IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ASSOCIAÇÃO BRASILEIRA DE MEDICINA DE GRUPO, *doing business as* ABRAMGE,

Plaintiff,

v.

BOSTON SCIENTIFIC CORPORATION, et al.,

Defendants.

C.A. No. 16-01184-GMS

DEFENDANT ARTHREX INC.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

This action is a fishing expedition. Based on media and public reports that certain (mostly unnamed) Brazilian medical-device distributors had paid kickbacks to doctors in Brazil, plaintiff Abramge, an association of Brazilian health insurers, brought this suit against three different U.S.-based medical-device manufacturers, claiming fraud that drove up insurers' costs. In addition to these three defendants, who share no connection apart from incorporation in Delaware, Abramge has separately sued five other manufacturers in different U.S. courts.[1] The complaints in these various actions feature extensive descriptions of a Brazilian television program's exposé on the so-called "Prosthetic Mafia" and ensuing government investigations in Brazil. But when it comes to the parties Abramge has actually sued, they offer only boilerplate allegations of wrongdoing, copied and pasted nearly verbatim and lacking even the most basic factual content. Even in this action against three different defendants accused of independent conduct, paragraph after paragraph of the complaint lobs the vaguest possible allegations at the "defendants" collectively. It is clear that Abramge has simply cast the widest possible net in the hopes of obtaining discovery that would reveal whether any of the defendants actually engaged in the conduct it alleges.

The Court should reject this effort and dismiss the complaint against Arthrex, for five independent reasons. *First*, as an association seeking relief on behalf of its members, Abramge lacks standing because its claims require the participation of the individual members who were allegedly harmed. *Second*, the complaint fails to plead fraud with particularity under Federal Rule of Civil Procedure 9(b); despite alleging a fraudulent scheme that has supposedly been ongoing since 2006, Abramge does not allege the particular time, place, or content of even a single

[1] *See Abramge v. Abbott Labs., Inc.*, No. 16-cv-11326 (N.D. Ill.); *Abramge v. Stryker Corp.*, No. 16-cv-01366 (W.D. Mich.); *Abramge v. Biotronik SE & Co. KG and Biotronik, Inc.*, No. 16-cv-41003 (Or. Cir. Ct.); *Abramge v. Orthofix Int'l N.V. and Orthofix, Inc.*, No. 16-09575-393 (Tex. Dist. Ct.); *Abramge v. St. Jude Med., Inc.*, No. 27-cv-16-18061 (Minn. Dist. Ct.).

fraudulent transaction involving Arthrex. *Third*, the complaint does not allege sufficient factual matter to state a plausible claim for relief, instead offering only conclusory recitations of the elements of Abramge's claims. *Fourth*, Abramge is fishing in the wrong pond. It alleges conduct in Brazil, by Brazilian actors, allegedly causing harm in Brazil; thus, if this action is not dismissed for lack of standing or failure to state a claim, it should be dismissed for *forum non conveniens*. *Fifth*, at the very least, the claims against Arthrex should be dismissed or severed for misjoinder because the claims against the three defendants arise from distinct transactions.

NATURE AND STAGE OF THE PROCEEDINGS

Abramge (also known as Associação Brasileira de Medicina de Grupo) brought this action against Boston Scientific Corporation, Arthrex, Inc., and Zimmer Biomet Holdings, Inc., on December 14, 2016. Abramge's amended complaint, D.I. 5 ("Compl."), includes 11 counts: fraud by nondisclosure, both directly and vicariously (Counts I and II); common-law fraud, both directly and vicariously (Counts III and IV); civil conspiracy (Counts V and VIII); tortious interference with contractual relations, both directly and vicariously (Counts VI and VII); negligent misrepresentation (Count IX); unjust enrichment (Count X); and injunctive relief (Count XI). On March 1, 2017, the Court accepted the parties' stipulation that all defendants would answer or move to dismiss the complaint by April 13, 2017. The parties have not engaged in any discovery. On March 2, 2017, Abramge moved the Judicial Panel on Multidistrict Litigation to centralize this case with the other actions it has filed in federal court, *see supra* p. 1 n.1, and transfer them all to the Northern District of Illinois. That motion remains pending.

SUMMARY OF ARGUMENT

1. The complaint must be dismissed because Abramge lacks standing. Abramge alleges no harm to itself, but seeks to recover on behalf of its members. Thus, as an association, Abramge has standing only insofar as its members have standing *and* neither the claims asserted

nor the relief requested requires individual members' participation. But Abramge's claims—for both damages and injunctive relief—plainly require extensive participation of individual members, because they are based on countless discrete transactions involving different members, different doctors, different devices, and different patients. As to the fraction of members who have purportedly assigned their claims to Abramge, the complaint fails to allege facts showing that a valid assignment exists or that those members even *have* claims against these defendants.

2. Abramge's claims do not satisfy Rule 9(b)'s requirement that "circumstances constituting fraud" be alleged "with particularity." The vast majority of the complaint's fraud allegations are brought against the "defendants" collectively, which in and of itself violates Rule 9(b). And the allegations merely sketch the broad strokes of an allegedly fraudulent scheme, entirely devoid of detail. The complaint fails to specify the who, what, when, where, and how of Arthrex's alleged fraud, as Rule 9(b) requires. As a result, all claims against Arthrex must be dismissed, because all are expressly premised on unparticularized allegations of fraud.

3. Abramge fails to state a claim for relief against Arthrex. All of its claims against Arthrex flow from the premise that Arthrex is responsible for the conduct of Brazilian distributors. But Abramge does not allege any *facts* supporting its conclusory assertions that Arthrex directed that conduct or that those distributors are Arthrex's agents. Absent a basis to impute the distributors' conduct to Arthrex, Abramge's claims fail. In any event, Abramge does not allege any specific misstatement or act of concealment; nor does it allege any facts that could support a duty of disclosure owed to Abramge's members, or establish any interference with a specific contractual duty owed to the members. And Abramge's claims are tardy—the conduct at issue allegedly began in 2006, but the statute of limitations for Abramge's claims is three years.

4. Any part of the action that survives should be dismissed for *forum non conveniens*. The Brazilian courts are available to hear Abramge's claims: a Brazilian court would have jurisdiction; Brazilian law, which likely applies here in any event, affords relief for Abramge's claims; and, as many courts have held, the Brazilian court system is an adequate alternative forum. A Brazilian forum would also be far more convenient. Abramge and its members reside in Brazil, the alleged fraudulent transactions took place in Brazil, the alleged harm occurred in Brazil, the key witnesses and documents are in Brazil, and this action has no relation to Delaware beyond defendants' incorporation here. This action should proceed, if it all, in Brazil.

5. At a minimum, the claims against Arthrex should be dismissed or severed for misjoinder. Abramge alleges that each defendant engaged in an "individual illicit schem[e]," Compl. ¶ 10, and does not allege any concerted action. Thus, Abramge's claims against the different defendants do not arise from the "same transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 20(a)(2)(A). And litigating these discrete claims against competing defendants in one action would cause delay, expense, and other prejudice to Arthrex.

STATEMENT OF FACTS

The complaint's allegations fit into two categories: those describing the "Prosthetic Mafia" in Brazil, which are detailed but barely mention Arthrex; and those that actually present Abramge's claims against Arthrex, which are wholly formulaic and conclusory.

A. The *Fantastico* Reports And Subsequent Investigations

The claims in this case can be traced to the Brazilian television program *Fantastico*'s reports on the so-called "Prosthetic Mafia"—medical-device distributors that allegedly paid kickbacks to physicians and hospitals in Brazil. *See* Compl. ¶¶ 51, 55. In January 2015, *Fantastico* aired "undercover testimony from participants in medical device bribery schemes disclosing extensive bribery, kickbacks and fraud in the sale of medical devices." *Id.* ¶ 57. "During the televi-

sion program, representatives for numerous medical device distributors—including distributors used by Defendants—offered physicians commission payments of 20 to 30 percent if they used certain medical devices." *Id.* ¶ 58. The complaint does not name any distributors or representatives featured on *Fantastico*, or any manufacturers whose products were implicated.

Following these reports, the National Congress of Brazil conducted hearings to investigate corruption in the medical-device market in Brazil. *Id.* ¶ 59. Two local distributors testified that they "provided hospitals with inflated invoices" to "allo[w] the doctor that implanted the device to keep the difference between the actual price and the invoiced price." *Id.* ¶¶ 60–61. The complaint does not name these distributors or hospitals, or the products involved.

The Brazilian Congress then issued a report, which the complaint summarizes as finding "that doctors, incentivized by receiving payments from medical device manufacturers *like Defendants*, were scheduling unnecessary surgeries for patients to implant devices." *Id.* ¶ 66 (emphasis added). The complaint does not allege that Arthrex—as opposed to other "manufacturers *like*" Arthrex—was implicated. The complaint alleges that distributor Tellus River Trade and Import and Export Ltda. was named in the congressional report as engaging in bribery "on its principals' behalves," *id.* ¶ 134, and that "[o]ne of those principals is Arthrex," *id.* ¶ 135, but it does not allege that Tellus was found to have engaged in bribery on Arthrex's behalf. In fact, the complaint does not (because it cannot) allege that Arthrex was named in the congressional report at all. Finally, the complaint alleges that Brazilian prosecutors have "launched investigations into the medical device industry," but does not allege that Arthrex has been the target of any investigation or prosecutorial action. *Id.* ¶ 77.

Based on these reports and investigations, Abramge alleges that Arthrex and the other defendants participated in "individual illicit schemes" to "increase … market share[s] in Brazil," *id.*

¶ 10, which purportedly generated millions of dollars at the expense of private health insurers, *id.* ¶ 28. Abramge has made substantially identical allegations against eight medical-device manufacturers in the U.S., citing the *Fantastico* reports and resulting investigations. *See supra* p. 1 n.1.

B. Allegations Against Arthrex

Despite the fact that Arthrex is not alleged to have been mentioned in the *Fantastico* reports, the congressional testimony, or the congressional report, Abramge asserts that "Arthrex is a willing participant in the fraud that medical device manufacturers perpetrated on the Brazilian medical device market and Brazilian private health insurers." *Id.* ¶ 125. Abramge says this scheme was "conceived, directed and controlled" by "Arthrex senior executives" in the U.S., *id.* ¶ 144, but it does not name any executives or connect them to the conduct it alleges in Brazil.

According to the complaint, "Arthrex perpetrated the complained of fraud in Brazil through [its] control of, use and direction of … various local Brazilian distributors. Specifically, local distributors engaged and/or controlled by Arthrex paid kickbacks and other secret financial inducements to Brazilian medical providers." *Id.* ¶ 132; *see id.* ¶ 143. Abramge also alleges that "Arthrex, Arthrex do Brasil and the local distributors fraudulently concealed these kickbacks and secret payments and did not record such payments in their books and records." *Id.* ¶ 136. The complaint does not explain how Arthrex allegedly controlled its subsidiary or distributors, does not identify which distributors (apart from Tellus) were allegedly involved, and does not explain what steps were allegedly taken to conceal the alleged fraud from Abramge's members.

Abramge further alleges that the "local distributors … paid kickbacks and other secret financial inducements to Brazilian medical providers" to "increase Arthrex's sales by getting doctors and hospitals to use their products more often." *Id.* at ¶¶ 132, 150. "On most occasions, bribe amounts ranged from 20 to 40 percent of the sales, depending on the doctor who prescribed and

used Arthrex products." *Id.* at ¶ 128. The complaint does not name the distributors that allegedly paid these bribes or the doctors who allegedly accepted them.

According to the complaint, these payments led doctors and hospitals to "overuse Arthrex medical devices in surgical procedures or engage in unnecessary operations in order to use more Arthrex products." *Id.* ¶ 146. The doctors and hospitals then billed the costs of these products to health insurers, *id.* ¶ 150, "generat[ing] millions of dollars," *id.* ¶ 153. Abramge does not name any specific doctor or hospital that accepted bribes, conducted procedures, or sent invoices to Abramge's member insurers, and does not identify the dates of any such procedures or invoices. Despite alleging a "pervasive" scheme that has been ongoing for more than a decade, Abramge does not allege the particulars of a single fraudulent transaction involving Arthrex.

ARGUMENT

I. Abramge Lacks Standing To Seek Damages Or Injunctive Relief.

The complaint must be dismissed because Abramge has failed to allege facts establishing its standing. Abramge is a trade association seeking to assert claims on behalf of its members; it does not allege any injury to itself. Compl. ¶ 3.[2] "Absent injury to itself, an association may pursue claims solely as a representative of its members." *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002). To assert claims in a representational capacity, Abramge must demonstrate that "(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." *Id.* Even assuming Abramge could satisfy the first two elements of as-

[2] Abramge purports to seek "injunctive relief both on behalf of its Members and in its own capacity as an association," Compl. ¶ 3, but it alleges no injury to itself and thus lacks standing to seek relief on its own behalf, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

sociational standing, the complaint must be dismissed because both the claims Abramge asserts and the relief it requests require the participation of Abramge's individual members.

There is no question that Abramge lacks associational standing to seek damages on behalf of its members. "[D]amages claims usually require significant individual participation, which fatally undercuts a request for associational standing." *Id.* at 284. This case is no exception. Abramge alleges that its members were damaged because they paid excessive amounts for medical devices as a result of the purported scheme to "bribe" doctors. Even aside from the individualized evidence needed to establish liability (discussed further below), to recover damages on behalf of any given member, that individual member's participation would be required. In order to calculate damages, Abramge would have to present evidence from each allegedly injured member showing how much that particular member allegedly overpaid, which would depend on how many devices that particular member paid for, the amount it paid for each individual device, and the extent to which that amount exceeded the amount it would have paid for that device but for the alleged scheme. All of this evidence would be member-specific, because each member paid for different devices implanted by different doctors in different patients on different occasions. Thus, proof of damages would have to proceed not only member by member, but invoice by invoice, and plainly would require the participation of individual members. As a result, Abramge can identify nothing that would exempt it from the rule that "associations cannot generally raise [damages] claims on behalf of their members." *Id.*; *see 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.").

Instead, Abramge seeks to evade this rule by claiming that some of its members have assigned their claims for compensation to Abramge. Compl. ¶ 4 & Ex. B (listing 35 members that

have purportedly assigned their damages claims to Abramge). This attempted evasion fails. To begin with, it does nothing to cure Abramge's lack of standing to assert claims on behalf of the vast majority of members that have not assigned their claims. *See id.* ¶ 2 & Ex. A (listing 142 total members). Moreover, even as to the 35 members listed in Exhibit B, Abramge has not adequately pled either that a valid assignment exists or that any alleged assignor has a cause of action. The complaint simply states the legal conclusion that the members have "irrevocably assigned" their claims, *id.* ¶ 4, without alleging any actual facts concerning the assignments, their terms, or whether they were made "for ordinary business purposes." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 292 (2008). And even a valid assignment would not support Abramge's standing because Abramge has not alleged facts establishing that any of the members listed in Exhibit B have a cause of action. It alleges only that the purported "schemes resulted in Brazilian health insurers such as the Members being forced to pay millions of dollars," Compl. ¶ 10, without specifying *which* members allegedly overpaid or alleging that *any* of those members is among those listed in Exhibit B. Indeed, other than in Exhibit B itself, the complaint does not even mention the names of any of the members that have purportedly assigned their claims to Abramge. Absent allegations establishing that the members listed on Exhibit B *have* a damages claim, the purported assignments provide no basis for Abramge's standing.[3]

Abramge also lacks standing to seek an injunction. An association does not "automatically satisf[y] the third prong of the [associational standing] test simply by requesting equitable re-

[3] For these same reasons, Abramge's allegation that it is the "attorney-in-fact" for "many" members, Compl. ¶ 4, cannot support Abramge's standing. Moreover, even if Abramge had adequately alleged that it is the attorney-in-fact for specifically identified members with adequately pled claims, "a mere power-of-attorney—i.e., an instrument that authorizes the grantee to act as an agent or attorney-in-fact for the grantor … does not confer standing to sue in the holder's own right because a power-of-attorney does not transfer an ownership interest in the claim." *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 108 (2d Cir. 2008).

lief rather than damages." *Bano*, 361 F.3d at 714. Even when injunctive *relief* would not require the participation of individual members, an association lacks standing if the underlying *claim* requires fact-intensive individual inquiry. *See Pa. Psychiatric*, 280 F.3d at 286 ("conferring associational standing would be improper for *claims* requiring a fact-intensive-individual inquiry") (emphasis added); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1022 (10th Cir. 1992) ("an association has standing only if neither *the claim asserted* nor the relief requested requires the participation of individual members in the lawsuit") (emphasis in original); *Bano*, 361 F.3d at 714 (an "organization lacks standing to assert claims [for] 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").

That is precisely the case here. To establish a viable claim for injunctive relief, Abramge would have to present extensive, fact-intensive, member-specific evidence. Unlike in the typical associational standing case where the defendant is alleged to have committed "systemic policy violations," *Pa. Psychiatric*, 280 F.3d at 286, here Abramge's claims are based on a multitude of individual transactions involving different manufacturers, different distributors, different doctors, different patients, different devices, and different insurers, and thus would require "significant individual participation," *id.* To establish the alleged violations, Abramge would have to show, on a member-by-member, invoice-by-invoice basis, that its members overpaid for medical devices for one of the many different reasons Abramge alleges—because "devices and products were implanted or used when none were necessary," because "multiple devices and products were implanted or used when fewer would have sufficed," or because "devices and products were implanted or used when cheaper alternatives would have been equally or more efficacious." Compl. ¶ 22. This will necessarily involve extensive individualized evidence concerning "specif-

ic, factually intensive, medical care determinations." *Pa. Psychiatric*, 280 F.3d at 286. Consequently, Abramge lacks associational standing to seek an injunction. *See id.*; *Kan. Health Care Ass'n*, 958 F.2d at 1022–23; *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1292–93 (9th Cir. 2014); *Nationwide Ins. Indep. Contractors Ass'n, Inc. v. Nationwide Mut. Ins. Co.*, No. 11-3085, 2012 WL 1524381, at *4 (E.D. Pa. May 1, 2012), *aff'd*, 518 F. App'x 58 (3d Cir. 2013).

II. The Complaint Fails To Plead Fraud With Particularity.

Even if Abramge had adequately pled a basis for standing, the complaint must be dismissed because it fails to "state with particularity the circumstances constituting fraud" as required by Rule 9(b).[4] The vast majority of Abramge's allegations are improperly leveled against the "defendants" as a group, and thus are irrelevant to whether Abramge's allegations against any particular defendant, including its barebones allegations against Arthrex, satisfy Rule 9(b). But even taking the complaint as a whole, it fails to satisfy Rule 9(b) because it does not plead the who, what, when, where, and how of the alleged fraud. Abramge alleges, in the most general terms, that the alleged fraud has been "pervasive" and "ongoing" for more than a decade, but it does not allege with particularity even *a single* fraudulent transaction. Under Rule 9(b), that is not enough to state a claim and unlock the door to discovery. Because Abramge's claims all depend upon its unparticularized allegations of fraud, the entire complaint must be dismissed.

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This rule "serves to give defendants notice of the claims against them, provide an increased measure of protection for

[4] Because the third prong of associational standing is prudential and not required by Article III, *see United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551 (1996), the Court can dismiss the complaint on the merits without resolving standing.

their reputations, and reduce the number of frivolous suits brought solely to extract settlements." *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 270 (3d Cir. 2006) (alterations omitted). Thus, "[i]n order to satisfy Rule 9(b), plaintiffs must plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Lum v. Bank of Am.*, 361 F.3d 217, 223–24 (3d Cir. 2004). "Plaintiffs may satisfy this requirement by pleading the date, place or time of the fraud, or through alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id.* at 224. "Plaintiffs also must allege who made a misrepresentation to whom and the general content of the misrepresentation." *Id.* In other words, to satisfy Rule 9(b), the plaintiff "must specify the who, what, when, where, and how: the first paragraph of any newspaper story." *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004).

Abramge's complaint does not remotely satisfy Rule 9(b). As an initial matter, in assessing the claims against Arthrex, the Court may consider only the allegations that specifically identify Arthrex, and must disregard any allegations that refer to the "defendants" collectively. *See Suprema*, 438 F.3d at 282 ("plaintiffs' manner of pleading their claim collectively, through blanket allegations against numerous different defendants, runs afoul of the particularity requirements of … Rule 9(b)"); *MDNet, Inc. v. Pharmacia Corp.*, 147 F. App'x 239, 245 (3d Cir. 2005) ("When multiple defendants are involved, the complaint must plead with particularity by specifying the allegations of fraud applying to each defendant.").[5] In Abramge's 64-page, 374-

[5] *Accord, e.g.*, 5A Charles Alan Wright *et al.*, *Fed. Prac. & Proc. Civ.* § 1297 (3d ed. 2017 update) ("[A] significant number of federal courts also have required the plaintiff to specify which defendant made each of the alleged misrepresentations … in order to give each of the defendants adequate notice of the particular fraudulent acts or statements for which he or she is to be held responsible."); *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1013

paragraph complaint, only 29 paragraphs, spanning just over three pages, refer specifically to Arthrex's alleged "scheme to defraud the Brazilian medical device market." Compl. ¶¶ 125–153 (capitalization omitted). These Arthrex-specific paragraphs "do not satisfy Rule 9(b) because they do not indicate the date, time, or place of the alleged misrepresentations, the financial transactions in connection with which these misrepresentations were made, or who made the misrepresentation to whom." *Lum*, 361 F.3d at 225. They are precisely the kind of "conclusory allegations" that courts have held "do not satisfy Rule 9(b)." *Id.* at 224.

But even if all the complaint's references to the "defendants" collectively were deemed to include Arthrex, the result would be the same. Nothing in the complaint identifies the who, what, when, where, and how of Arthrex's alleged fraud.

Who. The complaint does not name a single person at Arthrex, or any person acting on Arthrex's behalf, who made any misrepresentations. Abramge alleges that "Arthrex senior executives" conceived and directed the scheme, Compl. ¶ 144, but does not identify who these unnamed "senior executives" might be. The complaint further alleges that Arthrex "perpetrated the complained of fraud" through "various local Brazilian distributors." *Id.* ¶¶ 132, 143. But it does not identify any particular distributor, let alone any particular individual at a distributor, that made a misrepresentation on Arthrex's behalf.[6] Rather, it doubles down on generality by alleging

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(8th Cir. 2015) ("The [complaint] attributed fraudulent representations and conduct to multiple defendants generally, in a group pleading fashion.… [S]uch vague allegations do not satisfy Rule 9(b)."); *United States v. Corinthian Colls*, 655 F.3d 984, 997–98 (9th Cir. 2011) ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud."); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.'").

[6] The complaint identifies only one Brazilian distributor allegedly used by Arthrex—Tellus River Trade and Import and Export Ltda. Compl. ¶ 133. The complaint alleges that a preliminary investigation by the Brazilian government showed that Tellus had "engaged in widespread bribery

that the unnamed "local Brazilian distributors" used by Arthrex acted through *their* unnamed "employees, agents, representatives, distributors, contractors, subsidiaries, and/or affiliates." *Id.* ¶ 231. Nor does the complaint identify any particular medical provider who allegedly received an illicit payment from Arthrex, or any particular insurer to whom a resulting misrepresentation was made. Under Rule 9(b), Arthrex is entitled to know who in particular is alleged to have made the misrepresentations for which it is being called to answer, and to whom in particular those representations were made. The complaint does not say.

What. Nor does the complaint allege any specific misrepresentation or its content, identify any specific artifice used to conceal information from Abramge's members, or otherwise "identify particular fraudulent financial transactions." *Lum*, 361 F.3d at 224. The complaint does not identify any particular payment that was made to any particular medical provider by or on behalf of Arthrex; nor does it identify any particular fraudulent invoice that was submitted by any particular provider for any particular device to any particular insurer. Abramge cannot satisfy Rule 9(b) by alleging that unspecified agents of Arthrex made unspecified payments to unspecified providers who submitted unspecified invoices to unspecified insurers. *See id.*

When. The complaint also does not "indicate the date [or] time … of any misrepresentation" made by or on behalf of Arthrex. *Id.* The complaint alleges only that the purported fraud has been ongoing "from at least 2006 to the present." Compl. ¶ 14. Alleging a more-than-decade-long date range will not do. "[B]road date ranges, unaccompanied by specific examples, do not

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of Brazilian doctors on its principals' behalves," *id.* ¶ 134, and that "[o]ne of those principals is Arthrex," *id.* ¶ 135. It is unclear whether ¶ 135 alleges only that Arthrex is one of Tellus's principals, or that Arthrex is one of the principals on whose behalf Tellus allegedly engaged in "bribery." Such ambiguous pleading cannot satisfy Rule 9(b). Regardless, even on the latter reading, the complaint fails to satisfy Rule 9(b) because it does not identify any particular payment made by Tellus to any particular provider on any particular occasion or any particular fraudulent invoice submitted for any particular device to any particular insurer on Arthrex's behalf.

satisfy the particularity requirement." *APS Express, Inc. v. Sears Holdings Corp.*, No. 15-3275, 2016 WL 1746152, at *3 (N.D. Ill. May 3, 2016).

Where. Nor does the complaint allege the specific "place of any misrepresentation." *Lum*, 361 F.3d at 224. It alleges only that the relevant conduct took place somewhere in Brazil and the United States. That is the opposite of a particularized allegation as to place.

How. The complaint does not provide any details as to how Arthrex is alleged to have defrauded Abramge's members. Abramge alleges that the purported "bribes" resulted in insurers being forced to pay excessive amounts for devices, but it does not describe in any meaningful way how any specific misrepresentations were communicated to insurers. In essence, Abramge alleges that fraud must have occurred because insurers did not know that providers were receiving payments from device manufacturers for using their products and the insurers would not have paid for the devices if they had known. But without any allegations describing how, by whom, or to whom specific misrepresentations or omissions were made, or what specific steps were taken to fraudulently conceal information, the complaint does not satisfy Rule 9(b).

In short, Abramge's allegations flunk Rule 9(b)'s particularity requirement because they "do not indicate the date, time, or place of any misrepresentation; nor do they provide an alternative means of injecting precision and some measure of substantiation into the fraud allegations because they do not identify particular fraudulent financial transactions." *Lum*, 361 F.3d at 224.

In that regard, this case is indistinguishable from *Travelers Indemnity Co. v. Cephalon, Inc.*, 620 F. App'x 82 (3d Cir. 2015). There, several workers' compensation insurers alleged that the defendant drug manufacturers had engaged in false and misleading promotion of their drugs, causing doctors to improperly prescribe drugs whose cost was reimbursed by the insurers. *Id.* at 84–85. The Third Circuit held that the complaint failed to satisfy "the stringent Rule 9(b) re-

quirements for particularity" because it "fail[ed] to identify any specific fraudulent statements, omissions, or misrepresentations that were made to doctors who prescribed [defendants' drugs]." *Id.* at 85–86 (emphasizing that the complaint did not "specify when, where or to whom any sales pitch was made" or allege "the contents of [the allegedly fraudulent] statements and materials"). Likewise here, Abramge's complaint is devoid of any "particular facts surrounding the alleged fraud," and simply "boils down to an assertion that [the alleged payment of inducements] was inherently fraudulent and created a private cause of action." *Id.* at 86. Under Rule 9(b), that is not enough to hale a defendant into court to answer allegations of fraud.

Abramge's failure to satisfy Rule 9(b) requires dismissal of all claims against Arthrex. Rule 9(b)'s particularity requirement applies to allegations of fraud by nondisclosure or concealment as well as by affirmative misrepresentation. *Gunn v. First Am. Fin. Corp.*, 549 F. App'x 79, 82 n.1 (3d Cir. 2013) ("Allegations of fraudulent concealment must meet the requirements of Federal Rule of Civil Procedure 9(b)."). At a minimum, therefore, Counts I–V—which are expressly denominated as fraud claims—must be dismissed.

But that is not all. Rule 9(b) does not turn on labels; it applies to any claim that is "predicated on allegations of fraud," regardless of whether fraud is a "necessary element" of the claim. *Suprema*, 438 F.3d at 270; *accord Chubb*, 394 F.3d at 161; *Travelers*, 620 F. App'x at 86 n.3 ("all of Plaintiffs' claims alleging fraudulent activity—i.e., Plaintiffs' claims for intentional and negligent misrepresentation, unjust enrichment and an injunction—must be pled with sufficient particularity under Rule 9(b)."). All of Abramge's claims incorporate allegations of fraud. For one, each non-fraud count incorporates by reference the preceding allegations of fraud. Compl. ¶¶ 297, 308, 322, 334, 344, 356; *see Suprema*, 438 F.3d at 273 (to avoid triggering Rule 9(b), non-fraud claims must be "segregated" from fraud allegations). And if that were not enough,

each count expressly alleges fraudulent activity. *E.g.*, Compl. ¶¶ 301, 314, 329, 336, 347, 364. As a result, the entire complaint must be dismissed for failure to plead fraud with particularity.

In sum, Rule 9(b) exists precisely for situations like this—to prevent plaintiffs with nothing more than barebones, conclusory allegations from tarnishing a defendant's reputation and seeking to extract a settlement by leveling unfounded accusations of fraud. *See Suprema*, 438 F.3d at 270. Because "a core theory of fraud permeates the entire [complaint] and underlies all of [Abramge's] claims," *Chubb*, 394 F.3d at 160, and because Abramge failed to plead the circumstances constituting fraud with particularity, all claims against Arthrex must be dismissed.

III. The Complaint Fails To State A Claim Upon Which Relief May Be Granted.

The complaint must be dismissed because it does not adequately allege the elements of any claim. Many of these elements must be—but are not—alleged with particularity under Rule 9(b). But even as to the other elements, Abramge fails to "plea[d] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Abramge instead offers "labels and conclusions" or "naked assertion[s] devoid of further factual enhancement," which do not suffice. *Id.* at 678.[7]

A. Abramge fails to allege a basis for vicarious liability.

To begin with, all of Abramge's claims fail because the complaint neither alleges that Arthrex itself made the "fraudulent payments" underlying Abramge's claims nor pleads a sufficient basis to hold Arthrex vicariously liable for the alleged payments by Brazilian distributors. The crux of Abramge's claims is that "Arthrex perpetrated the complained of fraud in Brazil through [its] control of, use and direction of … various local Brazilian distributors. Specifically,

[7] Arthrex "assumes, for the limited purpose of the present motio[n] to dismiss, that Delaware law applies." *Zazzali v. Alexander Partners, LLC*, No. 12-828, 2013 WL 5416871, at *12 n.17 (D. Del. Sept. 25, 2013); *see* Compl. ¶ 76 (alleging violations of Delaware law). However, Brazilian law would likely govern if this case proceeded past the pleading stage. *See infra* pp. 28–29.

local distributors engaged and/or controlled by Arthrex paid kickbacks and other secret financial inducements to Brazilian medical providers." Compl. ¶ 132; *id.* ¶ 143. But Abramge has not alleged sufficient facts to hold Arthrex liable for any distributor's alleged conduct.

Abramge's theory is apparently that Arthrex is vicariously liable for the distributors' conduct because they were Arthrex's agents. Compl. ¶ 243; *see id.* ¶ 14. But "[a]n essential element of agency is the principal's right to control the agent's actions." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013); *accord Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997); Restatement (Third) of Agency § 1.01 cmt. e (2006). And Abramge has not adequately alleged that Arthrex had such control over any distributors. The complaint baldly asserts that "Arthrex perpetrated the complained of fraud in Brazil through its control of [its] local Brazilian distributors," *id.* ¶ 143; *see also id.* ¶ 132, but such a "conclusory" allegation that a company "dominated and controlled" a separate entity "does not satisfy the *Iqbal* requirement to plead facts that plausibly support an inference that would justify … a finding of an agency relationship." *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 195 (2d Cir. 2010) (Leval, J., concurring), *aff'd*, 133 S. Ct. 1659 (2013); *see also Johnson v. Dunkin' Donuts Franchising L.L.C.*, No. 11-1117, 2012 WL 1828028, at *23 (W.D. Pa. May 18, 2012) ("[A] plaintiff may not simply assert in conclusory terms that a party is another party's agent for purposes of vicarious liability.").[8]

Nor can Abramge rely on the distributor relationship itself to establish agency. "A purchaser is not 'acting on behalf of' a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent." Restatement (Third) of Agency § 1.01 cmt. g. Numerous courts

[8] Abramge's reliance on the distributors' "apparent authority," *see* Compl. ¶ 233, also fails because Abramge alleges no "manifestations" by Arthrex that any distributors were entitled to affect Arthrex's legal relations with third parties, *see Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 799 (Del. Ch. 2014).

have thus rejected attempts to hold manufacturers liable for their distributors' actions without a specific showing of control.[9]

The allegations regarding Arthrex's Brazilian subsidiary do not change this analysis. The complaint says that "Arthrex exercised complete control over Arthrex do Brasil, including but not limited to its sales and financial policies," Compl. ¶ 140, and that "Arthrex do Brasil controlled th[e] distributor[s]," *id.* ¶ 142. But "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation … is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *accord E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 198 (3d Cir. 2001) (applying Delaware law); Restatement (Third) of Agency § 1.01 cmt. f(2). Thus, Abramge must allege facts showing that Arthrex controlled Arthrex do Brasil in a manner creating a traditional agency relationship. *See E.I. DuPont*, 269 F.3d at 198. The passing reference to "sales and financial policies," Compl. ¶ 140, does not suffice, *see Johnson*, 2012 WL 1828028, at *23. And the bare assertion that "Arthrex do Brasil controlled th[e] distributors' actions" does not establish that the distributors were the subsidiary's agents either. *See id.*

Consequently, Counts II, IV, and VII, alleging vicarious liability for fraud and tortious interference, fail to state a claim. And without that foundation, the remaining claims collapse. Absent an agency relationship or other basis for holding Arthrex responsible for the Brazilian

[9] *See, e.g.*, *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1278 (10th Cir. 2000) (no agency relationship between home goods manufacturer and distributors); *Motorsport Eng'g, Inc. v. Maserati SPA*, 316 F.3d 26, 29–30 (1st Cir. 2002) (same, as to automobile distributor); *Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) (Posner, C.J.) (a "dealer, who … merely buys goods from manufacturers … for resale to the consuming public, is not his supplier's agent"); *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1148–49 (N.D. Cal. 2001) (collecting authorities holding that "a distributor of goods for resale is normally not treated as an agent of the manufacturer").

distributors' alleged conduct,[10] there is no basis to find that "Arthrex defrauded Brazilian health insurance companies." Compl. ¶ 127. Arthrex cannot have had a duty to disclose payments it was not responsible for. *See id.* ¶¶ 202–203, 207–208, 335–336. Nor can Arthrex have "concealed that invoiced prices included the cost of bribes and [its] fraudulent scheme," since Arthrex paid no bribes and had no such scheme. *Id.* ¶ 247. In short, even if Abramge had adequately alleged actionable misconduct—and it has not, as explained below—it has offered no basis to hold *Arthrex* liable, and thus all of its claims must be dismissed.

B. Abramge fails to allege fraud or negligent misrepresentation.

Abramge has failed to allege fraud and negligent misrepresentation (Counts I, III, and IX). Fraud requires (1) a false representation of fact, deliberate concealment of material facts, or silence in the face of a duty to speak, (2) knowledge of falsity, (3) an intent to induce reliance, (4) justifiable reliance, and (5) damages. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Negligent misrepresentation requires (1) a pecuniary duty to provide accurate information; (2) false information supplied by the defendant; (3) a failure to exercise reasonable care; and (4) damages. *Corp. Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, No. 3231, 2008 WL 963048, at *8 (Del. Ch. Apr. 10, 2008). Abramge has failed to plead these elements.

First, Abramge has failed to allege any factual misrepresentation. Under Rule 9(b), "[f]alsity must be pled with specificity," including the "specific content of the false representations." *AJZN, Inc. v. Yu*, No. 13-149, 2015 WL 331937, at *6 (D. Del. Jan. 26, 2015). The only communications the complaint alleges between any defendant, subsidiary, or distributor and any Abramge member are "invoices" that "Defendants issued, or caused to be issued," which Abramge says "did not state the true price of the product or device, or that they included the cost

[10] As explained below, the complaint also does not adequately allege that Arthrex entered into a conspiracy with the Brazilian distributors. *See infra* pp. 23–24.

of bribes." Compl. ¶¶ 247, 249; *see id*. ¶ 336. Abramge makes no attempt to explain what "specific content" in the invoices constituted a misrepresentation *of fact*. An invoice requesting payment in a particular amount generally does not communicate anything about what price other purchasers are charged or what costs are incorporated into the price. In any event, these allegations "d[o] not even purport to identify any specific statement by a specific defendant at a specific time." *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (applying Delaware's Rule 9(b)); *see also Steinman v. Levine*, No. 19107, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002) (dismissing negligent misrepresentation claim that "fail[ed] to assert with any specificity what false documents or false statements [plaintiff] relied upon" or "to identify specific acts of individual defendants"), *aff'd*, 822 A.2d 397 (Del. 2003). Abramge has thus failed to plead any factual misrepresentation.

Second, Abramge has failed to allege "some artifice to prevent knowledge of the facts." *See Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, No. 3658, 2009 WL 1124451, at *12 (Del. Ch. Apr. 20, 2009). The complaint asserts that "Defendants took active steps to ensure that their conduct remained unknown to the Members," Compl. ¶ 213, but it does not say what those steps were, who took them, or when they were taken. Likewise, it says that Defendants "intentionally and actively concealed" the alleged payments, *id.* ¶¶ 202, 203, 211, without providing any further detail. Such "[t]hreadbare recitals of the elements of a cause of action … do not suffice" under Rule 8, *Iqbal*, 556 U.S. at 678, much less under Rule 9(b), *see Halpern v. Barran*, 313 A.2d 139, 144 (Del. Ch. 1973) (concealment claim based on "mere generalizations, anchored to no specific acts of concealment," failed under Delaware's Rule 9(b)).

Third, Abramge has also failed to allege any duty to speak. Such a duty arises where there is a fiduciary relationship between the parties, where the course of dealing mandates dis-

closure, or where a party's prior statements would be misleading if not clarified. *Corp. Prop. Assocs.*, 2008 WL 963048, at *6 & n.52. The complaint asserts that "Defendants had a duty to disclose any payments" to medical providers, Compl. ¶ 207, but that is simply "a legal conclusion couched as a factual allegation," *Iqbal*, 556 U.S. at 678. The complaint alleges no fiduciary or similar relationship, nor could it among these "unrelated commercial entities." *Matthews Office Designs, Inc. v. Taub Invs.*, 647 A.2d 382, *2 (Del. 1994) (table). Nor does the complaint allege any "course of dealing … entitling [Abramge's members] to any particular disclosure," *see MetCap Sec. LLC v. Pearl Senior Care, Inc.*, No. 2129, 2007 WL 1498989, at *5 (Del. Ch. May 16, 2007), or an affirmatively misleading statement that could trigger a duty to clarify. Likewise, negligent misrepresentation requires a "duty of disclosure" arising from "a business relationship." *Outdoor Techs., Inc. v. Allfirst Fin., Inc.*, No. 99C-09-151, 2001 WL 541472, at *5 (Del. Super. Ct. Apr. 12, 2001). The complaint says only that "Defendants had a duty to provide accurate information about the price of Defendants' medical devices and products," Compl. ¶ 335, but again, that is just a legal conclusion, *see Iqbal*, 556 U.S. at 678.

Finally, Abramge has not adequately alleged reliance. As to concealment, Abramge does not allege that its members relied upon Arthrex or its distributors, but rather "upon the honest services of th[e] medical providers." Compl. ¶ 217; *see id.* ¶ 218. Abramge cannot maintain a claim that requires reliance when its own complaint pleads that it relied on a different party. Likewise, Abramge has not adequately alleged justifiable reliance on any factual misrepresentation. Abramge asserts that its members "relied on the invoices that Defendants issued, or caused to be issued," *id.* ¶ 248, *see id.* ¶ 339, but as explained above, Abramge has not adequately alleged that any invoice contained an actionable misrepresentation. *See Stephenson*, 462 A.2d at 1074 (plaintiff must allege "justifiable reliance upon the [false] representation").

In sum, Abramge has not alleged any specific factual misrepresentation, as required for Counts III and IX; any specific act of concealment or a duty to speak, as required for Counts I and IX; or justifiable reliance, as required for all of these counts. These claims therefore fail.

C. Abramge fails to allege tortious interference.

Abramge's tortious-interference claim depends on the same alleged "secret financial inducements" and "false and fraudulent invoices" as its fraud claims, *see* Compl. ¶ 301, and thus it fails for the same reason: Abramge has not adequately alleged, much less with particularity, any such misconduct attributable to Arthrex. S*ee Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 589 (Del. Ch. 1994) (tortious interference requires "actionable 'improper' intentional interference with the [contractual] performance").

This claim is also deficient because the complaint does not adequately allege the nature or breach of a contractual duty. Abramge alleges only that its members "had valid business relationships, contractual relationships, policies, and contracts with their policy holders and medical providers," Compl. ¶ 298, and that the defendants caused "breach[es] of the policy holders' and medical providers' respective contractual obligations to submit only invoices for reasonably necessary medical expenses," *id.* ¶ 301. These conclusory allegations say nothing about what specific obligations were breached, what contracts they were part of, who owed them to which of Abramge's members, or how exactly they were breached. That is insufficient. *See Kolber v. Body Cent. Corp.*, 967 F. Supp. 2d 1061, 1070 (D. Del. 2013) (complaint failed to allege "specific facts" supporting formation and content of implied contract for tortious-interference purposes).

D. Abramge's remaining claims fail.

Civil conspiracy (Counts V and VIII). Abramge's conspiracy claims are based on the fraud and tortious-interference claims discussed above. *See* Compl. ¶¶ 282–296, 322–333. Because those claims fail, Abramge has not alleged "an underlying tort that would be independently

actionable against a single defendant." *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, 193 F.3d 781, 789 & n.7 (3d Cir. 1999) (collecting cases); *Ramunno v. Cawley*, 705 A.2d 1029, 1039 (Del. 1998) (affirming dismissal because "the complaint failed to state a claim as to any underlying tort"). But Abramge also fails to allege the conspiracy itself. Abramge merely recites the elements of conspiracy, asserting a "confederation or combination" with Brazilian distributors or medical providers. Compl. ¶¶ 283–284, 323–324. These "conclusory allegation[s] of agreement at some unidentified point" mention "no specific time, place, or person involved in the alleged conspiracies," and thus fail to state a claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 565 n.10 (2007); *Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988).

Unjust enrichment (Count X). Because Abramge has failed to plead any misconduct attributable to Arthrex, it "does not adequately plead the enrichment of any defendant at the expense of the plaintiffs that was not justified." *Latesco, L.P. v. Wayport, Inc.*, No. 4167, 2009 WL 2246793, at *9 n.33 (Del. Ch. July 24, 2009). In any event, Abramge's other claims against these defendants, in addition to contract-based claims it could presumably bring directly against medical providers, *see* Compl. ¶ 311, demonstrate that it has an adequate remedy at law, *see Latesco*, 2009 WL 2246793, at *9 n.33 ("[I]f Stewart can succeed on the other claims, the unjust enrichment claim will be superfluous. If he cannot prevail on those claims, he will have no basis upon which to claim unjust enrichment by the defendants.").

Injunctive relief (Count XI). Because Abramge's other claims fail, there is no basis for an injunction, which is not a standalone claim but a form of relief. 42 Am. Jur. 2d Injunctions § 11 (2d ed. 2017 update). Further, Abramge has alleged only monetary harm to members, which cannot establish irreparable injury. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989).

E. The vast majority of Abramge's claims are untimely.

Abramge brings claims for conduct dating "from at least 2006," Compl. ¶ 14, but the statute of limitations for all of its claims is three years. *See* Del. Code tit. 10, § 8106; *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132 (Del. 1974) (fraud and negligent misrepresentation); *Williams v. Caruso*, 966 F. Supp. 287, 292 (D. Del. 1997) (tortious interference). Thus, all of Abramge's claims that accrued before December 14, 2013—three years before it filed this case—are untimely and should be dismissed.

IV. The Complaint Should Be Dismissed On *Forum Non Conveniens* Grounds.

Any surviving part of the case should be dismissed for *forum non conveniens* in favor of a Brazilian forum. Four factors govern this analysis: "(1) the amount of deference to be afforded to plaintiff['s] choice of forum; (2) the availability of an adequate alternative forum where defendants are amenable to process and plaintiff['s] 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 & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013) (footnote omitted). These factors show that litigating this case in Delaware would be "oppressiv[e] and vexatio[us] … out of all proportion to plaintiff's convenience." *Id.*

1. As a foreign entity suing in a U.S. jurisdiction, Abramge's choice of forum is entitled to little deference. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242, 255–56 (1981); *Windt v. Qwest Commcn's Int'l, Inc.*, 529 F.3d 183, 190 (3d Cir. 2008). "As well, deference is curbed when a plaintiff's choice of forum has little connection with the operative facts of the lawsuit." *Wm. H. McGee & Co. v. United Arab Shipping Co.*, 6 F. Supp. 2d 283, 290 (D.N.J. 1997). Here, the "operative facts" occurred in Brazil; that the "defendants in this case are incorporated in Delaware is of no moment." *Davis Int'l, LLC v. New Start Grp. Corp.*, No. 04-1482, 2006 WL

839364, at *8 (D. Del. Mar. 29, 2006), *aff'd in part, rev'd in part on other grounds*, 488 F.3d 597 (3d Cir. 2007). Abramge's decision to sue in Delaware thus deserves little or no deference.

2. Brazil is an available, adequate forum. A forum is available "when the defendant is amenable to process" there, and it is adequate so long as "the remedy offered by the other forum" is not "clearly unsatisfactory." *Piper Aircraft*, 454 U.S. at 254 n.22. A foreign forum will be inadequate only in "rare circumstances." *Id.* Arthrex hereby consents to jurisdiction in Brazil if this action is dismissed for *forum non conveniens*. Brazil is thus an available forum. *See Kisano Trade*, 737 F.3d at 873 n.1; Ex. A, Decl. of Keith S. Rosenn ("Rosenn Decl.") ¶ 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.").

Brazil is also an adequate forum. Numerous federal courts have so held,[11] and their reasoning applies equally here. Brazil provides a fair system of independent and impartial judges for resolving disputes in a manner that complies with due process. Rosenn Decl. ¶ 56. It has a modern code of civil procedure designed to foster fair and efficient litigation, with ample procedures to obtain discovery and testimony from both parties and nonparties. *See id*. ¶¶ 20–22.

Further, Brazilian law would permit recovery for Abramge's claims. *See id.* ¶¶ 35–36, 38 (Brazil "has a general tort statute requiring anyone who causes damage to another by commission of an illicit act to repair the damage[,] [and] . . . the fraud, negligent misrepresentation, and tortious interference with contract alleged in the Amended Complaint would plainly meet the definition of an illicit act."). A successful plaintiff may recover "compensatory damages, de-

[11] *See, e.g.*, *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330–31 (11th Cir. 2011) ("The record supports the determination … that Brazil is also an adequate forum" where the plaintiffs "are able to bring similar causes of action and seek adequate remedies in Brazil."); *Lleras v. Excelaire Servs. Inc.*, 354 F. App'x 585, 587 (2d Cir. 2009) (similar); *de Melo v. Lederle Labs., Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (similar).

signed to restore the status quo," plus "interest, costs, attorney's fees, and monetary correction," which adjusts for inflation. *Id*. ¶¶ 39–40. And the limitations period for tort actions in Brazil is three years, *id*. ¶ 41, the same as in Delaware. A Brazilian forum is adequate and available.

3. 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; … and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper Aircraft*, 454 U.S. at 241 n.6. These factors point decisively to Brazil. All key witnesses, including doctors, representatives of Abramge's members, defendants' Brazilian subsidiaries, and Brazilian distributors, are located in Brazil, making their compulsory attendance or joinder in Delaware impossible but their attendance or joinder in Brazil (voluntary or otherwise) both feasible and inexpensive. *See Delta Air Lines, Inc. v. Chimet, S.P.A.*, 619 F.3d 288, 300 (3d Cir. 2010) (ability to join third parties in foreign forum that cannot be joined in U.S. favors dismissal); Rosenn Decl. ¶ 33 (discussing interpleader in Brazil).

Likewise, relevant documents and records will be located overwhelmingly in Brazil, and will be in Portuguese, thus requiring translation into English if the action is tried here. Further, Brazil offers greater and easier access to "relevant documents and testimony without the need to resort to letters rogatory." Rosenn Decl. ¶¶ 55, 59. In similar cases, the Third Circuit has affirmed *forum non conveniens* dismissals. *See, e.g.*, *Kisano Trade*, 737 F.3d at 878 ("The location of the parties, their witnesses, and the availability of evidence favor resolution in Israel."); *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 162 (3d Cir. 2010) (underlying transactions occurred in France, "all of the sources of proof are located in France, including documents written in French and key witnesses; and … [a] third-party at the center of this contract dispute conducts business in France").

4. The public interest factors include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; 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; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft*, 454 U.S. at 241 n.6. "In evaluating the public interest factors the district court must consider the locus of the alleged culpable conduct … and the connection of that conduct to plaintiff's chosen forum." *Eurofins Pharma*, 623 F.3d at 162.

These factors point clearly to a Brazilian forum. The "local interest" in this case is in Brazil, where the "alleged culpable conduct" took place and where the health care system was allegedly impacted. "The only contact that Delaware has with this case is that it is [defendants'] state of incorporation." *Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1032 (3d Cir. 1980). No defendant is even headquartered here. Thus, "the commitment of Delaware judicial time and resources to this case is not justified by any nexus Delaware has with what is essentially a [Brazilian] case." *Id.*; *see Eurofins Pharma*, 623 F.3d at 162 ("the litigation is focused on French defendants' alleged breaches of contract and fiduciary duties, which took place in France, and, therefore France has a more significant interest in resolving the dispute than Delaware").

Moreover, while Arthrex has assumed that Delaware law applies for purposes of this motion, *see supra* p. 17 n.7, a choice-of-law analysis would dictate that Brazilian law likely governs Abramge's claims. Under the Restatement principles applied in Delaware, *see Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015), fraud claims are governed by the law of (1) the forum "where the false representations were made and received" and relied upon, or (2) if those events occurred in different places, the forum with the most significant relationship to

the dispute, *see* Restatement (Second) of Conflict of Laws § 148 (1971). Under either analysis, Brazilian law would control: all the relevant events occurred in Brazil, including Abramge's members' alleged reliance and any resulting harm. *See id.* § 148(2). Accordingly, "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern" weighs heavily in favor of a Brazilian forum. *Piper Aircraft*, 454 U.S. at 241 n.6.

V. The Claims Against Arthrex Should Be Dismissed Or Severed For Misjoinder.

Finally, if the action is not dismissed on other grounds, the Court should, at a minimum, dismiss or sever the claims against Arthrex for misjoinder. *See* Fed. R. Civ. P. 21. Under Rule 20(a), "[a]n essential element for permissive joinder is that all plaintiffs must assert a right to relief 'in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences.'" *Ross v. Meagan*, 638 F.2d 646, 650 n.5 (3d Cir. 1981) (quoting Fed. R. Civ. P. 20(a)(2)(A)), *overruled on other grounds, Neitzke v. Williams*, 490 U.S. 319 (1989). "A coincidental similarity in the underlying facts will not permit [plaintiffs] to proceed jointly." *Id.*

Here, the "transactions" underlying Abramge's claims are the alleged payments, the medical procedures, and resulting invoices, all of which are unique to each defendant. And there is no allegation that the defendants colluded or conspired as to these events; rather, each defendant allegedly engaged in an "individual illicit schem[e]." Compl. ¶ 10. Abramge thus "claim[s] relief for similar but entirely distinct and separate transactions or series of transactions," which is not a basis for joinder. *Ross*, 638 F.2d at 650 n.5; *see Odin's Eye Entm't v. Does 1-66*, No. 12-1389, 2013 WL 5890408, at * 2 (D. Del. Oct. 31, 2013) (same-transaction requirement not met where there was "no allegation … that the Defendants acted in concert"); *Spaeth v. Mich. State Univ. Coll. of Law*, 845 F. Supp. 2d 48, 53–54 (D.D.C. 2012) (severing claims against defendants who were "members of a common industry" and "engaged in similar types of behavior," where there was no "allegation of concerted action"). Because Abramge's complaint "collects a series of dis-

tinct claims, involving different parties, and disparate acts which are alleged to have occurred at different times," the defendants may not be joined in a single action under Rule 20(a). *Gunn v. First Am. Fin. Corp.*, No. 13-174, 2013 WL 3070875, at *4 (D. Del. June 18, 2013), *aff'd in part, vacated in part on other grounds*, 549 F. App'x 79 (3d Cir. 2013).

Even if Abramge could satisfy Rule 20(a), the Court should still exercise its discretion to drop Arthrex as a party or sever the claims against it under Rule 21 because joinder "does not promote judicial efficiency and unfairly weighs against [Arthrex]." *Odin*, 2013 WL 5890408, at *2. Any minimal factual overlap will be overwhelmed by defendant-specific—indeed, device-, doctor-, and patient-specific—factual issues. Thus, "joinder would be impractical as the [alleged misconduct] arose from separate occurrences and proving an actual injury would necessarily require a separate factual inquiry into each [member's] respective … proceedings." *Blood v. Fed. Bureau of Prisons*, 351 F. App'x 604, 607 (3d Cir. 2009). Further, joinder "could complicate [discovery], as defendants may need to erect complicated confidentiality barriers, since they are business competitors." *See In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012). It could also prejudice defendants by creating confusion as to which allegations pertain to each defendant. *See* Compl. ¶¶ 86–124, 125–153, 154–196.

Because the claims against Arthrex are not properly joined to the claims against the other defendants and joinder is prejudicial, Arthrex should be dismissed as a party. *See DIRECTV v. Armellino*, 216 F.R.D. 240, 241 (E.D.N.Y. 2003) (dismissing claims "against all but the first named defendant" for misjoinder). At a minimum, the claims against Arthrex should be severed and Abramge ordered to file a new complaint limited to its allegations against Arthrex.

CONCLUSION

For these reasons, the claims against Arthrex should be dismissed in their entirety, or at a minimum, severed from the claims against the other defendants.

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