UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

R.A.W. (RINNIGADE ART WORKS), LLC, and **CAMBRIDGE CUISINE LLC**, individually and behalf of all others similarly situated,

Plaintiffs,

v.

THE HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY; AND TWIN CITY FIRE INSURANCE COMPANY,

Defendants.

CASE NO.: 1:20-cv-10867-IT

CLASS ACTION

JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TWIN CITY'S MOTION TO DISMISS MULTISTATE CLASS ACTION CLAIMS

Plaintiffs R.A.W. (Rinnigade Art Works), LLC ("Rinnigade") and Cambridge Cuisine, LLC (Cambridge Cuisine")(collectively, "Plaintiffs") respectfully submit this Memorandum of Law in Opposition to the Motion to Dismiss Multistate Class Action Claims (the "Motion to Dismiss") filed by Defendant Twin City Fire Insurance Company ("Twin City").

INTRODUCTION

As the Court already indicated during the July 21 Scheduling Conference, Twin City's Motion to Dismiss Plaintiff's multistate class action claims is premature. This is so because it is well-settled that, until a class is certified, absent class members are treated as non-parties who are not before the Court. As such, as many courts have recognized, it is inappropriate to rule on their claims prior to class certification. This Court should follow these well-reasoned precedents and summarily deny Twin City's Motion to Dismiss for this reason alone.

Such a result would be particularly appropriate given the current procedural posture of this case. In this regard, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") is still considering whether to centralize all federal actions pending against Twin City and other companies affiliated with The Hartford concerning their refusal to provide business interruption insurance coverage during the COVID-19 pandemic in a single multidistrict litigation ("MDL"). If the MDL Panel, which is poised to decide whether to create such an MDL as soon as the end of September, Plaintiffs' claims in this case will likely be joined with many other plaintiffs' claims in a master complaint, nationwide discovery will ensue and class certification issues will be decided on a nationwide basis. As such, the creation of such an MDL would render Twin City's Motion to Dismiss moot and granting it now would accomplish nothing.

If the Court nevertheless reaches the jurisdictional issue raised by Twin City, it should deny the Motion to Dismiss on the merits. Twin City's Motion to Dismiss hinges entirely on whether

or not the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017)("*Bristol-Myers*"), bars Plaintiffs' multistate class action claims. However, as many courts, including this District and the Seventh Circuit have already ruled, *Bristol-Myers*, which concerned a mass action, does not apply to a class action.

For these reasons, discussed below, Twin City's Motion to Dismiss should be denied.

BACKGROUND

Plaintiff Rinnigade filed its original Class Action Complaint against Defendants on May 7, 2020. ECF No. 1. The original Class Action Complaint asserted claims against all Defendants for declaratory judgment, breach of contract and violation of Massachusetts General Laws Chapters 93A and 176D arising out of their refusal to provide insurance coverage for losses due to the COVID-19 pandemic and/or the actions of civil authorities prohibiting access to class members' businesses during the COVID-19 pandemic. On July 13, Defendants The Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company moved to dismiss the claims against them based on, among other things, lack of contractual privity. ECF No. 16. Twin City simultaneously moved to dismiss Rinnigade's claims brought on behalf of class members outside Massachusetts on the basis that the Court did not have personal jurisdiction over those claims. ECF No. 18.

The Court held a Scheduling Conference on July 21, during which Rinnigade's counsel indicated that Rinnigade intended to file an amended complaint that might render Defendants' motions to dismiss moot. *See* ECF No. 30. On July 27, Rinnigade filed a response to the pending motions to dismiss confirming its intent to file an amended Complaint. ECF No. 31. As promised, on August 3, Rinnigade filed a First Amended Class Action Complaint (the "First Amended Complaint"). ECF No. 32. On August 4, the Court issued an Order terminating Defendants' then-

pending motions to dismiss as moot. ECF. No. 33.

Among other things, the First Amended Complaint: (1) added Plaintiff Cambridge Cuisine, (2) added factual allegations further detailing the unfair claims settlement practices of all Defendants, and (3) modified the proposed class definitions and causes of action to (i) assert claims for declaratory relief and breach of contract on behalf of multistate classes against Twin City only and (ii) assert a claim for violation of Massachusetts General Laws Chapters 93A and 176D on behalf of a Massachusetts-only class against all Defendants.

Although Plaintiffs did consider Twin City's original motion to dismiss for lack of personal jurisdiction, they determined that it was both premature and without merit. Accordingly, Plaintiffs did not amend the original Class Action Complaint in response to that motion.

Defendants The Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company did not file a renewed motion to dismiss in response to the First Amended Complaint. Twin City, on the other hand, again moved to dismiss the multistate class claims. However, as explained below, Twin City's renewed Motion to Dismiss based on personal jurisdiction suffers from the same defects as its original motion to dismiss and should therefore be denied.

Meanwhile, as noted above, the MDL Panel is still considering whether or not to centralize all actions pending against The Hartford in a single MDL. In this regard, on August 12, 2020, the MDL Panel denied two motions for transfer seeking to centralize all federal litigation concerning insurers' refusals to provide business interruption insurance coverage in a single MDL but issued Orders to Show Cause as to why separate single-insurer MDLs should not be created as to litigation brought against four insurers, including The Hartford. *See In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2942, 2020 WL 4670700 (J.P.M.L. Aug. 12, 2020).[1] The MDL

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[1] On August 26, Plaintiffs in the present action submitted their response to the applicable Order to Show Cause opposing the creation of such an MDL but, if one is created, requesting centralization

Panel will hear oral argument on the Orders to Show Cause at its next hearing session on September 24. *Id.*, at *3.

ARGUMENT

A. Twin City's Motion to Dismiss Is Premature

As discussed during the July 21 Scheduling Conference, it would be premature for the Court to rule on the question of whether it has personal jurisdiction over businesses included in Plaintiffs' proposed classes that are located outside Massachusetts at the motion to dismiss stage. As the Court correctly recognized during the Scheduling Conference, that question is properly addressed at the class certification stage.

Indeed, as Twin City concedes (Def. Mem. at 12)[2], courts routinely defer the question of whether they have personal jurisdiction over nonresident class members until the class certification stage. This is so because, until a class is certified, absent class members are treated as non-parties who are not before the court. *See, e.g., Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F. 3d 240, 250 (5th Cir. 2020)(a personal jurisdiction defense is not available for absent class members prior to class certification, when putative class members are brought before the court); *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) (same); *Rain v. Connecticut Gen. Corp.*,2019 WL 760485, at *4 (D. Mass. Aug. 6, 2019) (Mastroianni, J.) (same).

As Judge Mastroianni explained in ruling on motions to dismiss filed in *Rain*:

[I]t is premature at this stage to consider personal jurisdiction over Defendants as

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before this Court. *In re Hartford COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2963 (Plaintiffs R.A.W. (Rinnigade Art Works), LLC, Cambridge Cuisine, LLC and Pure Fitness, LLC's Response to Panel's Order to Show Cause (J.P.M.L. Aug. 26, 2020) (ECF No. 134). On the same day, The Hartford submitted papers in opposition to both the creation of such an MDL and centralization before this Court. *In re Hartford COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2963 (Hartford's Response in Opposition to Order to Show Cause Pursuant to 28 U.S.C. § 1407) (J.P.M.L. Aug. 26, 2020) (ECF No. 146).

[2] All references herein to "Def. Mem. at _" refer to pages in the Memorandum of Law in Support of Defendant Twin City's Motion to Dismiss Multistate Class Action Claims, ECF No. 36.

> to the claims of non-resident putative class members. As mentioned, no motion for class certification has been filed yet. As a result, this action as presently situated is only brought on behalf of the named plaintiff. *See Cruz v. Farquharson*, 252 F.3d 530, 534 (1st Cir. 2001) ("Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs...."); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (describing as "novel and surely erroneous" the "argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*" (internal quotation marks omitted)). Personal jurisdiction is concerned with the court's power over parties. *See Swiss Am. Bank*, 274 F.3d at 617. Here, however, Defendants challenge the court's *potential* invocation of personal jurisdiction over them with regard to *potential* members of a class who reside outside of Massachusetts and, thus, according to Defendants, whose claims are not sufficiently related to the forum state. But the appropriate time to engage in that inquiry, in the court's view, is at the class certification stage, when Plaintiff seeks to transform this action from a traditional suit on her own behalf (as the representative of the Ms. Crandall's Estate) to a class action in accordance with Rule 23. *See Evan v. Taco Bell Corp.*, 2005 WL 2333841, at *4 (D.N.H. Sept. 23, 2005) ("But unless and until the court certifies such a class, the potential claims of class members other than the named plaintiff are simply not before the court."); *see also Bank v. CreditGuard of Am.*, 2019 WL 1316966, at *12 (E.D.N.Y. Mar. 22, 2019) (declining to decide whether *Bristol-Meyers Squibb* bars claims of non-resident putative class members, as "there are no actual 'non-forum state plaintiffs' or putative class members to speak of yet in this case, making Defendants' motion to dismiss or strike patently premature"); *Chernus v. Logitech, Inc.*, 2018 WL 1981481, at *8 (D.N.J. Apr. 27, 2018) ("At this stage of the litigation, no class has been certified, and therefore, to determine whether this Court has specific jurisdiction over Defendant with respect to the claims of unnamed class members prior to class certification would put the proverbial cart before the horse. In other words, because the class members are not yet parties in this case—and they may not be—absent class certification, I need not analyze specific jurisdiction with respect to their claims.").

Rain, 2019 WL 760485, at *4. This analysis, which is consistent with the reasoning of other courts who have considered motions to dismiss the claims of absent class members, applies equally to the present case. Accordingly, Twin City's Motion to Dismiss should be summarily denied.

Although the Court does not need another reason to deny Twin City's Motion to Dismiss, it would also be premature to address the question of whether the Court has personal jurisdiction over the claims of businesses located outside Massachusetts for the additional reason that the MDL Panel is still considering whether or not to centralize all federal litigation against The Hartford

concerning its refusal to provide business interruption insurance coverage, including the present case. Indeed, the Panel could order the creation of an MDL of all such litigation before the end of September. Thus, as a practical matter, granting Twin City's Motion to Dismiss now would accomplish nothing because the creation of a nationwide MDL for all similar litigation brought against The Hartford would likely require the filing of a single master complaint including plaintiffs from many states, nationwide discovery and the resolution of class certification issues on a nationwide basis. As such, Twin City's stated concerns regarding due process and discovery burdens (Def. Mem. at 1, 10-15) are wholly speculative at this juncture and may be rendered moot in the very near future by the creation of an MDL.[3] Tellingly, Twin City completely fails to mention the MDL proceedings in its Motion to Dismiss.

B. This Court Has Personal Jurisdiction Over Plaintiffs' Multistate Class Claims

Twin City argues that this Court does not have personal jurisdiction with respect to the claims Plaintiffs brings on behalf of class members outside Massachusetts based on the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). Def. Mem. at 6-10. This argument fails as a matter of law.

Despite Twin City's assertion that "*Bristol-Myers Squibb* is Not Distinguishable" (Def. Mem. at 6), this District, among others, has already held that the *Bristol-Myers* decision does not apply to class actions. *Rosenberg v. LoanDepot.com LLC*, 435 F.Supp.3d 308, 326 (D.Mass. 2020)(Gorton, J.); *Munsell v. Colgate Palmolive Co.*, No. 19-12512-NMG, 2020 WL 2561012, at * 7-8 (D.Mass. May 20, 2020)(Gorton, J.). In fact, the large majority of District Courts to

[3] To be sure, if this case does not become part of an MDL, future disputes regarding the scope of discovery and class certification can be properly addressed by this Court as they arise, just as the Court suggested during the Scheduling Conference. However, at present, there are no such disputes before the Court.

address the issue have held that *Bristol-Myers* does not apply to class actions; accordingly, the courts do not analyze the issue of jurisdiction with respect to unnamed class members. *See, e.g., In re Chinese-Manufactured Drywall Prods. Liability Litig.*, 2017 U.S. Dist. WL 5971622, *31-43 (E.D. La. Nov. 30, 2017); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 U.S. Dist. WL 4224723, at *13-16 (N.D. Cal. Sept. 22, 2017); *Cabrera*, 2019 U.S. Dist. WL 1146828, at *16-20; *Personal Allen v. ConAgra Foods, Inc.*, 2018 U.S. Dist. WL 6460451, *16-20 (N.D. Cal. Dec. 10, 2018); *Casso's Wellness Store & Gym LLC v. Spectrum Lab. Prods., Inc.*, 2018 U.S. Dist. WL 1377608, at *11-16 (E.D. La. Mar. 19, 2018); *Feller v. Transamerica Life Ins. Co.*, 2017 U.S. Dist. WL 6453262, *46-49 (C.D. Cal. Dec. 11, 2017); *In re Morning Song Bird Food Litig.*, 2018 U.S. Dist. WL 1382746, at *10-17 (S.D. Cal. Mar.19, 2018); *Branca*, 2019 U.S. Dist. WL 1082562, at *36-38; *Gress v. Freedom Mortg. Corp.*, 386 F. Supp. 3d 455, 464-465 (M.D. Pa. 2019); *Hicks v. Hous. Baptist Univ.*, 2019 U.S. Dist. WL 7599887, at *15-19 (E.D.N.C. Jan. 3, 2019). Furthermore, the Seventh Circuit recently reached the same conclusion. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020) ("named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.").

As these decisions recognize, *Bristol-Myers* is inapplicable to class actions for two primary reasons. First, *Bristol-Myers* involved a mass tort action which is "fundamentally distinguishable from a class action" because mass tort cases involve individual named plaintiffs who are real parties in interest whereas in a class action, the named plaintiff is the only real party in interest for jurisdictional purposes. *Rosenberg*, 435 F.Supp.3d at 326. *See also Munsell*, 2020 WL 2561012, at * 7-8. Indeed, in her dissent in *Bristol-Myers*, Justice Sotomayor recognized that the court's decision did not address whether the jurisdictional analysis applied in the context of a

class action. *Bristol-Myers*, 137 S. Ct. at 1789 n. 4. Second, a class action, unlike a mass tort action, requires the satisfaction of "additional due process standards for certification under Fed. R. Civ. P. 23." *Id.* Based on these "inherent differences" between mass tort cases and class actions, and the "well-reasoned caselaw holding that the [*Bristol-Myers*] case does not apply in the class action context", this District has expressly rejected the exact argument that Twin City makes here. *Rosenberg*, 435 F.Supp.3d at 326; *Munsell*, 2020 WL 2561012, at * 7-8.

While Twin City recognizes that this District and other courts have rejected their arguments, they ask this Court to go against the weight of authority in this case. Def. Mem. at 6-10. Yet there is no reason to depart from these well-reasoned decisions. The only decisions Twin City cites dismissing claims brought on behalf of nonresident absent class members (Def. Mem. at 6) are all from other Districts, represent a minority view that has already been rejected in this District, and do not control here. *See Wenokur v. AXA Equitable Life Ins. Co.*, 2017 WL 4357916, at *4 n.4 (D.Ariz. Oct. 2, 2017); *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 724 (E.D. Mo. 2019); *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1036 (S.D. Cal. 2020); *Zuelsdorf v. FCA US LLC*, 2019 WL 2098352, at *15 (C.D. Cal. Apr. 30, 2019). Significantly, of these decisions, only one was issued in the context of an MDL and is distinguishable for the additional reason that it dealt with claims alleged in a "94-Count Crop Damage Master Complaint" that was filed *after* the creation of the MDL. *In Re Dicamba Herbicides Litigation*, 359 F. Supp. 3d at 718. As such, if this decision is relevant at all, it merely confirms that Twin City's Motion to Dismiss is premature.

Twin City's citations to decisions involving collective action claims under the Fair Labor Standards Act (*see* Def. Mem., at 6 n.2) are similarly misplaced because, as those courts recognized, collective actions are more akin to mass tort actions than class actions because only

plaintiffs that opt-in are real parties in interest to the litigation. *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43, 51-61 (D. Mass. 2018)); *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 850 (N.D. Ohio 2018).[4]

Thus, if the Court reaches the question of whether it has personal jurisdiction over Plaintiffs' multistate class claims, as in *Rosenberg and Munsell*, the Court should decline to apply the *Bristol-Myers* analysis to this class action and exercise jurisdiction over those claims.

CONCLUSION

For all the foregoing reasons, Twin City's Motion to Dismiss should be denied.

Dated: August 31, 2020

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[4] Twin City is also not aided by it citation to *In re Dental Supplies Antitrust Litig.*, 2017 U.S. Dist. WL 5574376, at *33-38 (E.D.N.Y. Sept. 20, 2017)(*see* Def. Mem. at 8), which addressed the application of *Bristol-Myers* to the named plaintiff's claims in a putative class action where those claims were deemed unrelated to the defendant's activities in the forum state. *See Munsell*, 2020 WL 2561012, at * 7.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF on August 31, 2020.

/s/ Patrick J. Sheehan
Patrick J. Sheehan