IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ASSOCIAÇÃO BRASILEIRA DE MEDICINA DE GRUPO d/b/a ABRAMGE,

Plaintiff,

v.

BOSTON SCIENTIFIC CORPORATION, ARTHREX, INC., and ZIMMER BIOMET HOLDINGS, INC.,

Defendants.

C.A. No. 16-1184-GMS

DEFENDANT BOSTON SCIENTIFIC CORPORATION'S
OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Of Counsel:

John N. Nassikas III
David J. Weiner
Joshua M. Davis
Charles B. Weinograd
Stephen K. Wirth
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: (202) 942-5000

Karen L. Pascale (#2903)
Pilar G. Kraman (#5199)
YOUNG CONAWAY STARGATT & TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6600
kpascale@ycst.com
pkraman@ycst.com

Attorneys for Defendant
Boston Scientific Corporation

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INTRODUCTION

This case involves an attempt by a Brazilian plaintiff with no injury of its own to enlist the U.S. courts in scrutinizing payments by Brazilian health insurers for healthcare provided by Brazilian physicians to Brazilian patients in Brazil. Plaintiff Associação Brasileira de Medicina de Grupo ("Abramge") is a Brazilian association consisting of 142 Brazilian private health insurance companies ("the Members") that seeks damages and an injunction in relation to an alleged fraud that occurred in Brazil. Abramge alleges that medical device manufacturers, including Defendant Boston Scientific Corporation ("BSC"), along with their Brazilian subsidiaries and Brazilian device distributors, paid Brazilian physicians and Brazilian hospitals to use their products on Brazilian patients when the devices were not medically necessary. Abramge alleges that this scheme injured Brazilian health insurers, its Members, when they paid claims submitted by Brazilian physicians for unnecessary or improper treatment involving BSC's devices. Abramge's Members are not parties to this case, but it nonetheless seeks damages and an injunction on their behalf.

The Amended Complaint fails several times over. As a threshold matter, Abramge lacks standing to sue—it has suffered no personal injury, and the need for the Members' individual participation in the case bars Abramge from seeking damages or an injunction on their behalf. Even if Abramge had standing, the Amended Complaint should be dismissed based on the *forum non conveniens* doctrine. Virtually everything about this case involves conduct that occurred in Brazil and points to parties, witnesses, and evidence located in Brazil. This includes not only Abramge and its Members but also critical third parties not present in the United States, such as the device distributors and subsidiaries that allegedly made fraudulent payments and the physicians and hospitals that accepted the payments. And because Abramge alleges that BSC paid for its devices to be used when they were not medically necessary or appropriate, this case

will turn on individualized inquiries into treatment provided by Brazilian physicians for an untold number of Brazilian patients. On top of that, Brazilian law almost certainly governs Abramge's claims, which are of far greater interest to Brazil than they are to Delaware or the United States. Finally, the Amended Complaint does not satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b) and also fails to state a claim upon which relief can be granted.

NATURE AND STAGE OF PROCEEDINGS

On December 14, 2016, Abramge filed a complaint in this Court against Defendants BSC, Arthrex, Inc., and Zimmer Biomet Holdings, Inc. (D.I. 1) On February 6, 2017, Abramge filed the Amended Complaint. (D.I. 5) On March 1, 2017, the Court granted a stipulated extension of time to and including April 13, 2017, for Defendants to move, answer, or otherwise respond to the Amended Complaint. (D.I. 13)

SUMMARY OF ARGUMENT

The Court should dismiss the claims against BSC for the following four reasons:

First, Abramge lacks standing to sue and the Amended Complaint should be dismissed pursuant to Rule 12(b)(1). Abramge has suffered no personal injury, and binding precedent precludes it from recovering damages for its Members' losses. Abramge also lacks standing to seek injunctive relief because the individual participation of its Members is required to determine both the sufficiency of its claims and its right to the relief requested.

Second, all factors favor dismissal of the Amended Complaint based on the *forum non conveniens* doctrine: (1) Brazil is an adequate alternative forum; (2) Abramge's choice of forum is entitled to a low level of deference; and (3) the balance of private and public interest factors establishes that trial in the United States will be oppressive and vexatious to BSC out of all proportion to Abramge's convenience.

Third, the Complaint should be dismissed for failure to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). Abramge does not plead any of its claims with particularity, failing to allege the who, what, or when of any allegedly fraudulent conduct.

Fourth, the Complaint should be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Abramge does not allege sufficient facts to establish causation, and also fails to allege facts to establish at least one essential element for all of its claims.

STATEMENT OF FACTS

Abramge is a Brazilian association of Brazilian private health insurance companies that filed this lawsuit on behalf of its 142 Members. Am. Compl. ¶¶ 1–2 & Ex. A. Of the 142 Members, Abramge alleges that 35 assigned their claims to Abramge. *Id.* ¶ 4 & Ex. B. Abramge alleges that medical device manufacturers, including Defendants BSC, Arthrex, Inc., and Zimmer Biomet, made payments to Brazilian physicians or hospitals to use their products even when they were not medically necessary or when less expensive devices could have been used. *Id.* ¶¶ 10, 14, 22. Defendants allegedly made these payments directly and indirectly through their Brazilian subsidiaries and Brazilian device distributors because they knew that Brazil's regulator of Brazilian private health insurers, Agência Nacional de Saúde ("ANS"), effectively required Abramge's Members to pay all claims submitted by doctors for implanting devices. *Id.* ¶¶ 35, 41–42. Abramge alleges that the Members ultimately paid these false and/or inflated claims. *Id.* ¶¶ 85, 88.

Abramge also alleges that Defendants' conduct is part of a larger so-called Prosthetics Mafia. *Id.* ¶ 52. This "mafia" allegedly includes various Brazilian medical device distributors, various unnamed Brazilian physicians and hospital groups, and Defendants and their Brazilian subsidiaries. *Id.* ¶¶ 51–66. Abramge alleges that a Brazilian television show first uncovered the

"mafia," that the Brazilian Congress held hearings on the issue, and that Brazilian police arrested and prosecuted several Brazilian physicians and distributors implicated in the purported fraud. *Id.* ¶¶ 55–62. Abramge has filed 4 other nearly identical lawsuits in U.S. federal and state courts against various medical device companies involved in the alleged "mafia,"[1] and its director, Pedro Ramos, has stated that the lawsuits it filed in the United States are part of its effort to "solve the problem" of corruption in the Brazilian healthcare system. *A Máfia de Branco [The White Mafia]*, Blog Abramge (Mar. 31, 2017), http://blog.abramge.com.br/saude-em-geral/a-mafia-de-branco/.

Significantly, Abramge does not allege in this or in any of its U.S. lawsuits that any of the device manufacturers coordinated with one another, acted in concert, or even knew what the others were doing. Abramge instead employs mostly identical, generic, cookie-cutter allegations that lack specificity about the conduct of the individual Defendants. *E.g.*, Am. Compl. ¶¶ 14–22. Abramge compounds this lack of specificity by directing many of its allegations to "Defendants," without differentiating among the conduct of BSC, Arthrex, or Zimmer Biomet. *Id.*

The few allegations in the Amended Complaint that refer specifically to BSC point to conduct by Brazilian distributors of BSC devices or by Boston Scientific do Brasil ("BSC Brazil"), a separate company that is not named as a defendant in this case. *Id.* ¶¶ 86–124. Abramge alleges that Brazilian police raided the offices of a distributor "linked" to BSC, Signus

[1] Those cases are as follows: *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. Stryker Corp.*, No. 16-cv-01366 (W.D. Mich. Nov. 28, 2016); *Associação Brasileira de Medicina de Grupo d/b/a Abramge v. Biotronik SE & Co. KG*, 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.*, 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).

do Brasil Comercio de Materiales Hospitalares Ltda. ("Signus"), and that the Brazilian police are investigating Signus and BSC Brazil executives. *Id.* ¶ 99. But apart from the fact that the Brazilian prosecutors described the "scheme" as "'transnational,'" Abramge does not allege any facts about BSC's participation in or knowledge of this particular scheme. *Id.* Abramge likewise alleges that "[s]ales representatives working on behalf of Boston Scientific, or on behalf of Boston Scientific's Brazilian distributors at the direction of Boston Scientific," offered kickbacks to Brazilian physicians to use BSC products, but there are no factual allegations regarding BSC's involvement in or knowledge of the alleged scheme, or what it means that distributors worked "on behalf" of BSC. *Id.* ¶ 101.

The Amended Complaint does allege that one "example of the type of dealings" that BSC and Signus engaged in involved kickbacks that Signus employees paid to three Brazilian physicians and the medical group they later formed, Angiomac, to use BSC products. *Id.* ¶ 103. But Abramge does not allege that BSC itself made or knew about such payments, only that Signus made them "on behalf of [BSC]" and that Signus employees acted "on behalf of [BSC]." *Id*. ¶¶ 104, 107. The Amended Complaint also does not allege that any Member paid a claim Angiomac submitted that was impacted by Signus payments. Finally, Abramge alleges that BSC's "kickbacks to local doctors and medical providers induced" (1) unnecessary indications for surgery; (2) exaggeration of the severity of injuries; (3) use of unnecessary amounts of BSC devices; (4) falsification of medical reports; and (5) use of expired or damaged medical devices, *id.* ¶ 114, but does not identify a single example of this "induced" conduct.

The Amended Complaint seeks damages and an injunction to, in effect, stop "Defendants" from breaking the law. *Id.* ¶ 374. The Amended Complaint's 11 counts are: Count I (Fraud by Non-Disclosure and Active Concealment); Count II (Fraud by Non-Disclosure

– Vicarious Liability); Count III (Common Law Fraud); Count IV (Common Law Fraud – Vicarious Liability); Count V (Civil Conspiracy (Fraud)); Count VI (Tortious Interference with Contractual Relations); Count VII (Tortious Interference – Vicarious Liability); Count VIII (Civil Conspiracy (Tortious Interference with Contractual Relations)); Count IX (Negligent Misrepresentation); Count X (Unjust Enrichment); and Count XI (Injunctive Relief).

ARGUMENT

I. ABRAMGE LACKS STANDING TO SUE ON BEHALF OF ITS MEMBERS

An association has Article III standing only if "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). And an association may pursue claims as its members' representative only if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 405 (3d Cir. 2005) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

Abramge does not allege that the organization itself has suffered any injury; rather, Abramge pleads damages suffered only by its Members. Abramge cannot assert associational standing on behalf of those Members, however, because each of its claims "requires the participation of [Abramge's] individual members in the lawsuit." *Id.*

A. Abramge Cannot Bring Damages Claims on Behalf of Its Members

"Because claims for monetary relief usually require individual participation, courts have held [that] associations cannot generally raise these claims on behalf of their members. Specifically, the Supreme Court has counseled 'that an association's action for damages running solely to its members would be barred for want of the association's standing to sue.'" *Pa. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002) (citations omitted) (quoting *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996)). Thus, in *Pennsylvania Psychiatric Society*, the Third Circuit noted that if the association in that case had "continued to press damages claims on behalf of its members, it would not [have met] the requirements for associational standing." *Id.* at 286 n.6; *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (no Supreme Court or federal court of appeals precedent supports associational standing to seek damages).

Much like the damages claims abandoned by plaintiffs in *Pennsylvania Psychiatric Society*, Abramge's claims for damages here will require testimony concerning hundreds, if not thousands, of individual medical decisions made by healthcare providers over the course of several years. And if liability is imposed, these claims will require separate calculations of damages for each insurer based on individual assessments of which medical procedures each insurer covered, and the cost differential between the treatment administered and some medically appropriate alternative. This is precisely the sort of "extensive individual participation" the Supreme Court's associational-standing requirements foreclose. *Id.* at 286.

The fact that "Brazilian law" authorizes Abramge "to represent its members' interests . . . in foreign jurisdictions," Am. Compl. ¶ 3, has no bearing on Abramge's standing to seek damages on behalf of its Members in federal court. Brazil has no power to abrogate federal standing requirements. The jurisdiction of the federal courts is delimited by the Constitution and

laws of the United States. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013). Although *Congress* can abrogate certain "prudential" standing requirements, such as the "individual participation" prong of the associational-standing doctrine, *United Food*, 517 U.S. at 546, that limited holding does not support the conclusion that a *foreign government* can expand the jurisdiction of federal courts.[2] "[S]tanding in federal court is a question of federal law, not state law," *Hollingsworth*, 133 S. Ct. at 2667—much less foreign law.

Nor can Abramge escape these prudential standing requirements by accepting assignments of claims from 35 of the 142 insurance companies it purports to represent. Am. Compl. ¶ 4 & App'x B. The Supreme Court has held that simple claims aggregators may have standing when "the assignments were made for ordinary business purposes," such as "for purposes of collection." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 272, 292 (2008). But it is indisputable that the purpose of the assignments here is far from ordinary. First, Abramge admits that its purpose in bringing these claims is to reform the Brazilian insurance and healthcare systems through litigation. *E.g.*, Am. Compl. ¶ 358 ("Abramge is charged with ensuring the continued viability of private group medical service in Brazil by defending, representing, and educating its member insurers."); *id.* ¶ 361 ("Stopping market-wide illicit business practices that are damaging Brazilian private medical insurers is germane to Abramge's organizational purpose."). This is nothing like *Sprint*, where the Court permitted the simple aggregation of small claims. *Sprint*, 554 U.S. at 272–73. Second, Abramge makes no allegation that the association is an adequately capitalized ongoing concern like the claim aggregator in *Sprint*. *PEAK 6 Capital Mgmt. LLC v. BP p.l.c. (In re BP p.l.c. Sec. Litig.)*, No.

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[2] These requirements are deemed "prudential" because they are not constitutionally required. But that does not make them optional. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004); *Allen v. Wright*, 468 U.S. 737, 750–51 (1984).

4:10-MD-2185, 2016 WL 29300, at *8 (S.D. Tex. Jan. 4, 2016). Rather, Abramge seems to engage in no business dealings or revenue-generating activities whatsoever. Am. Compl. ¶¶ 2–4, 358, 361; *accord PEAK 6*, 2016 WL 29300, at *8 (considering such an arrangement to be a "point of contrast with *Sprint* that counsels in favor of departing from the Supreme Court's holding"). Third, unlike the claims in *Sprint*, which were assigned by independently owned and operated entities in arm's-length transactions, *Sprint*, 554 U.S. at 271–72, the Members assigned their claims to Abramge itself—presumably for the sole purpose of creating standing, *accord PEAK 6*, 2016 WL 29300, at *8.

As noted by the *PEAK 6* court, assignments made for non-business reasons raise "problematic procedural issues." *Id.* at *5. "With the litigation vehicle serving as the nominal plaintiff, the real claimant would potentially be beyond the reach of court sanctions, conventional discovery protocols, certain evidentiary rules, and other obligations that are incumbent upon parties to litigation." *Id.* at *6 (footnotes omitted). This is especially so here where the assignors are all in Brazil and not subject to this Court's jurisdiction. These problematic issues implicate the "additional prudential questions" the Supreme Court warned about in *Sprint*. *See Sprint*, 554 U.S. at 292. Prudential reasons thus require dismissal even of the 35 assigned claims.

B. Abramge's Claims for Injunctive Relief Require Individual Participation of Its Members

Abramge also lacks standing to seek injunctive relief because "extensive individual participation" of its Members is necessary to prove its claims and entitlement to the remedy requested. *Pennsylvania Psychiatric Soc.*, 280 F.3d at 284. "[An] organization lacks standing to assert claims of injunctive relief on behalf of its members where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof,' or where 'the relief requested [would] require[] the participation of individual members in the

lawsuit.'" *Bano*, 361 F.3d at 714 (quoting *Warth v. Seldin*, 422 U.S. 490, 515–16 (1975); *Hunt*, 432 U.S. at 343). That is the case here. The Amended Complaint alleges that BSC, both directly and through local subsidiaries, paid kickbacks to doctors that induced them to defraud Abramge's Members by submitting claims for unnecessary procedures, using BSC devices in lieu of cheaper alternatives, and falsifying medical records or using expired or damaged products. *E.g.*, Am. Compl. ¶¶ 101–15; ¶ 114(a)–(e). Abramge also pleads that the nature and amount of the alleged payments varied by provider. *Id.* ¶¶ 48, 109–10.

Abramge can neither prove its claims nor its entitlement to injunctive relief without the individual participation of the Members. Any inquiry into the kickback scheme alleged in the Amended Complaint will "require individualized proof" of "'the fact and extent' of the injury that gives rise to [Abramge's] claims for injunctive relief," *Bano*, 361 F.3d at 714 (quoting *Warth*, 422 U.S. at 515–16), including BSC's relationships with its Brazilian subsidiaries, the specific agreements between those subsidiaries and individual Brazilian doctors, and the specific claims those doctors made to individual insurance companies. Abramge will not be able to establish those facts through mere "sample testimony" from a few of its Members; rather, this inquiry will require the individual testimony of potentially hundreds of healthcare providers and insurance companies regarding "specific, factually intensive, individual medical care determinations" to evaluate whether those determinations were medically necessary. *Pennsylvania Psychiatric Soc.*, 280 F.3d at 286.

Abramge also will need extensive individual participation of its Members to prove its entitlement to "relief requested." *Hunt*, 432 U.S. at 343. Without an individualized factual examination, the Court will be unable to craft injunctive relief in "specific[]" terms so as to put BSC on notice of "the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)–(C).

"Broad, nonspecific language that merely enjoins a party to obey the law . . . does not give the restrained party fair notice of what conduct will risk contempt." *Louis W. Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994).[3] Injunctions "must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Id.* (citation and internal quotation marks omitted). Absent individual evidence of specific agreements with, or payments to, doctors—linked to specific insurance claims to Abramge's individual Members—the Court will be unable to craft injunctive relief that specifically describes the conduct to be restrained so as to comply with Rule 65(d).[4] Thus, because their individual participation is necessary, Abramge does not have standing to seek injunctive relief on behalf of its Members. *See Hunt*, 432 U.S. at 343; *Pennsylvania Psychiatric Soc.*, 280 F.3d at 286.

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED BASED ON THE *FORUM NON CONVENIENS* DOCTRINE

The *forum non conveniens* doctrine permits the Court to dismiss a case "[w]hen an alternative forum has jurisdiction to hear the case, and when trial in the plaintiff's chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Windt v. Qwest Commc'ns Int'l,*

[3] In *Pennsylvania Psychiatric Society*, the Third Circuit permitted plaintiffs to challenge the overarching policies and methods that a group of managed-care organizations used to make decisions about medical care, but explained that an examination of the decisions themselves would require an inappropriate level of individual participation. 280 F.3d at 286. The individualized nature of Abramge's allegations, which do not involve "systemic policy violations," *id*., distinguishes this case from *Pennsylvania Psychiatric Society* and highlights its lack of standing to seek injunctive relief. *See also Kan. Health Care Ass'n v. Kan. Dep't of Soc. and Rehab. Servs.*, 958 F.2d 1018, 1022–1023 (10th Cir. 1992) (holding that proof of plaintiffs' underlying claims—that state Medicare reimbursements were inadequate—required individual participation of healthcare providers).

[4] The Amended Complaint's request for relief (¶ 374) consists of "[b]road, non-specific language that merely enjoins a party to obey the law." *Louis W. Epstein Family*, 13 F.3d at 771.

Inc., 529 F.3d 183, 189 (3d Cir. 2008) (quoting *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). Courts follow a three-part test to determine whether dismissal on *forum non conveniens* grounds is appropriate. First, the court must "determine whether an adequate alternative forum can entertain the case." *Id.* at 189–90. Second, if there is an adequate alternate forum, then the court must determine the "appropriate amount of deference to be given the plaintiff's choice of forum." *Id.* at 190. "Once the district court has determined the amount of deference due the plaintiff's choice of forum, the district court must balance the relevant public and private interest factors." *Id.*; *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010) (same). "If the balance of these factors indicates that trial in the chosen forum would result in oppression or vexation to the defendant out of all proportion to the plaintiff's convenience, the district court may, in its discretion, dismiss the case on *forum non conveniens* grounds." *Windt*, 529 F.3d at 190. Consideration of these factors strongly favors dismissal.

A. Abramge's Choice of Forum Is Entitled to a Low Level of Deference

Abramge is the quintessential foreign plaintiff whose choice of a U.S. forum deserves a low degree of deference. *Windt*, 529 F.3d at 191. Although courts ordinarily attach a "strong presumption of convenience . . . in favor of a domestic plaintiff's chosen forum," *id.* at 190, it is well established that "this assumption is much less reasonable" when the plaintiff is foreign, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). For this reason, a foreign plaintiff's decision to sue in the United States "deserves less deference." *Id.*; *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007) (same). Because Abramge is a foreign party that is suing on behalf of Brazilian health insurers, its choice of forum deserves a low level of deference. Am. Compl. ¶¶ 1–3. Moreover, neither Abramge nor this lawsuit has a strong connection to the forum that would justify a higher level of deference to Abramge's choice of

forum. *Windt*, 529 F.3d at 191. There is "no indication that evidence is concentrated in [Delaware], nor is there an indication that a substantial amount of conduct giving rise to the instant dispute occurred in [Delaware]." *Id.* A "low degree of deference" to Abramge's choice of forum is warranted. *Id.*

B. Brazil Is an Adequate Alternate Forum

The next question is whether Brazil is an adequate alternate forum. "The court's role in determining the adequacy of the proposed alternative forum is a very limited one; usually, the defendant's amenability to process in the foreign jurisdiction and the existence of a satisfactory remedy there are sufficient to establish the jurisdiction's adequacy." *Miller v. Boston Sci. Corp.*, 380 F. Supp. 2d 443, 447 (D.N.J. 2005). But it is only in "rare circumstances" when a forum "does not permit litigation of the subject matter of the dispute" that a foreign forum is "inadequate." *Piper Aircraft*, 454 U.S. at 254 n.22.

Brazil easily satisfies these standards. As explained by Defendants' Brazilian law expert, Professor Keith Rosenn, a Brazilian court can exercise jurisdiction over Abramge's claims against BSC on multiple grounds, including because BSC consents to jurisdiction. *See* Declaration of Keith S. Rosenn ("Rosenn Decl.") ¶¶ 26–32, 58. Brazilian law also permits litigation of the subject matter of the dispute and Abramge can recover damages if it proves its allegations. *Id.* ¶¶ 26–30, 32, 34–55, 57–58. Thus, as numerous federal courts have held, Brazil is an adequate alternate forum. *See, e.g.*, *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1331 (11th Cir. 2011) (product liability claims); *Value Partners S.A. v. Bain & Co.*, No. 98-CV-1562, 1998 U.S. Dist. LEXIS 9136, at *8 (S.D.N.Y. June 19, 1998) (tortious interference and conspiracy claims).

C. The Balance of Private and Public Interest Factors Strongly Favors Dismissal to Brazil

The next factor, the balance of the private and public interests, favors dismissal. Trial of Abramge's claims in its chosen forum would cause "oppressiveness and vexation" to BSC "out of all proportion to [Abramge's] convenience." *Koster*, 330 U.S. at 524.

1. The Private Interest Factors Favor Dismissal

The private interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

First, the witnesses and evidence are located overwhelmingly in Brazil. Abramge, its employees, and its documents are in Brazil. Am. Compl. ¶¶ 1–2. The witnesses and evidence for all of Abramge's 142 Members, who will need to provide individualized proof that they paid fraudulent claims due to BSC's conduct, are all in Brazil. *Id.* ¶¶ 3–5. Other critical sources of proof in Brazil include (1) employees and documents from Signus, and any other device distributors that allegedly offered and paid kickbacks on behalf of BSC; (2) employees and documents from Angiomac, and any other physicians and medical groups that accepted such kickbacks; (3) employees and documents from BSC's Brazilian subsidiary, BSC Brazil; (4) the countless Brazilian patients who allegedly were subject to unnecessary surgeries or improper medical care, leading to the submission of fraudulent claims; and (5) the innumerable family, friends, and employers of the Brazilian patients whose care was affected and who will need to testify about the appropriateness of treatment they received.

That so many witnesses and sources of proof are in Brazil strongly favors dismissal. *Windt*, 529 F.3d at 194. The cost to obtain this evidence and testimony will be exorbitant and, to make matters worse, it is likely that most of the witnesses and documents will require translation from Portuguese, resulting in a trial-by-interpreter. *Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001) ("German court would be more competent than a United States court to hear the claim because of its familiarity with the German language"); *Miller*, 380 F. Supp. 2d at 453 (expense of providing English translation favors dismissal). In contrast, there are likely to be very few witnesses in the United States. Although BSC's principal place of business is in Massachusetts, Am. Compl. ¶ 5, Abramge alleges that it acted principally through Brazilian "representatives," including employees of BSC Brazil and Signus (and other Brazilian device distributors). *Id.* ¶¶ 91, 101. Brazilian witnesses will predominate.

Second, the inability to compel testimony or evidence from critical third parties in Brazil strongly favors dismissal. *Miller*, 380 F. Supp. 2d at 452. This includes witnesses and evidence from the 142 Members, Signus and other device distributors, Angiomac and other physicians and hospitals, and all of the Brazilian patients and related witnesses. A U.S. court cannot compel production of these key sources of proof. *Id.* at 452–53. At most, the parties would have to rely on the Hague Convention, Rosenn Decl. ¶¶ 49–51, but that is slow, expensive, and impractical in a case with so many nonparty witnesses, *Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs., Corp.*, 421 F. Supp. 2d 741, 769 (S.D.N.Y. 2006). Moreover, Brazil does not permit use of the Hague Convention for purposes of pretrial discovery, Rosenn Decl. ¶¶ 50–51, so for all practical purposes, the parties and Court would have little or no access to these critical witnesses. At best, testimony from third parties would have to be presented through depositions, but that "create[s] a condition not satisfactory to court, jury or most litigants." *Gulf Oil*, 330 U.S. at 511.

Dismissal will alleviate these problems. Brazilian courts can compel testimony and evidence from Brazilian parties and non-parties alike. Rosenn Decl. ¶¶ 22–23, 59. To the extent any witnesses and evidence are in the United States, the parties can easily access them for trial in Brazil pursuant to 28 U.S.C. § 1782. Rosenn Decl. ¶¶ 52–55.

A final private interest factor that supports dismissal is the inability of a court in Delaware—or any court in the United States—to exercise personal jurisdiction over potentially liable third parties. *Piper Aircraft*, 454 U.S. at 259; *Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980) (inability to implead party favored dismissal). There are multiple Brazilian co-tortfeasors Abramge did not name, including Signus and other Brazilian distributors that paid kickbacks and Angiomac and other Brazilian physician groups that accepted kickbacks. Am. Compl. ¶¶ 86–114. Because these third parties are not subject to personal jurisdiction in Delaware or the United States, BSC's only recourse against them would be to file separate actions against them in Brazil. "'Such a scenario not only represents a waste of judicial resources, but also creates a risk of inconsistent judgments.'" *Miller*, 380 F. Supp. 2d at 453–54 (quoting *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993)).

Moreover, it would also be unfair and highly prejudicial to BSC if it is tried in Delaware "while other, potentially culpable, defendants [a]re sued in [Brazil]." *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 n.4 (11th Cir. 2001) (per curiam). BSC may seek to defend against Abramge's claims by arguing that Signus or Angiomac alone is to blame, but "[s]uch an accusation is surely less persuasive when aimed at a set of empty chairs. If a [Delaware] jury ultimately looked to place blame at the defense table, it would have available only one, rather than several, defendants to bear the brunt of its verdict and damage award." *Id*. The "'inability to implead other parties directly involved in the controversy is a factor which weighs against the

retention of jurisdiction.'" *Dahl*, 632 F.2d at 1031 (quoting *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1974)).

2. The Public Interest Factors Favor Dismissal

The public interest factors also favor dismissal. These factors include: (1) the administrative difficulties flowing from court congestion; (2) the "'local interest in having localized controversies decided at home'"; (3) "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action"; (4) "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law"; and (5) "the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft*, 454 U.S. at 241 n.6 (quoting *Gilbert*, 330 U.S. at 509).

First, this lawsuit is of paramount interest to Brazil because it is about an alleged fraud that caused "significant harm in the Brazilian private health insurance market." Am. Compl. ¶ 85. Abramge alleges that the fraud arose from BSC's desire to "increase [its] market share *in Brazil* by making improper payments and paying bribes and kickbacks to *Brazilian doctors* . . . . [that] resulted in *Brazilian health insurers* . . . being forced to pay millions of dollars beyond what those insurers should have been required to pay . . . ." *Id.* ¶ 10 (emphasis added). The contracts BSC allegedly interfered with are between Brazilian parties and relate to healthcare to be delivered in Brazil, *id.* ¶ 298; the patients whose treatment the fraud affected are all Brazilian, *id.* ¶ 118; and Abramge alleges that the scheme worked only as a consequence of Brazilian health insurance regulatory requirements, *id.* ¶¶ 29–48.

There are several additional indicia of Brazil's interest. The Brazilian media has reported extensively on the purported fraud, *id.* ¶¶ 51–52, 55–59; the Brazilian government, including the Brazilian Congress, is investigating the fraud, *id.* ¶¶ 59–60, 65, 77–81, 99; and Brazilian police allegedly raided Signus's offices, *id.* ¶ 98. There is a strong Brazilian interest in the case. *See,*

e.g., *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1147 (9th Cir. 2001) (New Zealand government probe indicates public interest); *In re Air Crash Near Peixoto de Azeveda*, 574 F. Supp. 2d 272, 288 (E.D.N.Y. 2008) (noting Brazilian interest in case in part due to "governmental inquiries, criminal charges, [and] mass media coverage").

But this case does not involve a strong local interest. Abramge does not allege that its Members operate in Delaware or the United States or that they suffered any harm here. And generalized interests the United States or Delaware may have in policing local corporations are "insufficient to outweigh the locus of the alleged culpable conduct in this case." *Eurofins*, 623 F.3d at 163 (citing *Armstrong v. Pomerance*, 423 A.2d 174, 177 (Del. 1980)); *see also Windt*, 529 F.3d at 193–94 (citing *Dahl*, 632 F.2d at 1033). The Third Circuit has consistently held that foreign jurisdictions have a greater interest in deterring tortious conduct by U.S. or Delaware companies for claims brought by foreign plaintiffs in connection with foreign torts. *See, e.g.*, *Auxer v. Alcoa, Inc.*, 406 F. App'x 600, 605 (3d Cir. 2011) (unpublished); *Dahl*, 632 F.3d at 1032. Besides, "any deterrent impact on [BSC] is not eliminated merely because damages are determined in [Brazil] rather than in the United States," *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1061 (11th Cir. 2009), and "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant," *Piper*, 454 U.S. at 260–61. "[W]ithout a dispute local to the community . . . , there is little public interest in subjecting that community to the burdens of jury service." *Windt*, 529 F.3d at 193 (citing *Dahl*, 632 F.2d at 1032).

Finally, the need "to 'untangle problems in conflict of laws, and in law foreign to itself,'" is another factor that favors dismissal. *Piper*, 454 U.S. at 260 (quoting *Gilbert*, 330 U.S. at 509); *see also Windt*, 529 F.3d at 193. Delaware's most-significant-relationship test for tort claims

points toward application of Brazilian law. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46–47 (Del. 1991) (noting Delaware's use of Restatement (Second) Conflict of Laws § 145 (1971)). The injuries alleged in the Amended Complaint occurred in Brazil, where Abramge and the Members are located and do business; the conduct causing Abramge's alleged injury, including the alleged bribery of Brazilian physicians, occurred in Brazil; Abramge and the Members are Brazilian citizens and domiciliaries; and any relationship that may have existed between BSC and Abramge is necessarily centered in Brazil. Although BSC is incorporated in Delaware, Abramge alleges that BSC acted through its Brazilian subsidiary and Brazilian distributors. Am. Compl. ¶ 89. Besides, courts applying Delaware choice-of-law rules have consistently applied foreign law to foreign tort claims brought by foreign plaintiffs against defendants incorporated in Delaware. *E.g.*, *Integral Resources (PVT) Ltd. v. Istil Group, Inc.*, 2004 WL 2758672, at *2 (D. Del. Dec. 2, 2004) (Ukrainian law applies to Ukrainian plaintiff's tortious interference claims). Thus, the likely need to figure out and apply Brazilian law favors dismissal. *See Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) ("Far better that the case be tried in France by one or more jurists familiar with French law as we are unfamiliar with it.").

III. ABRAMGE FAILS TO PLEAD FRAUD AND FRAUD-BASED CLAIMS WITH PARTICULARITY

A. Rule 9(b) Requires Abramge to Plead Fraud and Claims Predicated on Fraud with Specific Factual Allegations

Under Rule 9(b), "a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (quoting *Lum v. Bank of America*, 361 F.3d 217, 223–24 (3d Cir. 2004)). The plaintiff must allege "the date, time and place of the alleged fraud," *id.*, and "who made a misrepresentation to whom and the general content of the misrepresentation," *Lum*, 361 F.3d at 224; *see also In re*

Rockefeller Ctr. Properties, Inc. Sec. Litig., 311 F.3d 198, 217 (3d Cir. 2002) (Rule 9(b) requires alleging the facts "that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue") (internal quotation marks omitted)).

Rule 9(b) applies to each of Abramge's fraud claims: Count I (Fraud by Non-Disclosure and Active Concealment), Count II (Fraud by Non-Disclosure – Vicarious Liability), Count III (Common Law Fraud), and Count IV (Common Law Fraud – Vicarious Liability). But many courts, including in this Circuit, have extended Rule 9(b)'s stringent pleading standard to non-fraud claims that are predicated on fraud and arise out of the same operative facts. *Hanover Ins. Co. v. Ryan*, 619 F. Supp. 2d 127, 142 (E.D. Pa. 2007) ("The particularity requirement of Rule 9(b) applies to claims of negligent misrepresentation."); *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004) (extending Rule 9(b) to claims "predicated on fraud," even where fraud is not itself an element of the claim); *Girard Trust Bank v. Martin*, 557 F.2d 386, 390 (3d Cir. 1977) (conspiracy based on fraud); *Smith v. Bank of Am. Corp.*, 485 F. App'x 749, 755 (6th Cir. 2012) (unjust enrichment based on fraud); *Lum*, 361 F.3d at 224 (RICO claim based on fraud); *but see Schmidt v. Ford Motor Co.*, 972 F. Supp. 2d 712, 720 n.3 (E.D. Pa. 2013) (recognizing intracircuit split).[5] These courts have applied Rule 9(b) to claims "where the underlying conduct alleged has been fraud or closely linked with fraudulent behavior," or where "the pleading includes a claim based on fraud, and the non-fraud claim incorporates the fraud allegations." *Levy v. Young Adult Inst., Inc.*, 103 F. Supp. 3d 426, 442–43 (S.D.N.Y. 2015).

[5] "Even courts that have held that Rule 9(b) does not apply to negligent misrepresentation, however, have noted that 'a plaintiff must nonetheless plead negligent misrepresentation with a degree of specificity.'" *Schmidt*, 972 F. Supp. 2d at 720 n.3 (quoting *Scott v. Bimbo Bakeries, USA, Inc.*, Civil Action No. 10-3154, 2012 WL 645905, at *5 (E.D. Pa. Feb. 29, 2012)).

Here, each of Abramge's non-fraud claims arises out of the same operative facts as the fraud claims, *and* each claim incorporates the fraud allegations.[6] At the heart of Abramge's prolix Amended Complaint are the purported kickback schemes by which Defendants allegedly defrauded Abramge's Members. Each of the Amended Complaint's counts arises out of and refers to those alleged schemes. Indeed, three sections of the Amended Complaint bear headings to that effect: "Boston Scientific's Scheme to Defraud the Brazilian Medical Device Market," "Arthrex's Scheme to Defraud the Brazilian Medical Device Market," and "Zimmer Biomet's Scheme to Defraud the Brazilian Medical Device Market." Am. Compl. at 15, 21, 24 (capitalization altered). The Court should thus apply Rule 9(b) to each of Abramge's claims.

B. Abramge Fails to Plead Specific Facts—"Who, What, When, Where and How"—in Support of Its Claims

The Amended Complaint includes none of the information Rule 9(b) requires. It does not identify (1) a single fraudulent statement made by BSC, its employees, subsidiaries, distributors, or anyone else; (2) a single unnecessary medical procedure, a single fraudulent insurance claim,

[6] Count V (Civil Conspiracy (Fraud)) alleges that "Defendants entered into a confederation with Brazilian distributors in order to accomplish the above enumerated fraudulent and deceitful scheme." Am. Compl. ¶ 283. Count VI (Tortious Interference with Contractual Relations) alleges that "Defendants . . . knowingly induced false and fraudulent invoices." *Id.* ¶ 301; *see also id.* ¶ 297. Count VII (Tortious Interference – Vicarious Liability) alleges that "Defendants . . . knowingly caused . . . false and fraudulent invoices and claims to be submitted to third-party payers." *Id.* ¶ 314; *see also id.* ¶ 308. Count VIII (Civil Conspiracy (Tortious Interference with Contractual Relations)) alleges that "Defendants . . . knowingly induced false and fraudulent invoices and claims to be submitted to the Members for payment." *Id.* ¶ 329; *see also id.* ¶ 322. Count IX (Negligent Misrepresentation) alleges that "Defendants made or caused to be made misrepresentations and provided false information to the Members." *Id.* ¶ 336; *see also id.* ¶ 334. Count X (Unjust Enrichment) alleges that "Defendants and various medical device distributors accomplished Defendants' scheme by issuing fraudulent invoices which the Members were obligated to pay." *Id.* ¶ 347; *see also id.* ¶ 344. Count XI (Injunctive Relief) alleges that "[Defendants] engaged and are still engaging in their fraudulent scheme," and seeks to enjoin "Defendants from engaging in their fraudulent acts." *Id.* ¶¶ 365, 374; *see also id.* ¶ 356.

or even a specific insurer who was defrauded; (3) "the date, time and place of the alleged fraud," *Frederico*, 507 F.3d at 200; or (4) "who made a misrepresentation to whom" or even "the general content of the misrepresentation," *Lum*, 361 F.3d at 224.

Instead, Abramge alleges merely that unnamed BSC employees and distributors ran kickback schemes with unnamed doctors at unspecified times to defraud unspecified insurance companies. *See, e.g.*, Am. Compl. ¶ 91 (alleging improper payments without naming BSC employees, distributors, or doctors allegedly involved); *id.* ¶ 92 (alleging "upon information and belief" that unnamed BSC employees and distributors concealed secret payments to unnamed doctors); *id.* ¶ 93 (alleging "upon information and belief" that unnamed "employees, agents, representatives, distributors, contractors, subsidiaries, and/or affiliates falsely recorded the payments . . . ."); *id.* ¶ 104 (alleging that unnamed employees approached three unnamed doctors); *id.* ¶ 114 (alleging that BSC's kickbacks induced unnamed doctors to commit misconduct); *id.* ¶ 117 (alleging that unnamed insurers paid for the increased use of BSC's products). Such allegations fail to satisfy Rule 9(b). *Frederico*, 507 F.3d at 200.

C. Abramge Improperly Alleges Claims Against All "Defendants"

Each of the Amended Complaint's 11 counts is pleaded against "Defendants" collectively without identifying any specific conduct committed by the individual Defendants. "While collective pleading (i.e. allegations that refer to 'Defendants' as a single unit), might be sufficient to satisfy Rule 9(b) in some circumstances, . . . general allegations regarding 'Defendants' are entirely insufficient [where] it is evident from the complaint that the defendants are not similarly situated and did not engage in similar (let alone identical) conduct." *Lind v. New Hope Prop., LLC*, No. 09-cv-3757, 2010 WL 1493003, at *4 (D.N.J. Apr. 13, 2010); *see also Adams v. Madison Realty & Dev., Inc.*, No. 87-cv-1279, 1989 WL 41283, at *5 (D.N.J. Apr. 21, 1989). Here, the Amended Complaint alleges three separate fraudulent "schemes." *Compare* Am.

Compl. ¶¶ 86–124 (BSC's "scheme"), *with id.* ¶¶ 125–53 (Arthrex's "scheme"), *and id.* ¶¶ 154–96 (Zimmer Biomet's "scheme"). There are no allegations that Defendants even knew of the others' purported schemes, much less that they collaborated, conspired, or shared some common goal.[7] The Amended Complaint even refers to "Defendants' *individual* illicit schemes." Am. Compl. ¶ 10 (emphasis added). Abramge's "general allegations regarding 'Defendants' are entirely insufficient" to satisfy Rule 9(b). *Lind*, 2010 WL 1493003, at *4.

IV. ABRAMGE FAILS TO STATE A CLAIM FOR RELIEF

Not only has Abramge failed to satisfy the particularity standard of Rule 9, it has failed to allege even a plausible claim for relief, as required by Rule 8. Disregarding "legal conclusions" and "conclusory statements," a court must evaluate whether the complaint's well-pleaded factual allegations "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009). A plaintiff is not entitled to relief "[w]here a complaint pleads facts that are merely consistent with a defendant's liability." *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted).[8]

A. The Amended Complaint Does Not Adequately Allege Causation

Causation is, of course, an essential element of every tort action. *See Habecker v. Copperloy Corp.*, 893 F.2d 49, 54 (3d Cir. 1990). When a plaintiff brings claims that sound in fraud, Rule 9(b) requires that the plaintiff allege causation with particularity. *Pa. Emp. Benefit*

[7] Abramge's allegation that Defendants engaged in separate schemes and the absence of any claim that Defendants colluded or conspired warrant dismissal or severance under Rule 21. Nor is permissive joinder under Rule 20(a) appropriate. *Ross v. Meagan*, 638 F.2d 646, 650 n.5 (3d Cir. 1981), *overruled on other grounds, Neitzke v. Williams,* 490 U.S. 319 (1989); *see also Odin's Eye Entm't v. Does 1-66*, No. 12-1389, 2013 WL 5890408, at * 2 (D. Del. Oct. 31, 2013).

[8] As noted in Section II.C.2, Brazilian law governs substantive liability considerations. To the extent that the Court disagrees and retains jurisdiction over this case, the Court should default to and evaluate liability under the laws of the forum—Delaware. *See Montgomery Ward & Co. v. Pac. Indem. Co.*, 557 F.2d 51, 58 n.11 (3d Cir. 1977); *see also Publicker Indus., Inc. v. Roman Ceramics Corp.*, 652 F.2d 340, 343 n.6 (3d Cir. 1981).

Tr. Fund v. Zeneca, Inc., 710 F. Supp. 2d 458, 478 (D. Del. 2010). That means that Plaintiff must allege with specificity that BSC's conduct, "in natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] [Plaintiff's] injury." *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 828–29 (Del. 1995) (citations, internal quotation marks, and emphasis omitted).

Rules 8 and 9 require more than speculative and vague allegations that some unidentified "Brazilian health insurers were forced to pay for Defendants' devices and products" or that "*[s]ometimes*, these devices and products were implanted or used when none were necessary." *See* Am. Compl. ¶¶ 22–23 (emphasis added). Putting aside these conclusory legal allegations, Abramge alleges that: (1) BSC sells its medical devices into Brazil through its subsidiary, Boston Brazil; (2) BSC's subsidiary engages distributors to distribute BSC's medical devices; (3) distributors bribe physicians to encourage them to use BSC's medical devices; (4) physicians decide whether, when, and how many medical devices to use; (5) patients belonging to a subset of the population that decided to acquire private health insurance to supplement Brazil's public healthcare system—a decision that itself is influenced by a multitude of factors—decide to undergo the procedures recommended by their physicians; (6) for that subset of patients, physicians submit invoices to insurers, some of whom belong to Abramge; and (7) based at least in part on the terms of insurance contracts, the Members decide to cover and reimburse for the medical devices. "The sheer number of links in [this] chain of causation" is too great and their relationships are too tenuous to support proximate causation. *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 930 (3d Cir. 1999).

Abramge's causal chain breaks at its first link. Abramge fails adequately to allege that BSC had "direct involvement in causing the [unlawful conduct]." *United States v. Exec. Health*

Res., Inc., 196 F. Supp. 3d 477, 513 (E.D. Pa. 2016). Abramge seems to rely heavily on the conduct of BSC Brazil, but merely alleging that a parent controlled its subsidiary is not enough to establish a causal link—"[these] conclusion[s] require[] factual support." *U.S. ex rel. Lisitza v. Par Pharm. Cos.*, No. 06-06131, 2013 WL 870623, at *5 (N.D. Ill. Mar. 7, 2013).[9]

The remaining causal links are equally frail. Intervening events make any connection between BSC's actions and Abramge's injuries too attenuated. *Steamfitters*, 171 F.3d at 928. For each invoice Members paid, causation depends on an analysis of multiple layers of decision-making by physicians, patients, and insurers. These "independent decisions . . . eviscerate[] the chain of causation." *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1370 (11th Cir. 2011) (Martin, J., concurring); *see UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 135 (2d Cir. 2010).[10]

B. Abramge Has Not Alleged that BSC Injured Its Members

Abramge's claims also fail because the Amended Complaint does not plausibly allege that the Members suffered injury as a direct result of BSC's conduct. In the BSC-specific section, the Amended Complaint nowhere alleges that any of the Members actually made a single payment as a result of anything that BSC did. Am. Compl. ¶¶ 86–124. Abramge instead speaks in hypotheticals and describes only the potential for payment by its Members. *Id.* ¶¶ 117–18. Such "generalized allegations of fraudulent conduct and resulting harm" are insufficient. *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, No. 2:06-

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[9] Abramge's theories of indirect liability also fail because, for all the other reasons discussed in this Section, Abramge has not alleged that BSC Brazil caused its Members' injuries either. Abramge's theories of indirect liability fail for the reasons discussed in Section IV.F & G, below.

[10] Abramge alleges that physicians "responded to [Defendants'] bribes," Am. Compl. ¶ 19, but even if this is so, "the court would [still] need to determine the extent to which [its Members'] increased costs . . . resulted from" BSC's alleged payment of bribes, as compared to some third parties' "independent (i.e., separate from the fraud and conspiracy) decisions." *Steamfitters*, 171 F.3d at 933.

CV-5774 (SRC), 2009 WL 2043604, at *26 (D.N.J. July 10, 2009). To establish a plausible claim for relief, Abramge must allege that its Members' injuries are directly linked to conduct by BSC. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343–44 (2005); *see also Duphily*, 662 A.2d at 829. Absent such an allegation, all Abramge's claims must be dismissed.

C. Abramge Has Not Plausibly Alleged Fraud

The Court should dismiss Counts 1, 2, 3, 4, and 5 because Abramge has not alleged fraud, either by affirmative misrepresentation or by non-disclosure.[11]

1. Abramge Has Failed to State a Claim for Fraud by Non-Disclosure

Counts 1 and 2 allege that BSC committed fraud by non-disclosure, so Abramge must allege (1) that BSC was silent about a material fact in the face of a duty to speak that BSC owed to Abramge or (2) that BSC actively concealed a material fact from Abramge. *See Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987). Abramge has not plausibly alleged either. It also has failed to allege, as it must, that it relied to its detriment on BSC's incomplete statements. *See id.*

Abramge alleges that Defendants (and not BSC in particular) "had a duty to disclose any payments or inducements that they provided to Brazilian doctors." Am. Compl. ¶ 207. But Abramge alleges no facts to support this legal conclusion or any theory for why BSC owes a duty to disclose anything to Abramge or the Members. *In re Am. Bus. Fin. Servs., Inc.*, 361 B.R. 747, 755–56 (Bankr. D. Del. 2007).[12]

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[11] To establish a claim of fraud, a plaintiff must plausibly allege: "1) a false representation, usually one of fact, made by the defendant; 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

[12] Abramge's allegations that Defendants had a "duty to abide by legal and ethical requirements" and a "duty not to bribe," or that physicians and hospitals are bound by certain codes of conduct,

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In similarly conclusory fashion, and relying on "information and belief," Abramge contends that BSC "fraudulently concealed . . . kickbacks and secret payments and did not record such payments in [its] books and records" and that BSC "falsely recorded the payments to conceal the true nature of the payments in the consolidated books and records." Am. Compl. ¶¶ 92–93. But Abramge does not allege that it or its Members ever reviewed BSC's books, records, or filings; thus, Abramge has not alleged that its Members knew of, let alone relied on, BSC's books, records, or public filings when it paid for BSC products. Counts 1 and 2 must be dismissed. *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 814 (Del. Ch. 2014); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 150 (Del. Ch. 2004).

2. Abramge Has Failed to State a Claim for Common Law Fraud

Counts 3 through 5 hinge on the allegation that "Defendants made knowing and reckless misrepresentations about the price of Defendants' medical devices and products." Am. Compl. ¶ 247. These counts fail because Abramge has not plausibly alleged justifiable reliance on, or materiality of, BSC's purported misrepresentations.

Abramge repeatedly alleges that its Members "reasonably relied on their belief that the doctors who had been bribed were acting in line with industry standards and ethics." *Id.* ¶ 240. But to establish a claim of common law fraud, Abramge must plausibly allege that it justifiably relied on a false representation made by BSC. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). It has not done so.

Furthermore, Abramge has not alleged facts to establish materiality. "Under any understanding of the concept, materiality looks to the effect on the likely or actual behavior of

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are beside the point. *E.g.*, Am. Compl. ¶¶ 204–06, 69-70. The relevant question is whether *BSC* violated some duty *to speak*. *Nicolet*, 525 A.2d at 149.

the recipient of the alleged misrepresentation." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016) (citation, internal quotation marks, and alteration omitted). So, where a payor "regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." *Id.* at 2003–04. Abramge says that if it knew about Defendants' fraudulent scheme, it would have refused to pay for Defendants' devices. Am. Compl. ¶ 221. Abramge has, of course, discovered the alleged scheme, and yet Abramge admits that Members continue to reimburse at artificially inflated prices. *See id.* ¶ 366. This Court "need not opine in the abstract when the record offers insight into . . . actual payment decisions." *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1032 (D.C. Cir. 2017). As a matter of law, any misrepresentation by BSC cannot be material.[13]

D. Abramge Has Not Stated a Claim for Tortious Interference with Contractual Relations (Counts 6, 7, and 8)

With regard to BSC's purported tortious interference with policyholder contracts, Abramge fails to allege that the policyholders (i.e., patients) breached those contracts. *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013).[14] Abramge never explains how physicians' submission of inflated invoices breached the patients' contracts with their insurers. And the claim that BSC tortiously interfered with provider contracts fails because it relies on

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[13] This same principle undercuts any argument that BSC caused Abramge's alleged injury. Insurers who continue to reimburse for products that are prescribed as part of a known illegal scheme "cannot, as a matter of law, establish that they were 'injured by reason of' or were victims of" that scheme. *Teamsters Local 237 Welfare Fund v. AstraZeneca Pharm. LP*, 136 A.3d 688, 695–96 (Del. 2016). The Members "were injured by their own conduct." *Id.* at 696.

[14] The elements of a tortious interference with contract claim are "(1) a contract, (2) about which defendant knew, *and* (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury." *Bhole*, 67 A.3d at 453 (citation and internal quotation marks omitted).

conclusory allegations that agreements were "breach[ed]," Am. Compl. ¶¶ 301–02, and because it does not once describe a provider contract, let alone a breached provision, *id.* ¶¶ 86–124.

E. Abramge Has Not Stated a Claim for Negligent Misrepresentation (Count 9)

"[N]egligent misrepresentation is essentially a species of fraud with a lesser state of mind requirement, but with the added element that the defendant must owe a pecuniary duty to the plaintiff." *Vichi*, 85 A.3d at 822.[15] For all the reasons described in Section III and IV.C, Abramge has not plausibly alleged misrepresentation, justifiable reliance, or materiality, and so has failed to state a claim for negligent misrepresentation. Moreover, because Abramge has not alleged that BSC owed it a "pecuniary duty," the Court should dismiss Count 9. *Id.*

F. Plaintiff Has Not Alleged Vicarious Liability (Counts 2, 4, and 7)

Counts 2, 4, and 7 rely on the theory that Defendants can be held vicariously liable for the acts of third parties. Am. Compl. ¶¶ 243, 319. The Amended Complaint names two such third parties—a subsidiary, BSC Brazil, and a distributor, Signus—but as described in Section IV.A, Abramge fails to allege facts that explain the "means through which [BSC] exercised its alleged 'control' and 'direction'" over BSC Brazil. *Lisitza*, 2013 WL 870623, at *5.

At most, Counts 2, 4, and 7 would have to rest on a purported agency relationship between BSC, as principal, and Signus, as agent. Abramge, however, does not allege that BSC's "control or direction [of Signus] dominate[d] the manner or means of the work performed," *Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. 1997), as is need to overcome the "general rule" that a "contractee will not be held liable for the torts of an independent contractor," *id.* at

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[15] "To assert a claim for negligent misrepresentation, the following elements must be present: (1) a pecuniary duty to provide accurate information, (2) the supplying of false information, (3) failure to exercise reasonable care in obtaining or communicating information, and (4) a pecuniary loss caused by justifiable reliance upon the false information. More specifically, in order to successfully assert a claim for negligent misrepresentation, the plaintiff must allege that she relied upon the misrepresentations." *Zeneca*, 710 F. Supp. 2d at 485–86 (citation omitted).

53, 58, 61–62. Abramge's conclusory allegations that Signus acted "on behalf of Boston Scientific," and that BSC "perpetrated the complained of fraud in Brazil through their control of, use and direction of . . . various local Brazilian distributors," Am. Compl. ¶¶ 91, 104, 107, are not enough. *E.I. Du Pont de Nemours & Co. v. I.D. Griffith, Inc.*, 130 A.2d 783, 784–85 (Del. 1957) (agency relationship required "absolute right to direct the manner and method of proceeding with the work rather than with respect to the end result").

G. Abramge's Remaining Claims Must Be Dismissed (Counts 5, 8, 10, and 11)

"Civil conspiracy is not an independent cause of action; it must be predicated on an underlying wrong." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009). Because Abramge fails to state a claim for fraud or tortious interference, the conspiracy claims related to those Counts also fail. And so Counts 5 and 8 must be dismissed. Abramge's unjust enrichment Count—Count 10—boils down to an allegation that Members were injured by "Defendants' scheme [of] issuing fraudulent invoices which the Members were obligated to pay." Am. Compl. ¶ 347. Because Abramge cannot establish fraud, it cannot argue that BSC's retention of money is "against the fundamental principles of justice or equity and good conscience." *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988) (citation omitted).

Finally, because Count 11 seeks only a different form of relief—an injunction—for the causes of action alleged in the Amended Complaint's other Counts, and because Abramge has failed to state a claim for relief, Count 11 also fails. *See Lisa, S.A. v. Mayorga*, No. CIV.A. 2571-VCL, 2009 WL 1846308, at *8 & nn.35–36 (Del. Ch. June 22, 2009).

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed.

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Of Counsel:

John N. Nassikas III
David J. Weiner
Joshua M. Davis
Charles B. Weinograd
Stephen K. Wirth
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: (202) 942-5000
john.nassikas@apks.com
david.weiner@apks.com
joshua.davis@apks.com
charles.weinograd@apks.com
stephen.wirth@apks.com

YOUNG CONAWAY STARGATT & TAYLOR LLP

/s/ Karen L. Pascale

Karen L. Pascale (#2903)
Pilar G. Kraman (#5199)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600
kpascale@ycst.com
pkraman@ycst.com

Attorneys for Defendant
Boston Scientific Corporation

CERTIFICATE OF SERVICE

I, Karen L. Pascale, Esquire, hereby certify that on April 13, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF (which will send notification that such filing is available for viewing and downloading to all registered counsel), and in addition caused true and correct copies of the foregoing document to be served upon the following counsel of record by e-mail:

For Plaintiff, Associação Brasileira de Medicina de Grupo d/b/a ABRAMGE:

Karen B. Skomorucha Owens kowens@ashby-geddes.com
F. Troupe Mickler IV tmickler@ashby-geddes.com
ASHBY & GEDDES, P.A.
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19899

Robert A. Romano rromano@lockelord.com
William G. Primps william.primps@lockelord.com
R. James DeRose, III rderose@lockelord.com
Jeffrey Kramer jkramer@lockelord.com
LOCKE LORD LLP
200 Vesey Street, 20th Floor
New York, New York 10281

For Defendant Zimmer Biomet Holdings, Inc.:

Jody C. Barillare jody.barillare@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
The Nemours Building
1007 N. Orange Street, Suite 501
Wilmington, DE 19801

Troy S. Brown troy.brown@morganlewis.com
Eric W. Sitarchuk eric.sitarchuk@morganlewis.com
Rebecca J. Hillyer rebecca.hillyer@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921

For Defendant Arthrex, Inc:

Kelly E. Farnan RICHARDS, LAYTON & FINGER, P.A. One Rodney Square P.O. Box 551 Wilmington, DE 19899	farnan@rlf.com
Karen A. Popp Brian P. Morrissey Eric D. McArthur Tobias S. Loss-Eaton William Hochul, III SIDLEY AUSTIN LLP 1501 K Street, N.W. Washington, D.C. 20005	kpopp@sidley.com bmorrissey@sidley.com emcarthur@sidley.com tlosseaton@sidley.com whochul@sidley.com
Michael D. Mann SIDLEY AUSTIN LLP 787 Seventh Avenue New York, NY 10019	mdmann@sidley.com

/s/ Karen L. Pascale
Karen L. Pascale (#2903) [kpascale@ycst.com]
YOUNG CONAWAY STARGATT & TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6600

Attorneys for Defendant
Boston Scientific Corporation