries in which the medical devices allegedly were unnecessary or more expensive than other options; (8) any Zimmer employees or executives who allegedly participated in or directed the supposed scheme;

(9) the names of local Brazilian distributors allegedly offering the bribes or kickbacks; and (10) the names of any employees or executives of those Brazilian distributors. (*See id.* ¶¶ 14, 154-96, 201-96.) Only the identity of one Brazilian distributor allegedly involved in the FCPA investigation is referenced in the AC, which is immaterial because that investigation pertains to the public health system in Brazil, not the private system that is the basis for the claims here. (*Id.* ¶ 187.) None of these other categories of information are pleaded with specificity – as to the public or private health system – in the AC.

These omissions are particularly egregious, given that Abramge's members presumably are in the unique position of having access to this information, if it exists, from medical records and invoices issued to them. Accordingly, there is "no reason to relax 'the normally rigorous particularity rule' based upon lack of knowledge or control." *In re Student Fin. Corp.*, Nos. 02-11620, Civ.A. 03-507 JJF, 02-6803 LK, 2004 WL 609329, at *2 (D. Del. Mar. 23, 2004) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997)).

Because the AC fails to put Zimmer on notice of the who, when, and how for the alleged misrepresentations or omissions, the fraud claims do not satisfy Rule 9(b) and should be dismissed.

b. All Fraud Claims Fail to the Extent that Zimmer Did Not Make the Allegedly Fraudulent Statements Directly to Abramge's Members

Abramge's fraud claims also fail to the extent that Zimmer (or its distributors) did not make any statements directly to Abramge's members. The AC pleads that the allegedly fraudulent statements – the statements about the price of Zimmer's products – were made by local Brazilian distributors on invoices issued either to (1) Abramge's members, or (2) hospitals that, in turn, billed Abramge's members. (*E.g.*, AC ¶¶ 11-12, 45, 48.) The AC does not specify which of the 142 members received invoices from hospitals. Those members cannot state a

fraud claim because Zimmer made no misrepresentations directly to them. *Kapoor v. Dybwad*, 49 N.E.3d 108, 134 (Ind. Ct. App. 2015) (affirming dismissal of fraud claims where defendant made no "direct misrepresentation" to plaintiffs); *ABN AMRO Mortg. Grp., Inc. v. Maximum Mortg., Inc.*, No. Civ. 1:04CV492, 2005 WL 1162889, at *6 (N.D. Ind. May 16, 2005) (dismissing fraud claim where there were no allegations that defendant made a misrepresentation to plaintiff).

5. Negligent Misrepresentation Is Not Actionable Under Indiana Law

Abramge's claim for negligent misrepresentation (Count IX) must be dismissed, as there is no such cause of action under Indiana law. *Lycan v. Walters*, 904 F. Supp. 884, 903 n.15 (S.D. Ind. 1995) (stating that with limited exceptions applicable only in employment context, "Indiana does not recognize the tort of negligent misrepresentation" (citation omitted)).[8]

6. Abramge Cannot State Key Elements of a Claim for Tortious Interference with Contractual Relations

Even accepting as true the sparse allegations in the AC, Abramge cannot state a claim for tortious interference with a contract (Count VI), which, under Indiana law, requires: (1) a contract, (2) defendant's knowledge of same, (3) defendant's intentional inducement of a breach,

[8] The result is the same under Delaware law, for different reasons. First, the negligent misrepresentation claim fails for the same reasons as the fraud claim. *Associated/ACC Int'l, Ltd. v. DuPont Flooring Sys. Franchise Co.*, No. CIV.A. 99-803-JJF, 2002 WL 32332751, at *8 (D. Del. Mar. 28, 2002) ("The elements of a negligent misrepresentation claim are essentially the same as for a fraudulent misrepresentation claim, except that there is no state of mind requirement . . . . Since the Court dismissed Plaintiff's fraud claim in its entirety, and because this dismissal was not dependent on Defendants' intent, the reasons for dismissing Plaintiff's fraud claim are equally applicable here.") (internal citation omitted), *aff'd*, 89 F. App'x 758 (3d Cir. 2004). Additionally, to the extent the negligent misrepresentation claim is premised upon statements about medical devices' prices, and these statements are alleged to be false due to failure to disclose that the alleged improper payments inflated the prices, the claim fails because in Delaware a claim for negligent misrepresentation cannot be based on omissions. *Conway v. A.I. DuPont Hosp. for Children*, No. 04-4862, 2007 WL 560502, at *7 (E.D. Pa. Feb. 14, 2007).

(4) absence of justification, and (5) damages resulting from the wrongful inducement of the breach. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1234 & n.7 (Ind. 1994).[9]

Abramge cannot satisfy the third element, intentional inducement of breach of contract. "[T]ortious conduct – i.e., that which is intentional" – is an essential element of the claim. *Rogovsky Enter., Inc. v. Masterbrand Cabinets, Inc.*, No. 3:15-cv-00022-RLY-WGH, 2015 WL 7721223, at *8 (S.D. Ind. Nov. 30, 2015). Abramge does not allege that Zimmer engaged in any intentional conduct directed towards the members' contracts, and does not allege that the intent of the alleged scheme was to cause the members to breach their contracts with policy holders and medical providers. Instead, Abramge claims that Zimmer had an entirely different intent, that is, to increase its market share in Brazil (AC ¶¶ 10, 49-50, 196), and only the effect of this scheme was to breach unidentified provisions in Abramge's members' contracts. (*Id.* ¶ 302). Accepting these factual allegations as true, Abramge cannot state a tortious interference claim. *Rogovsky Enter.*, 2015 WL 7721223, at *8 (dismissing tortious interference claim because plaintiff "fail[ed] to allege" that defendant "intentionally induced the breaking of [plaintiff's] franchise agreements").

For similar reasons, Abramge cannot establish the fourth element, absence of justification. This element "is established only if the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another." *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005) (emphasis added). The complaint must plead that defendant engaged in the alleged conduct "exclusively to harm" the plaintiff. *Morgan Asset Holding Corp. v. CoBank,* ACB, 736 N.E.2d 1268, 1273 (Ind. Ct. App. 2000) (emphasis added). Courts

[9] The elements are substantially the same under Delaware law. *Colbert v. Goodville Mut. Cas. Co.*, No. K10C-01-001JTV, 2011 WL 441363, at *1 (Del. Super. Ct. Jan. 31, 2011).

routinely dismiss tortious interference claims that fail to plead this fact. *Id.* at 1272-73; *Mfr. Direct LLC v. DirectBuy, Inc.*, No. 2:05-CV-451, 2006 WL 2095247, at *7 (N.D. Ind. July 26, 2006) ("[T]he Court finds that [plaintiff's] claim for tortious interference with contract also fails because [plaintiff] has not alleged that [defendant's] conduct was intended for the sole purpose of causing injury and damage to [plaintiff]."") (emphasis added); *Best Flooring, Inc. v. M & I Marshall & Ilsley Bank*, No. 1:12-cv-5-WTL-TAB, 2012 WL 3242111, at *6 (S.D. Ind. July 20, 2012) ("Plaintiff's statement hedges too closely to a threadbare recital, and Plaintiff does not allege facts to support its claim. . . . [T]he complaint does not allege that Defendant maliciously targeted Plaintiff exclusively to cause Plaintiff harm."") (emphasis added).

Abramge's tortious interference claim should be dismissed for failure to plead any facts showing that Zimmer acted "exclusively to cause harm" and "for the sole purpose of causing injury and damage to" Abramge's members, or otherwise "maliciously targeted" them. *Mfr. Direct*, 2006 WL 2095247, at *7; *Best Flooring*, 2012 WL 3242111, at *6. Abramge simply asserts, without any factual support, that Zimmer's conduct was "made without justification." (AC ¶ 302.) But "[t]his conclusory statement without more is not sufficient to allege the absence of justification." *Morgan Asset Holding*, 736 N.E.2d at 1272 (dismissing tortious interference claim). Moreover, this naked assertion is contradicted by the other allegations in the AC, which establish that Zimmer did not act for the "sole" or "exclusive" purpose of causing the members to breach their contracts. *Id.*; *Mfr. Direct*, 2006 WL 2095247, at *7. Instead, the AC alleges that Zimmer participated in the alleged scheme for an entirely different reason that had nothing to do with the members – to increase its market share in Brazil. (AC ¶¶ 10, 49-50, 196.)

7. All Vicarious Liability Claims Fail Because Abramge Does Not Identify the Primary Actors and Because the Underlying Tort Claims Fail

The vicarious liability claims (Counts II, IV, and VII) seek to hold Zimmer liable for fraud and tortious interference with contractual relations, based on actions taken by a laundry list of unidentified "employees, agents, representatives, distributors, contractors, subsidiaries and/or affiliates." (*Id.* ¶¶ 231, 233-34, 243, 319.) The AC never identifies these primary actors, whose conduct forms the entire basis for Zimmer's purported vicarious liability. Moreover, the AC does not plead any facts to substantiate its legal conclusions related to vicarious liability that: (1) an agency relationship existed between Zimmer and any of the unnamed distributors who carried out the alleged scheme; (2) any of the unnamed employees of Zimmer or of the unnamed distributors were acting within the scope of their employment; or (3) Zimmer otherwise exercised control over any of the unnamed distributors. *See, e.g.*, *Moore v. Hosier*, 43 F. Supp. 2d 978, 989-90 (N.D. Ind. 1998) (under Indiana tort law, employer may be vicariously liable for wrongful acts of employee where those acts are committed within scope of employment); *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999) (principal is liable based on conduct of its agent as opposed to independent contractor). Thus, because the vicarious liability claims are based on legal conclusions without any substantiating factual allegations, the claims cannot proceed. *Wild v. Hillery*, Nos. 01-C-0461-C, 01-C-0463-C, 2003 WL 23200303, at *2 (W.D. Wis. Mar. 14, 2003) (dismissing vicarious liability for fraud claim for failure to "identify with any particularity the nature of any relationship between [the actors] that would give rise to vicarious liability"); *In re New Eng. Compounding Pharmacy, Inc. Prod. Liab. Litig.*, No. 13-02419-RWZ, 2014 WL 6676061, at *7 (D. Mass. Nov. 25, 2014) (dismissing vicarious liability claim for lack of "allegations indicating that defendants exercised any control over [the entity] or

its conduct at all, let alone had the right to assign [the entity] tasks or control the manner and means by which [the entity] accomplished such tasks.").

The vicarious liability claims also must be dismissed because they are secondary claims, based on the underlying tort violations. The underlying tort claims fail, as discussed above, so the vicarious liability claims necessarily fail as well. *Methodist Hosps., Inc. v. FTI Cambio, LLC*, No. 2:11-cv-036, 2011 WL 2610476, at *10 (N.D. Ind. July 1, 2011) ("But since the underlying fraud claim . . . will be dismissed here, the vicarious fraud claim must also necessarily be dismissed").[10]

8. Abramge's Civil Conspiracy Claims Fail Because No Such Separate Cause of Action Exists, the Underlying Claims Fail, and Abramge Fails to Plead With Particularity

Abramge alleges that Zimmer conspired with unidentified "Brazilian distributors" and unidentified "Brazilian medical providers" to commit fraud (Count V) and tortiously interfere with the contracts of Abramge's members (Count VIII). (AC ¶¶ 283-85, 323-26.) These claims fail for three reasons.

First, under Indiana law, there is no separate cause of action for civil conspiracy; "[a]llegations of a civil conspiracy are just another way of asserting a concerted action in the commission of a tort" for which the parties to the conspiracy would be jointly liable. *Zimmer, Inc. v. Stryker Corp.*, No. 3:14-CV-152-JD, 2014 WL 3866454, at *11 (N.D. Ind. Aug. 6, 2014) (citation omitted).

Second, all civil conspiracy claims must be dismissed because, for the various reasons set forth above, the underlying fraud and tortious interference claims are deficient. *Zemco Mfg., Inc.*

[10] The same is true under Delaware law. *Gandhi v. Sitara Capital Mgmt., LLC*, 689 F. Supp. 2d 1004, 1018 (N.D. Ill. 2010) (dismissing vicarious liability claim under Delaware law because underlying tort claims were dismissed); *Nixon v. Wilmington Tr. Co.*, No. 3:06 CV 3046, 2007 WL 2156654, at *4 (N.D. Ohio July 25, 2007) (same), *aff'd*, 543 F.3d 354 (6th Cir. 2008).

v. Navistar Int'l Transp. Corp., 186 F.3d 815, 822-23 (7th Cir. 1999) (affirming dismissal of civil conspiracy claim under Indiana law because underlying tortious interference claim was dismissed); *Anton Realty, LLC v. Fifth Third Bank*, No. 1:15-cv-00199-RLY-TAB, 2015 WL 8675188, at *6 (S.D. Ind. Dec. 11, 2015) (dismissing civil conspiracy claim because underlying claim dismissed); *Am. Heritage Banco, Inc. v. McNaughton*, 879 N.E.2d 1110, 1115-16 (Ind. Ct. App. 2008) (same).

Third, like the underlying fraud claim, the civil conspiracy to commit fraud claim (Count V) fails under Rule 9(b). *C & S Mgmt., LLC v. Superior Canopy Corp.*, No. 1:08-CV-29PS, 2008 WL 5215994, at *6 (N.D. Ind. Dec. 12, 2008) ("The heightened specificity requirements of Rule 9(b) extends to any claim premised upon a course of fraudulent conduct, including charges of civil conspiracy to defraud."). The AC does not identify any of the local Brazilian distributors or doctors with whom Zimmer is alleged to have conspired, nor plead with particularity each distributor's role in the conspiracy, or the time and place of the alleged acts in furtherance of the conspiracy. (AC ¶¶ 283-88.) Without any of these specific facts required under Rule 9(b), the claim for civil conspiracy to commit fraud fails. *C & S Mgmt.*, 2008 WL 5215994, at *6 (dismissing civil conspiracy claim under Rule 9(b) because complaint pleaded "only the most general allegations regarding the other Counterdefendants and their roles in the conspiracy").[11]

[11] The result is the same under Delaware law. *Anderson v. Airco, Inc.*, No. CIV.A. 02C-12-091HDR, 2004 WL 2827887, at *3 (Del. Super. Ct. Nov. 30, 2004) ("An actionable tort must accompany any conspiracy in order for there to be a recovery."); *Parker v. Learn the Skills Corp.*, 530 F. Supp. 2d 661, 681 (D. Del. 2008) (same); *Eames v. Nationwide Mut. Ins. Co.*, 412 F. Supp. 2d 431, 439 (D. Del. 2006) (dismissing civil conspiracy claim because underlying claims were dismissed). The civil conspiracy claims also fail under Delaware law to the extent that the unidentified distributors with whom Zimmer is alleged to have conspired are the same entities that, for the vicarious liability claims, Zimmer is alleged to have controlled. *Am. Capital Acquisition Partners, LLC v. LPL Holdings, Inc.*, No. 8490-VCG, 2014 WL 354496, at *12 (Del. Ch. Feb. 3, 2014) ("[A] corporation generally cannot be deemed to have conspired with its wholly owned subsidiary, or its officers and agents.") (citation omitted). Count VIII also fails

9. Abramge Cannot Establish the Elements of Unjust Enrichment, Let Alone Plead the Claim with Particularity Under Rule 9(b)

Rule 9(b) applies to unjust enrichment claims where, as here, allegations of fraud underlie the claims. *See, e.g.*, *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 198 n.30 (D. Del. 2000). Abramge's claim for unjust enrichment (Count X) is grounded in fraud because Abramge alleges that Zimmer unjustly enriched itself by engaging in a scheme to "brib[e] and pay[] secret financial inducements to Brazilian doctors to use Defendants' medical devices." (AC ¶ 346.) Abramge does not identify the distributors or medical products allegedly involved and does not specify any allegedly "fraudulent invoices" issued by Zimmer or its distributors. (*Id.* ¶ 347.) Nor does Abramge allege the amount of the supposed benefit that was conferred on Zimmer at the expense of Abramge's members. (*Id.* ¶¶ 350-52.) Abramge fails to identify any allegedly fraudulent statements, where the statements were made, to whom they were made, or when they were made. These pleading deficiencies are fatal to Abramge's unjust enrichment claim, as they are to its fraud claims, and Count X should be dismissed.

Even if Abramge were to plead additional facts under Rule 9(b), the claim still would fail because a claim for unjust enrichment cannot lie where, as here, plaintiff did not directly confer a benefit upon defendant. *Decatur Ventures, LLC v. Stapleton Ventures, Inc.*, 373 F. Supp. 2d 829, 849 (S.D. Ind. 2005) (dismissing unjust enrichment claim where there were no allegations that plaintiff paid money to defendant; defendant instead received payment from a third-party).[12] Here, Abramge alleges that "Defendants were unjustly enriched at Members' expense when they

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because there is no claim for civil conspiracy for tortious interference with contract under Delaware law. *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009); *Am. Capital*, 2014 WL 354496, at *11.

[12] Similarly, under Delaware law, to succeed on a claim for unjust enrichment, "a plaintiff must show that there is some *direct* relationship . . . between a defendant's enrichment and a plaintiff's impoverishment." *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 59-60 (Del. Ch. 2012) (alteration in original) (citation and internal quotation marks omitted).

bribed Brazilian doctors to induce them to overuse Defendants' medical devices, or to use those devices when they were not necessary." (AC ¶ 345.) Accepting this allegation as true, Abramge's members did not directly confer a benefit directly upon Zimmer. Rather, the AC describes a payment scheme under which local Brazilian distributors or hospitals invoiced Abramge's members for Zimmer's products. (*E.g.*, *id.* ¶¶ 11-12, 45, 48.) Zimmer would be paid by the distributors or by the hospitals, but not by Abramge's members directly. (*Id.*) Under these alleged circumstances, the members cannot state an unjust enrichment claim against Zimmer.

10. Abramge Has No Basis for Injunctive Relief, Let Alone for Asserting It As a Standalone Cause of Action

Count XI is a standalone claim for injunctive relief, in the form of an injunction to cease the alleged bribery scheme. (AC ¶ 374.) However, "an injunction is a remedy rather than a cause of action, so a separate claim for injunctive relief is unnecessary." *Chruby v. Kowaleski*, 534 F. App'x 156, 160 n.2 (3d Cir. 2013) (affirming dismissal of injunctive relief claim). Count XI therefore must be dismissed as a standalone claim.

Nor is Abramge entitled to injunctive relief as a remedy for its other claims. As discussed above, none of those other claims are viable. But, even if they were, injunctive relief would be inappropriate because, if the claims were brought by the proper parties with standing – i.e., the members themselves – monetary damages would be an adequate remedy. *Viet. Veterans*, 644 F. Supp. at 966-67 ("[T]he gravamen of the complaint is that plaintiffs suffered monetary injury from defendants' kickback scheme. In such situations, monetary damages provide an adequate remedy at law. Where such an adequate legal remedy exists, injunctive relief will not be granted."); *Goadby v. Phila. Elec. Co.*, 639 F.2d 117, 122 (3d Cir. 1981) (reversing district

court's preliminary injunction because plaintiff "can have his claim reduced to money damages").

The crux of Abramge's allegations is that its members suffered monetary injury from defendants' kickback scheme, in the form of overcharges. (*See*, *e.g.*, AC ¶¶ 21, 25, 212, 215, 312.) Because Abramge's members could, if liability were established, recover damages for the alleged harm, there is an adequate remedy at law, which precludes injunctive relief.

11. Further Amendment Would Be Futile

Zimmer respectfully requests that the Court dismiss all claims with prejudice because further amendment would be futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 111 (3d Cir. 2002) (plaintiff can amend complaint "unless doing so would be inequitable or futile"). Abramge already amended its pleading once; there is no basis to provide a second bite at the apple. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 639 F. App'x 866, 869-70 (3d Cir. 2016) (affirming district court's dismissal with prejudice of amended complaint based on conclusion that further amendment would be futile). Further, dismissal with prejudice is appropriate because, as discussed above, in addition to the pleading deficiencies there are also legal deficiencies that bar each claim, even accepting as true the current allegations in the AC (or more specific allegations, if they exist).

B. Alternatively, the AC Should Be Dismissed Under the Doctrine of *Forum Non Conveniens*

In the alternative to dismissal on the merits, or if any part of the action remains following adjudication of the arguments under Rules 12(b) and 9(b), the Court may dismiss this action on the basis of *forum non conveniens* under 28 U.S.C. § 1404(a), in favor of a Brazilian forum. This dispute is inherently Brazilian: it is brought by a Brazilian association on behalf of its Brazilian members; the alleged conduct and injuries occurred in Brazil; and the key actors

carrying out the alleged scheme and those impacted by it – that is, the medical device distributors, doctors, and patients – also are in Brazil.

Four factors guide a district court's exercise of discretion to dismiss a case for *forum non conveniens*:

> (1) the amount of deference to be afforded to plaintiffs' choice of forum; (2) the availability of an adequate alternative forum where defendants are amenable to process and plaintiffs' claims are cognizable; (3) relevant "private interest" factors affecting the convenience of the litigants; and (4) relevant "public interest" factors affecting the convenience of the forum.

Kisano Trade & Investi Ltd v. Lemster, 737 F.3d 869, 874 (3d Cir. 2013) (citation omitted). All four factors favor dismissal here.

First, although a domestic plaintiff's choice of forum is generally afforded deference, "[w]hen a plaintiff is foreign . . . the choice of a United States forum 'deserves less deference.'" *Id.* at 874 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)). Here, because Abramge is a citizen of Brazil (AC ¶ 1), its choice of a Delaware forum deserves little deference.

Second, as recognized by numerous federal courts, Brazil is an adequate forum, including for certain of the claims asserted here. *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011) (affirming dismissal for *forum non conveniens* and stating "[o]ther federal courts have found Brazil to be an adequate forum"); *Value Partners S.A. v. Bain & Co.*, No. 98 Civ. 1562 (SAS), 1998 WL 336648, at *3 (S.D.N.Y. June 22, 1998) (dismissing tortious interference and conspiracy claims for *forum non conveniens* and holding that "Brazil is both an adequate and available forum in which to litigate plaintiffs' claims"); *Barcode Informatica Limitada v. Zebra Techs. Corp.*, No. 08 C 2021, 2011 WL 1100449, at *3 (N.D. Ill. Mar. 23, 2011) (dismissing tortious interference claims and holding that "Brazilian courts are an adequate alternative

forum").[13] Here, if Abramge's claims are properly pleaded, remedies exist under Brazilian law for those claims. (Rosenn Decl. ¶¶ 35-40, 46-47 (stating that compensatory tort damages are available in Brazil, and Brazilian law recognizes liability for fraud, civil conspiracy, interference with contractual relations, vicarious liability, and unjust enrichment).)

Brazil is also an adequate forum because, if this case is dismissed for *forum non conveniens* and Abramge were to re-file in Brazil, a Brazilian court could exercise both subject matter and personal jurisdiction. Subject matter jurisdiction would exist because virtually all of the alleged conduct occurred in Brazil. (*Id.* ¶¶ 26-30, 32.) Further, if the allegations in the AC are true, a Brazilian court could exercise personal jurisdiction over Zimmer and the other two defendants. (*Id.* ¶ 29.) Zimmer is amenable to process in Brazil and will consent to personal jurisdiction there in any event. (*Id.* ¶ 31 ("Brazilian courts will exercise jurisdiction over a defendant who has voluntarily submitted to Brazilian jurisdiction as a result of a *forum non conveniens* dismissal.").)

Third, the private interest factors favor a Brazilian forum over a Delaware forum. These include: "ease of access to sources of proof; ability to compel witness attendance if necessary; means to view relevant premises and objects; and any other potential obstacle impeding an otherwise easy, cost-effective, and expeditious trial." *Kisano*, 737 F.3d at 873. These factors favor a Brazilian forum because the majority of the witnesses and documentary evidence are located in Brazil, including: (1) Plaintiff Abramge and its members (AC ¶¶ 1-2); (2) the "local Brazilian medical device distributors" who carried out the alleged scheme (*id.* ¶ 14); (3) the doctors and hospitals involved in the alleged scheme (*id.* ¶¶ 14, 19, 26); (4) the patients affected

[13] A district court may rely on prior decisions holding that a forum is adequate. *In re Ford Motor Co.*, 591 F.3d 406, 413 (5th Cir. 2009) ("District courts do not have to start from scratch each time they consider a forum's availability; if we have found a forum to be available in earlier cases, district courts can rely on our precedent in similar cases to hold that it is still available.").

by the alleged scheme (*id.* ¶¶ 27, 85); (5) medical records reflecting the effects of the alleged scheme (*id.* ¶ 26); and (6) the allegedly inflated invoices issued to Abramge's members as a result of the alleged scheme (*id.* ¶ 23). In contrast, no witnesses or evidence are expected to be in Delaware, which is merely the place of incorporation for Defendants; no Defendant has its principal place of business here. (*Id.* ¶¶ 5-7.) Under these circumstances, the relevant private interest factors favor a Brazilian forum over a Delaware forum. *Eurofins Pharma U.S. Holdings, Inc. v. Bioalliance Pharma SA*, No. 08-613-GMS, 2009 WL 2992552, at *7 (D. Del. Sept. 18, 2009) (Sleet, J.) (granting *forum non conveniens* motion because, among other reasons, conduct giving rise to lawsuit occurred in France and all sources of proof were located there), *aff'd in part and vacated in part sub nom. on other grounds*, 623 F.3d 147 (3d Cir. 2010).

The ability to compel witness attendance also favors a Brazilian forum over a Delaware forum. Litigants in Brazil could easily obtain testimony and documents from witnesses located in the U.S. pursuant to 28 U.S.C. § 1782 and without the need to issue letters rogatory. (Rosenn Decl. ¶¶ 52-55.) A Brazilian forum also would permit interpleader of additional defendants, such as the Brazilian distributors alleged to have carried out the fraudulent scheme. (*Id.* ¶ 33.) In contrast, in a Delaware forum, the ability to compel witness attendance at trial would be limited because this Court's subpoena power does not reach key third-party witnesses like the Brazilian distributors or doctors. Fed. R. Civ. P. 45(b)(2) ("A subpoena may be served at any place within the United States."). The ability to take pretrial discovery of these witnesses also is limited as a result of Brazilian reservations to the Hague Convention. (Rosenn Decl. ¶¶ 49-51.)

Finally, the public interest factors likewise favor a Brazilian forum. "Public interests include administrative difficulties arising from increasingly overburdened courts; local interests in having the case tried at home; desire to have the forum match the law that is to govern the case

to avoid conflict of laws problems or difficulty in the application of foreign law; and avoiding unfairly burdening citizens in an unrelated forum with jury duty." *Kisano*, 737 F.3d at 873. Given that, as detailed above, almost all of the relevant actors are located in Brazil, and that nearly all of the relevant acts occurred there as well, this is an inherently Brazilian dispute in which Delaware has no local interest. To the extent the Court prefers to apply Brazilian law to this dispute because Brazil is the place where the alleged injuries occurred,[14] that public interest factor also favors dismissal.

V. CONCLUSION

For the foregoing reasons, Zimmer respectfully requests that the Court dismiss all claims in the AC with prejudice, or, in the alternative, dismiss this action under the doctrine of *forum non conveniens*.

Respectfully submitted,

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[14] *See Integral Res.(PVT) Ltd. v. Istil Grp., Inc.*, No. 03-904 (GMS), 2004 WL 2758672, at *4 (D. Del. Dec. 2, 2004) (Sleet, J.) (applying Ukrainian law because that was the place where the injury occurred and the place where the conduct causing the injury occurred), *aff'd*, 155 F. App'x 69 (3d Cir. 2005).

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