

DANIEL NIETZOLD AND
PATRICIA NIETZOLD

vs.

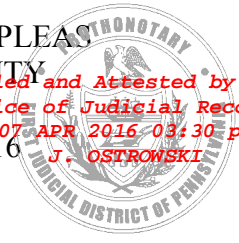
OLYMPUS AMERICA INC.,
OLYMPUS CORPORATION OF
THE AMERICAS, OLYMPUS MEDICAL
SYSTEM CORP. AND
CUSTOM ULTRASONICS, INC.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

FEBRUARY TERM, 2016

NO. 001031

Filed and Attested by the
Office of Judicial Records
07 APR 2016 03:30 pm
J. OSTROWSKI



ORDER

AND NOW, this ____ day of _____, 2016, upon consideration of the Preliminary Objections of Defendants Olympus America Inc., Olympus Corporation of the Americas, and Olympus Medical Systems Corp. to Plaintiffs' Amended Complaint, and any response thereto, it is hereby **ORDERED** and **DECREED** that said Preliminary Objections are **SUSTAINED**. Plaintiffs' Amended Complaint is hereby dismissed.

NOTICE TO PLEAD

You are hereby notified to plead to the enclosed pleading within 20 days from service hereof or judgment may be entered against you.

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**PRELIMINARY OBJECTIONS OF DEFENDANTS OLYMPUS AMERICA INC.,
OLYMPUS CORPORATION OF THE AMERICAS, AND OLYMPUS MEDICAL
SYSTEMS CORP. TO PLAINTIFFS' AMENDED COMPLAINT**

Defendants Olympus America Inc. (“OAI”), Olympus Corporation of the Americas (“OCA”), and Olympus Medical Systems Corp. (“OMSC”), by and through their attorneys, Marshall Dennehey Warner Coleman & Goggin, hereby submit their Preliminary Objections to Plaintiffs’ Amended Complaint pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure and state as follows:

1. Plaintiffs Daniel Nietzold and Patricia Nietzold are residents of Gastonia, North Carolina. (See Amended Complaint, annexed hereto as Exhibit A, ¶¶ 7-8.)

2. Between January 2013 and July 2015, Mr. Nietzold underwent multiple procedures at Carolinas Medical Center in Charlotte, North Carolina. (Exhibit A, ¶ 6; see also Carolinas Medical Center webpage, annexed hereto as Exhibit B (available at <http://www.carolinashealthcare.org/cmc>.)

3. The procedure involved an Olympus TJF-Q180V duodenoscope, manufactured by OMSC. (Exhibit A, ¶¶ 1, 6, 12, 16.)

4. Plaintiffs allege that Mr. Nietzold was exposed to a drug-resistant infection via the duodenoscope and suffered injuries that affect him to this day. (Exhibit A, ¶¶ 6, 25, 42.)

5. The Amended Complaint names OAI, OCA, and OMSC as defendants and acknowledges that each is a separate corporate entity with different roles as pertains to the TJF-Q180V duodenoscope. (Exhibit A, ¶¶ 10-12, 16.)

6. Plaintiffs note that while OAI and OCA are New York corporations with principal places of business in Center Valley, Pennsylvania, OMSC is Japanese corporation with an address located in Tokyo, Japan. (Exhibit A, ¶¶ 10-12; see also Affidavit of Michael R. Smith, annexed hereto as Exhibit C, ¶¶ 3-5.)

7. In fact, Plaintiffs acknowledge that the Japanese corporation OMSC may be served through The Hague Service Convention. (Exhibit A, ¶ 12.)

8. OMSC designs, manufactures, packages, and ships duodenoscopes from its facilities in Japan. (Exhibit A, ¶¶ 12, 16, Exhibit C, ¶ 5.) OMSC does not handle sales, distribution, or marketing of its products in the United States. (Exhibit A, ¶¶ 12, 16, Exhibit C, ¶ 5.) Those sales, distribution, and marketing functions are handled by other members of the Olympus corporate family, none of which own (or are owned) by OMSC. (Exhibit A, ¶ 16, Exhibit C, ¶ 5.)

9. OMSC has no operations or facilities in Pennsylvania and is not registered to do business in Pennsylvania. (Exhibit C, ¶ 4.) Plaintiffs claim OMSC “owns a distribution center in Pennsylvania where the Q180V scope was shipped.” (Exhibit A, ¶ 12; see also ¶ 35(b) (OMSC used “its product warehouse in Breinigsville, Pennsylvania ... owned by an OMSC subsidiary called Olympus Logitech.”).) That is contradicted directly by the testimony of Michael R. Smith, which Plaintiffs had in their possession before amending their Complaint, explaining that “OMSC has no operations or facilities in Pennsylvania.” (Exhibit C, ¶ 4.) Instead, the warehouse is owned by a Connecticut entity, Riverbend Crossings III Holdings LLC (See Lehigh County Assessment Records, annexed hereto as Exhibit D); the “Olympus Logitech” warehouse Plaintiffs describe (apparently based on testimony from a deposition in a Washington case) is actually in Japan, not Pennsylvania¹ (See Deposition of Laura Storms, annexed hereto as Exhibit E, at 63); and there is no “Olympus Logitech” registered in Pennsylvania (See Pennsylvania Corporation Search, annexed hereto as Exhibit F).

10. Even though Plaintiffs acknowledge the different roles played by OMSC and the American entities, OAI and OCA, the Amended Complaint sets forth causes of action against them generally without any differentiation as to the roles each entity allegedly undertook.

¹ The testimony at issue makes it clear OMSC has no role with a duodenoscope after it leaves Japan:

- Q. Do you know what happens in terms of chain of custody of the duodenoscopes? How do they get from the manufacturing facility to the United States?
- A. My understanding is they go from the factory to Olympus Logitech. From Olympus Logitech they are exported to the U.S. and imported by OCA.
- Q. And then they go what, to a warehouse at OCA, is that what you had said?
- A. That's right. An OCA warehouse.
- Q. And what possible warehouses would that be? Is there only one?
- A. There's only one. It's in Breinigsville, Pennsylvania.

(Exhibit A, ¶¶ 53-59 (Negligence); 69-79 (Fraud – Intentional Misrepresentation); 91-102 (Fraud – Negligent Misrepresentation); 115-18 (Loss of Consortium).) Only the Strict Liability claim differentiates between OMSC, OAI, and OCA.

11. Plaintiffs’ generalized pleading of their causes of action are particularly egregious in connection with the two Counts sounding in fraud, alleging “OA Defendants and OMSC made false representations to Plaintiffs and/or Plaintiff DANIEL NIETZOLD’s physicians concerning the safety of the Q180V Scope and the risk associated with the reprocessing protocol for the Q180V Scope[.]” (Exhibit A, ¶ 71 (Fraud – Intentional Misrepresentation) and “OA Defendants and OMSC made false representations to Plaintiffs and Plaintiff DANIEL NIETZOLD’s physicians concerning the safety of the Q180V Scope and the risk associated with the reprocessing protocol for a previously used Q180V Scope.” (Exhibit A, ¶ 93 (Fraud – Negligent Misrepresentation).) Although the Amended Complaint acknowledges the actual representations at issue were made by “OAI’s employees” to “physicians and staff at CAROLINAS Hospital between July 2010 and March 2015” ((Exhibit A, ¶¶ 73, 96) – itself an impermissibly vague assertion – nowhere in the Amended Complaint do Plaintiffs make a distinction between the three entities in connection with either fraud claim.

12. In relevant part, Rule 1028(a) states that:

[p]reliminary objections may be filed by any party to any pleading and are limited to the following grounds: (1) lack of jurisdiction over the subject matter of the action or the person of the defendant . . . (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter; (3) insufficient specificity in a pleading

Pa. R. Civ. P. 1028(a).

13. For the reasons set forth below and in the accompanying Memorandum of Law, which is incorporated by reference as if set forth fully herein, OAI, OCA, and OMSC preliminarily object to Plaintiffs' Amended Complaint.

14. Plaintiffs' Amended Complaint must be dismissed for lack of personal jurisdiction as to OMSC because OMSC cannot "fairly be regarded at home" for the purpose of establishing general jurisdiction in Pennsylvania. Further, OMSC does not have sufficient minimum contacts with Pennsylvania to establish specific jurisdiction, because the acts alleged as to OMSC in the Amended Complaint occurred outside Pennsylvania and allegedly caused an injury outside Pennsylvania, in North Carolina, where the product at issue was sold and used and where Plaintiffs were allegedly injured.

15. The Amended Complaint must be dismissed because Plaintiffs have failed to allege any particular facts—and, therefore, any particular causes of action—that pertain specifically to acts, omissions, or conduct of OAI, OCA, and OMSC thereby failing to plead with the specificity required by Pennsylvania law. See Pa. R. Civ. P. 1019(a); Sevin v. Kelshaw, 611 A.2d 1232 (Pa. 1992); Lerner v. Lerner, 954 A.2d 1229 (Pa. Super. Ct. 2008).

16. Plaintiffs' claims sounding in fraud also fail to plead fraud with the particularity required by Rule 1019(b).

17. Lastly, Plaintiffs' Amended Complaint fails to comply with the requirements of Pa. R. Civ. P. 1022 which requires that "[e]ach paragraph shall contain as far as practicable only one material allegation." Pa. R. Civ. P. 1022.

WHEREFORE, Defendants OAI, OCA, and OMSC respectfully request that this Honorable Court grant their Preliminary Objection and enter the accompanying proposed form of Order.

Respectfully submitted,

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Eric A. Weiss

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Attorney for Defendants

Dated: 4/7/16

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FEBRUARY TERM, 2016

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**MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS OF
DEFENDANTS TO PLAINTIFFS' AMENDED COMPLAINT**

Defendants Olympus America Inc. (“OAI”), Olympus Corporation of the Americas (“OCA”), and Olympus Medical Systems Corp. (“OMSC”), by and through their attorneys, Marshall Dennehey Warner Coleman & Goggin, hereby submit the instant Memorandum of Law in support of their Preliminary Objections to Plaintiffs’ Amended Complaint pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure and state as follows:

I. MATTER BEFORE THE COURT

Preliminary Objections of Defendants OAI, OCA, and OMSC to Plaintiffs’ Amended Complaint.

II. STATEMENT OF QUESTIONS INVOLVED

Should the Amended Complaint be dismissed for: (1) lack of personal jurisdiction over OMSC; (2) lack of specificity in pleading particular facts and claims attributable to OAI, OCA, and OMSC; and (3) failure to conform to the requirements set forth in Pennsylvania Rule of Civil Procedure 1022?

Suggested Answer: Yes.

III. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs Daniel Nietzold and Patricia Nietzold are residents of Gastonia, North Carolina. (See Amended Complaint, annexed to the Preliminary Objections as Exhibit A, ¶¶ 7-8.) Between January 2013 and July 2015, Mr. Nietzold underwent multiple procedures at Carolinas Medical Center in Charlotte, North Carolina. (Preliminary Objections, Exhibit A, ¶ 6; see also Carolinas Medical Center webpage, annexed to the Preliminary Objections as Exhibit B (available at <http://www.carolinashealthcare.org/cmc>.) The procedure involved an Olympus TJF-Q180V duodenoscope, manufactured by OMSC. (Preliminary Objections, Exhibit A, ¶¶ 1, 6, 12, 16.) Plaintiffs allege that Mr. Nietzold was exposed to a drug-resistant infection via the duodenoscope and suffered injuries that affect him to this day. (Preliminary Objections, Exhibit A, ¶¶ 6, 25, 42.) All injuries in the Amended Complaint stem from that alleged exposure, which occurred in Charlotte, North Carolina, and involved a product sold to Charlotte, North Carolina.

The Amended Complaint acknowledges OAI, OCA, and OMSC are each separate corporate entities with different roles as to the TJF-Q180V duodenoscope. (Preliminary Objections, Exhibit A, ¶¶ 10-12, 16.) Plaintiffs note that while OAI and OCA are New York corporations with principal places of business in Center Valley, Pennsylvania, OMSC is a Japanese corporation with an address located in Tokyo, Japan. (Preliminary Objections, Exhibit

A, ¶¶ 10-12; see also Affidavit of Michael R. Smith, annexed to the Preliminary Objections as Exhibit C, ¶¶ 3-5.) In fact, Plaintiffs acknowledge that the Japanese corporation OMSC may be served through The Hague Service Convention. (Preliminary Objections, Exhibit A, ¶ 12.)

OMSC designs, manufactures, packages, and ships duodenoscopes from its facilities in Japan. (Preliminary Objections, Exhibit A, ¶ 12, 16; Preliminary Objections, Exhibit C, ¶ 5.) OMSC does not handle sales, distribution, or marketing of its products in the United States. Those sales, distribution, and marketing functions are handled by other members of the Olympus corporate family, none of which own (or are owned) by OMSC. (Preliminary Objections, Exhibit A, ¶ 12, 16; Preliminary Objections, Exhibit C, ¶ 5.) OMSC has no operations or facilities in Pennsylvania and is not registered to do business in Pennsylvania. (Preliminary Objections, Exhibit C, ¶ 4.)

Regardless, the Amended Complaint sets forth causes of action against OAI, OCA, and OMSC generally without any differentiation as to the roles each entity allegedly undertook. (Preliminary Objections, Exhibit A, ¶¶ 53-59 (Negligence); 69-79 (Fraud – Intentional Misrepresentation); 91-102 (Fraud – Negligent Misrepresentation); 115-18 (Loss of Consortium).) Only the Strict Liability claim differentiates between OMSC, OAI, and OCA. The undifferentiated allegations in the two fraud claims contain these allegations:

- “OA Defendants and OMSC made false representations to Plaintiffs and/or Plaintiff DANIEL NIETZOLD’s physicians concerning the safety of the Q180V Scope and the risk associated with the reprocessing protocol for the Q180V Scope[.]” (Preliminary Objections, Exhibit A, ¶ 71 (Fraud – Intentional Misrepresentation); and
- “OA Defendants and OMSC made false representations to Plaintiffs and Plaintiff DANIEL NIETZOLD’s physicians concerning the safety of the Q180V Scope and the

risk associated with the reprocessing protocol for a previously used Q180V Scope.”
(Preliminary Objections, Exhibit A, ¶ 93 (Fraud – Negligent Misrepresentation).)

Although the Amended Complaint acknowledges the actual representations at issue were made by “OAI’s employees” to “physicians and staff at CAROLINAS Hospital between July 2010 and March 2015” (Preliminary Objections, Exhibit A, ¶¶ 73, 96), nowhere in the Amended Complaint do Plaintiffs make a distinction between the three entities in connection with either fraud claim.

IV. ARGUMENT

A. Standard of Review

In relevant part, Rule 1028(a) states that:

[p]reliminary objections may be filed by any party to any pleading and are limited to the following grounds: (1) lack of jurisdiction over the subject matter of the action or the person of the defendant . . . (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter; (3) insufficient specificity in a pleading

Pa. R. Civ. P. 1028(a). In ruling on preliminary objections, a court must accept as true all well pleaded facts which are material and relevant. Erie Cty. League of Women’s Voters v. Dept. of Environmental Resources, 525 A.2d 1290 (Pa. Cmwlth. Ct. 1987). “However, once the moving party has supported his objection to jurisdiction, the burden of proof shifts to the party asserting jurisdiction.” Rivello v. New Jersey Auto. Full Ins. Underwriting Ass’n, 638 A.2d 253, 256 (Pa. Super. 1994) The trial court need not accept as true unwarranted inferences from facts, argumentative allegations, or expressions of opinion. Griffin v. Chronister, 616 A.2d 1070 (Pa. Cmwlth. Ct. 1992). Moreover, the court cannot supply facts missing in the complaint. Linda Coal and Supply Co. v. Tasa Coal Co., 204 A.2d 451 (Pa. 1964). Where facts either have not or cannot be pled to sustain a cause of action or claim for damages under the law, preliminary

objections should be sustained. United Refrigerator Co. v. Applebaum, 189 A.2d 253 (Pa. 1963).

B. The Amended Complaint Must Be Dismissed For Lack of Personal Jurisdiction Over Foreign Defendant OMSC.

OMSC has no contacts with Pennsylvania related to this action sufficient to grant this Court personal jurisdiction over it. As Plaintiffs themselves acknowledge, all of Plaintiffs' claimed injuries arose from the alleged use of an Olympus duodenoscope on Plaintiff Daniel Nietzold at Carolinas Medical Center in Charlotte, North Carolina. Mr. Nietzold is a North Carolina resident, and there is no allegation that he experienced any part of his injury in Pennsylvania (or even that he has ever visited Pennsylvania).

Likewise, OMSC does not have any continuous or systematic contacts in Pennsylvania. As Plaintiffs admit in their Amended Complaint, OMSC is a Japanese corporation, headquartered in Japan, which designs and manufactures medical devices in Japan and ships them from its facilities in Japan. Indeed, OMSC has no operations or facilities in Pennsylvania and is not registered to do business in Pennsylvania. Nor does OMSC handle the sales, distribution, or marketing of its products in the United States. Those sales, distribution, and marketing functions are handled by other members of the Olympus corporate family, none of which own (or are owned by) OMSC.

A court may exercise personal jurisdiction over a foreign corporation in only two instances: First, when that corporation can be "fairly regarded at home" in the forum state—which in most cases means it is incorporated or has its principal place of business there, or at least conducts business there in a "continuous and systematic" manner—the corporation can be sued in that state for any claim under the principle of "general jurisdiction." When the corporation's ties to the forum state are anything less, however, it is subject to suit only when it

has sufficient minimum contacts with the state *in connection with the specific claim at issue*. For that “specific jurisdiction,” the *only connections to the state that matter are those from which the lawsuit eventually arises*—any other contacts are irrelevant. This is black-letter law, from the United States Supreme Court to Pennsylvania’s own long-arm statute.

Here, there simply are no relevant contacts between OMSC and Pennsylvania. The product at issue was manufactured in Japan and sold to a hospital in North Carolina. It was used in the medical procedure at issue in North Carolina, on a patient who lives in North Carolina. Even if OMSC had some other contacts, they are irrelevant, because none of them have anything to do with Plaintiffs’ claims. And the allegations and evidence are undisputed that OMSC is not so “at home” in the state that it is subject to general jurisdiction there.

The simple fact is Plaintiffs sued a foreign defendant in Pennsylvania for alleged torts occurring entirely outside Pennsylvania, all involving a plaintiff who has no connection to Pennsylvania. There is no basis for this Court to exercise personal jurisdiction over OMSC in this matter. Plaintiffs’ claims should be dismissed.

1. OMSC lacks the continuous and systematic contacts with Pennsylvania to be subject to general jurisdiction.
 - i. Even regular business in the forum state does not confer general jurisdiction over a foreign defendant.*

A court may assert general jurisdiction over an out-of-state corporation—that is, hear any claim against the corporation regardless of whether it arises out of any connection to the forum—only when its “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011); Mendel v. Williams, 53 A.3d 810, 817 (Pa. Super. Ct. 2012). “The paradigm all-purpose forums for general jurisdiction are a corporation’s place of incorporation

and principal place of business.” Daimler AG v. Bauman, 571 U.S. 310 (2014) (citing Goodyear, 131 S. Ct. at 2846). Anything less typically is not sufficient for the exercise of general jurisdiction, even if the corporation “engages in a substantial, continuous, and systematic course of business” there. Id. A corporation’s “continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.” Int’l Shoe Co. v. Wash., 326 U.S. 310, 318 (1945). Nor can simply placing goods into the “stream of commerce” suffice to grant general jurisdiction. Goodyear, 131 S. Ct. at 2846.

This standard is reflected in Pennsylvania statute, which allows general jurisdiction over a foreign defendant in only three cases: incorporation in Pennsylvania, consent to suit in Pennsylvania, and (echoing the Supreme Court’s language) “carrying on of a continuous and systematic part of its general business” in Pennsylvania. 42 Pa. Cons. Stat. § 5301(a)(2).

ii. Except in extreme circumstances, general jurisdiction is only available where a defendant is incorporated or has its principle place of business.

To determine if a corporation could be subject to general jurisdiction in the forum, a court first looks to whether it is incorporated there or maintains its principal place of business there. Goodyear, 131 S. Ct. at 2846. For example, in Perkins v. Benguet Consol. Mining Co.—a rare Supreme Court case in which general jurisdiction was considered and upheld—the defendant was a Philippines corporation, which during World War II had essentially moved its operations to Ohio, including its president’s office, all its files, and everything else needed to oversee its limited wartime operations. 342 U. S. 437, 447-48 (1952). The Court determined that although the defendant was not incorporated in Ohio, “Ohio was the corporation's principal, if temporary, place of business” and it was thus amendable to suit there. Keeton v. Hustler Magazine, Inc., 465 U. S. 770, 779-780, n. 11 (1984) (discussing Perkins holding.) Conversely, in Helicopteros Nacionales de Colombia, S. A. v. Hall, a Peruvian corporation that had regular and diverse

business contacts with Texas was not subject to general jurisdiction because those contacts “were insufficient to support the exercise of jurisdiction over a claim” not arising from the corporation’s activities in Texas. 466 U. S. 408, 415-16. The fact a corporation is not registered to do business in the forum and has no offices, employees, or bank accounts in the forum suggests it is not “at home” in the forum. Goodyear, 131 S. Ct. at 2846.

Pennsylvania law follows the United States Supreme Court’s dictates. Mendel, 53 A.3d at 818 (“we may draw several principles from both the United States Supreme Court’s jurisprudence on general jurisdiction and our own cases”). To exercise general jurisdiction over a foreign corporation—even one which manufactured a product that injured a plaintiff in Pennsylvania—a Pennsylvania court needs more than “a series of on-going contacts, meetings, and opportunities to exchange information with several Pennsylvania companies[,]” McCall v. Formu-3 Intern., Inc., 650 A.2d 903, 906 (Pa. Super. 1994), or a public, ongoing business affiliation with a Pennsylvania company, Mendel, 53 A.3d at 820. Those contacts, no matter how long-lasting or pervasive, are insufficient when a defendant “did not purposefully distribute its product in Pennsylvania, maintained no office here, was not qualified to do business here, had no real or personal property here and did not maintain a bank account here.” Id. at 819. See also Derman v. Wilair Svcs., Inc., 590 A.2d 317, 324 (Pa. Super. 1991) (doing business with Pennsylvania residents did not make defendant subject to general jurisdiction in Pennsylvania).

iii. OMSC is a Japanese corporation with its principal place of business in Japan, not Pennsylvania.

As Plaintiffs themselves allege, OMSC is a corporation formed and existing under Japanese law with its principal place of business in Japan. (Preliminary Objection, Exhibit A, ¶ 12.) In fact, Plaintiffs acknowledge that service on OMSC can be accomplished in Japan through the Hague Convention. (Preliminary Objection, Exhibit A, ¶ 12.)

OMSC is a wholly owned Japanese entity with all of its design and manufacturing facilities located in Japan. It has no operations in the United States, let alone Pennsylvania. (Preliminary Objections, Exhibit C ¶¶ 3-4.) Further, OMSC is not registered to do business in Pennsylvania. (Preliminary Objections, Exhibit C, ¶ 4.) Nor does OMSC handle sales, distribution, or marketing of its products in the United States. Rather, those sales, distribution, and marketing functions are handled by other members of the Olympus corporate family, none of whom own (or are owned) by OMSC. (Preliminary Objections, Exhibit C, ¶ 5.)

After OMSC and the other defendants filed their original Preliminary Objections, Plaintiffs amended their pleading, presumably to correct some of the issues raised in the Preliminary Objections. But as to OMSC's connections to Pennsylvania, Plaintiffs' additions are either contradicted by the evidence before this Court or irrelevant to the general personal jurisdiction analysis:

- Plaintiffs claim OMSC “owns a distribution center in Pennsylvania where the Q180V scope was shipped.” (Preliminary Objection, Exhibit A, ¶ 12; see also ¶ 35(b) (OMSC used “its product warehouse in Breinigsville, Pennsylvania ... owned by an OMSC subsidiary called Olympus Logitech.”).) That is contradicted directly by the testimony of Michael R. Smith, which Plaintiffs had in their possession before amending their Complaint. They offer no evidence to contradict his statement that “OMSC has no operations or facilities in Pennsylvania.” (Preliminary Objections, Exhibit C, ¶ 4.) Indeed, they offer no evidence of OMSC's connection to the warehouse at all, even though simple internet searches would reveal the warehouse is owned by a Connecticut entity, Riverbend Crossings III Holdings LLC (See Lehigh County Assessment Records,

annexed to the Preliminary Objections as Exhibit D); the “Olympus Logitech” warehouse Plaintiffs describe (apparently based on testimony from a deposition in a Washington case) is actually in Japan, not Pennsylvania¹ (See Deposition of Laura Storms, annexed to the Preliminary Objections as Exhibit E, at 63); and there is no “Olympus Logitech” registered in Pennsylvania (See Pennsylvania Corporation Search, annexed to the Preliminary Objections, Exhibit F).

Once a defendant has offered evidence that disputes a plaintiff’s allegations of jurisdictional facts, the plaintiff must come forward with actual evidence supporting jurisdiction, not just allegations. Scoggins v. Scoggins, 555 A.2d 1314, 1318 (Pa. Super. 1989) (once the defendant proffers evidence that there is no personal jurisdiction over it, “the burden of proving jurisdiction fall[s] upon the party asserting it”); Taylor v. FEDRA Intern., Ltd., 828 A.2d 378, 379 (Pa. Super. 2003) (same).

- Even if true, ownership of a warehouse in Pennsylvania by a Japanese company with its headquarters in Japan would not render it “essentially at home” in Pennsylvania. Goodyear, 131 S. Ct. at 2846.

¹ The testimony at issue makes it clear OMSC has no role with a duodenoscope after it leaves Japan:

- Q. Do you know what happens in terms of chain of custody of the duodenoscopes? How do they get from the manufacturing facility to the United States?
- A. My understanding is they go from the factory to Olympus Logitech. From Olympus Logitech they are exported to the U.S. and imported by OCA.
- Q. And then they go what, to a warehouse at OCA, is that what you had said?
- A. That's right. An OCA warehouse.
- Q. And what possible warehouses would that be? Is there only one?
- A. There's only one. It's in Breinigsville, Pennsylvania.

- Similarly, sending Japanese employees as liaisons to Pennsylvania, as alleged in the Amended Complaint (Preliminary Objection, Exhibit A, ¶ 12), would also not make a foreign company “essentially at home” in Pennsylvania. Goodyear, 131 S. Ct. at 2846.
- Finally, Plaintiffs’ conclusory statement that Center Valley, Pennsylvania “is the center of operations in the United States for OMSC” does nothing to advance their argument. Even if it was not contradicted by Mr. Smith’s testimony, already in the record (Preliminary Objections, Exhibit C, ¶ 4), the term “center of operations in the United States” has no legal significance. What matters when general jurisdiction is at issue is the principal place of business – and Plaintiffs admit that is in Japan, not Pennsylvania. (Preliminary Objection, Exhibit A, ¶ 12.)

In short, OMSC lacks the “continuous and systematic” contacts—namely, incorporation, headquarters, or even a physical presence—that would make it “essentially at home” in Pennsylvania Goodyear, 131 S. Ct. at 2846; 42 Pa. Cons. Stat. § 5301(a)(2). Any jurisdiction this Court may exercise over OMSC must be based only on the contacts from which this suit arises. Mendel, 53 A.3d at 820.

2. There can be no specific jurisdiction over OMSC because Plaintiffs’ claims do not arise from any contacts OMSC had with Pennsylvania.

When a defendant’s contacts with the forum fall short of the high bar for general jurisdiction, that defendant might still be subject to personal jurisdiction in the forum for claims that arise from those contacts. “In order for a Pennsylvania court to assert specific jurisdiction, the cause of action must arise out of the defendant’s activities within the Commonwealth.” Derman, 590 A.2d at 319-20.

The key language, of course, is “arise out of the defendant’s activities.” Specific jurisdiction is *only* available for claims that arise out of the defendant’s contacts with the forum. E.g. Int’l Shoe, 326 U.S. at 319; Efford v. Jockey Club, 796 A.2d 370, 373 (Pa. Super. Ct. 2002) (noting that specific jurisdiction “is focused upon the particular acts of the defendant *that gave rise to the underlying cause of action.*”) (emphasis added); Mendel, 53 A.3d at 817 (“Specific jurisdiction ... depends on an ‘affiliatio[n] between the forum and the underlying controversy,’ principally, activity or *an occurrence that takes place in the forum State* and is therefore subject to the State’s regulation.”) (quoting Goodyear, 131 S. Ct. at 2851) (emphasis added).

This principle is codified in Pennsylvania’s Long Arm Statute, which extends the Commonwealth’s jurisdiction “as to cause of action or other matter arising from” one of ten enumerated acts. 42 Pa. Cons. Stat. § 5322. Two of those acts are applicable to this case: “(3) Causing harm or tortious injury by an act or omission in this Commonwealth” and “(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.” Id. But both apply only when the cause of action is based on the contacts at issue. Id.; Mendel, 53 A.3d at 817. Any exercise of specific jurisdiction by a Pennsylvania court must meet both the strictures of 42 Pa. Cons. Stat. § 5322 and the requirements of Constitutional due process. Here, neither standard is met.

i. Plaintiffs do not allege any act enumerated in Pennsylvania’s Long-Arm Statute.

Plaintiffs’ claims fail to meet this element because Plaintiffs do not allege OMSC committed any act enumerated in the Long Arm Statute. All ten of the enumerated acts, including the two that could conceivably apply to Plaintiffs claims—committing a tortious act or omission in Pennsylvania or committing a tortious act or omission elsewhere that causes injury in Pennsylvania—require the defendant either commit the act within the state of Pennsylvania or

cause an injury in Pennsylvania. 42 Pa. Cons. Stat. § 5322. Plaintiffs’ tort allegations as to OMSC all concern acts committed in Japan or resulting in injury in North Carolina (Preliminary Objections, Exhibit A, ¶¶ 6, 12, 73, 74, 96, 97); none of the acts alleged occurred in Pennsylvania. Once OMSC contends the Court lacks personal jurisdiction over it, Plaintiffs have the burden of showing personal jurisdiction over it exists. Mendel, 53 A.3d at 816-17. Here, Plaintiffs cannot meet the initial threshold of their required showing.

ii. Plaintiffs’ claims do not arise from any contacts in Pennsylvania.

Here, Plaintiffs simply do not—and indeed, cannot—allege that OMSC either committed a tortious act or omission in Pennsylvania or caused an injury in Pennsylvania. Instead, Plaintiffs are quite clear that OMSC’s acts at issue—designing, manufacturing, and testing a duodenoscope and creating instructions for use of the device—were performed in Japan, and Plaintiffs were injured at Carolinas Medical Center in North Carolina. (Preliminary Objections, Exhibit A, ¶¶ 6, 12, 36, 54, 71, 91.) Plaintiffs’ causes of action against OMSC thus arise solely out of OMSC’s alleged acts and effects *in Japan and North Carolina*, not Pennsylvania.² As Pennsylvania courts have held, there can be no specific jurisdiction over a defendant if either the acts or omissions—or injury—at issue did not occur in Pennsylvania. See Filipovich v. J.T. Imports Inc., 637 A.2d 314, 316 (Pa. Super. 1994) (no personal jurisdiction over California manufacturer who sold allegedly defective motorcycle helmet when the helmet was not purchased in Pennsylvania and the accident did not occur in Pennsylvania).

² As discussed above, Plaintiffs have added to their pleadings an allegation that the duodenoscope was sent to an OMSC-owned warehouse in Pennsylvania. But even if that bare allegation – which Plaintiffs offer without support even though it directly contradicts the evidence OMSC submitted with both sets of its Preliminary Objections, ignoring their burden to prove jurisdiction once contradictory evidence is raised (Rivello v. New Jersey Auto. Full Ins. Underwriting Ass’n, 638 A.2d 253, 256 (Pa. Super. 1994), it is hard to see that owning a warehouse where a sealed package is briefly stored could constitute the “act or omission” causing injury required by 42 Pa. Cons. Stat. § 5322.

iii. *Exercising jurisdiction over OMSC for Plaintiffs' claims would violate its Constitutional due process rights.*

For the same reason, due process concerns bar Pennsylvania courts from asserting jurisdiction over OMSC in this case. A finding that a claim arises from the defendant's contacts with the forum state is crucial to the Constitutional exercise of specific jurisdiction. Int'l Shoe, 326 U.S. at 319; Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985). "The general rule [is] that a State may dispense with in-forum personal service on nonresident defendants in *suits arising out of their activities in the State*." Burnham v. Sup. Ct., 495 U.S. 604, 618 (1990) (emphasis added). When the "cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State," there is no jurisdiction over the defendant. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

C. The Amended Complaint Must Be Dismissed For Insufficient Specificity of Pleading Under Rule 1028(3) and Failure to Conform with the Rule 1019(b) Requirement for Pleading Fraud with Particularity.

As Pennsylvania courts have explained, "Pennsylvania is a fact-pleading jurisdiction. ... A complaint must therefore not only give the defendant notice of what the plaintiffs' claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim." Sevin v. Kelshaw, 611 A.2d 1232, 1235 (Pa. 1992) (citations omitted). See also Lerner v. Lerner, 954 A.2d 1229, 1236 (Pa. Super. Ct. 2008) (a complaint "should formulate the issues by fully summarizing the material facts. Material facts are ultimate facts, *i.e.* those facts essential to support the claim.") (citation omitted). Accordingly, under Rule 1028(a)(3), a preliminary objection may be made to a pleading for lack of sufficient specificity, where Rule 1019(a) requires that "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form."

Here, Plaintiffs have failed to allege particular facts or claims—and, therefore, any particular causes of action—that pertain specifically to each of OAI, OCA, and OMSC, at least in connection with their negligence, fraud, and loss of consortium claims. As noted above, Plaintiffs instead refer to them, over and over, as “OA Defendants and OMSC.” (Preliminary Objections, Exhibit A, ¶¶ 16, 17, 19, 20, 23-25, 37(a), 37(c), 38, 40, 42, 43, 54-59, 70, 71, 74-79, 92, 93, 95, 97-102, 117, 118). (After OAI, OCA, and OMSC filed their first Preliminary Objections, pointing out that Plaintiffs described the three defendants collectively as “Olympus” or “Defendants,” Plaintiffs amended the Complaint to use the phrase “OA Defendants and OMSC” instead. This is no better, because repeatedly listing separate entities says nothing more about what each entity did than referring to them as a collective.)

This kind of generalized pleading as to these defendants is manifestly improper under Rule 1019(a), particularly where Plaintiffs concede (and even allege) that OAI, OCA, and OMSC are distinct corporate entities. (Preliminary Objections, Exhibit A, ¶¶ 10-12). Without allegations specifying which particular defendant performed or failed to perform what particular act, OAI, OCA, and OMSC are prejudiced in their ability to defend against Plaintiffs’ claims.

The impropriety of repeatedly combining OAI, OCA, and OMSC into one indiscriminate phrase is further highlighted by Plaintiffs’ two fraud claims against Defendants, which fail to meet the higher pleading standard required of fraud claims. Each cause of action consists of paragraph after paragraph alleging all three defendants collectively committed some fraudulent act, punctuated by a single paragraph in each claim stating that “OAI’s employees” actually made the representations at issue. (Preliminary Objections, Exhibit A, ¶¶ 69-79, 91-102). (Those two paragraphs about OAI employees were added to the Amended Complaint after the defendants argued in their initial Preliminary Objections that Plaintiffs’ original fraud claims had

absolutely no differentiation between defendants.) Of course, Plaintiffs cannot have it both ways: if all three defendants committed fraudulent acts, Plaintiffs must spell out with at least some particularity what each defendant did; if only OAI made the alleged misrepresentations to Mr. Nietzold's physicians, then there are no grounds for the claims against OCA and OMSC.

Rule 1019(b) requires that “[a]verments of fraud or mistake shall be averred with particularity.” Pa. R. Civ. P. 1019(b). However, Plaintiffs do nothing more than allege that the “Defendants” made various general putative misrepresentations to a wide range of medical providers over an unspecified period of time, without stating which corporate entity made which particular misrepresentation, when, where, or to whom. (Preliminary Objections, Exhibit A, ¶ 81.) The prejudice to OAI, OCA, and OMSC in trying to defend such nebulously and self-contradictorily pled claims is plain and is precisely what the Rules, and particularly Rules 1028 and 1019, were intended to prevent.

D. The Amended Complaint Must Be Dismissed For Failure to Conform with the Rule 1022 Requirement for Limiting Paragraphs of the Complaint to One Material Allegation.

Pennsylvania Rule of Civil Procedure 1022 provides that “[e]ach paragraph in a pleading shall contain, as far as practical, only one material allegation. Pa. R. Civ. P. 1022. Here, nearly every paragraph of Plaintiffs’ Amended Complaint includes multiple factual averments, allegations of negligence, and/or conclusions of law, making it difficult for OAI, OCA, and OMSC to answer these paragraphs. Accordingly, Plaintiffs’ Amended Complaint, as pled, should be dismissed pursuant to Rules 1028(a)(2) and 1022.

V. CONCLUSION

For the reasons set forth above, Defendants OAI, OCA, and OMSC respectfully request that this Honorable Court sustain their Preliminary Objections and enter the accompanying

proposed form of Order dismissing Plaintiffs' Amended Complaint.

Respectfully submitted,

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Dated 4/7/16

