UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE EYE CARE CENTER OF NEW JERSEY, PA, on behalf of itself and all others similarly situated, Plaintiff, v. TWIN CITY FIRE INSURANCE COMPANY, Defendant.	Civil Action No. 20-5743(KM)(ESK)

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS NATIONAL CLASS

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PRELIMINARY STATEMENT

Defendant Twin City Fire Insurance Company's[1] ("Twin City") first-filed 12(b) motion is to dismiss Plaintiff The Eye Care Center Of New Jersey, PA's ("Eye Care") allegations relating to a putative national class because Eye Care purportedly does not have standing to assert claims on behalf of persons other than from New Jersey, and because there would be no personal jurisdiction over Twin City with respect to the claims of absent class members. This motion is both procedurally improper and substantively meritless.

By way of background, Twin City issued business interruption insurance to Eye Care. After Eye Care's business was completely shut-down as a result of Gov. Murphy's stay-at-home orders, Eye Care filed a claim under its business interruption insurance policy with Twin City. Twin City denied Eye Care's claim, contending, *inter alia*, that Eye Care had suffered no "direct physical loss or damage", which would trigger its business interruption coverage, and that its claim was subject to an exclusion for harm caused by viruses. Eye Care has asserted claims on its own behalf and on behalf of a nationwide class of insureds who were similarly denied business interruption claims by Twin City arising from stay-at-home orders.

Defendant concedes that Plaintiff has standing to assert its own claims against Defendant and there is personal jurisdiction over it in New Jersey with respect to Plaintiff's own claims. Rather, this motion attacks Plaintiff's ability to assert claims on behalf of insureds from states other than New Jersey. This motion is procedurally improper because it is, in essence, a reverse class certification motion, which courts in this District routinely deny as premature.

More substantively, Defendant's contention that Plaintiff does not have standing to assert claims on behalf of a nationwide class is based upon misdirection and reliance upon cases relating

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[1] Twin City is a Hartford insurance company.

to consumer protection class-actions, not authorities addressing claims arising under uniform contract forms. In addition, as is explained below, whether there is personal jurisdiction over Twin City with respect to claims of absent class members is simply not a relevant consideration with respect to any personal jurisdiction analysis. Thus, for the reasons explained below, Twin City's motion to dismiss Eye Care's national class allegations should be denied.

LEGAL ARGUMENT

I

TWIN CITY'S MOTION TO DISMISS EYE CARE'S NATIONAL CLASS ALLEGATIONS SHOULD BE DENIED

a) Applicable Legal Standard

Upon a facial challenge under Article III to jurisdiction under Rule 12(b)(1), the Court accepts all material allegations as true and "draws all reasonable inferences" from those allegations in the plaintiffs' favor. *See In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 632–33 (3d Cir. 2017); *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 356 n.12 (3d Cir. 2014). Standing requires that a party seeking to invoke federal jurisdiction demonstrate standing for each claim he seeks to press. *Neale v. Volvo of N. Am., LLC.*, 794 F.3d 353, 359 (3d Cir. 2015) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). In the class action context, the "case or controversy" requirement of standing is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class. *Neale*, 794 F.3d at 362. Once Article III has been satisfied for the representative plaintiffs, "the issue becomes one of compliance with the provisions of Rule 23, not one of Article III standing." *Id.* at 361. Where a standing issue would not arise but for class certification, those class certification issues are logically antecedent to Article III standing and should be decided in advance of any standing issues. *Ortiz v. Fibreboard Corp*. 527 U.S. 815, 831 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). Said differently, if the standing issue in question arises solely because of class certification, then the class certification issue should be decided first and the standing question is determined with respect to the class as a whole, not just with respect to the named plaintiffs. *Clark v. McDonalds,*

Inc., 213 F.R.D. 198, 204 (D.N.J. 2003) (quoting *Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002)).

b) The Court Should Follow Its Own Prior Decisions And Defer Standing Issues Until Class Certification

Twin City urges the Court to reject the line of cases deferring consideration of whether a named plaintiff can assert claims under the law of states other than the state where they reside, and follow the line of cases that follow a contrary position, rejecting the idea that a plaintiff can ever assert claims under the law of states other than where they live.[2] However, this Court has already ventured into this disputed territory and determined that

> a more prudent approach would be to defer consideration of this argument [whether non-resident plaintiffs have standing to bring claims] until the certification stage. To the extent the proposed class is not certified, or is limited, many of these issues might be rendered moot. I here follow the lead of other cases that have declined to address similar issues in advance of class certification.

Rickman v. BMW of N.A., 2020 WL 3468250, at *11 (D.N.J. June 25, 2020). This reasoning is correct, and there is no reason for the Court to change its mind.

Twin City also relies heavily on this Court's decision in *Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304 (D.N.J. 2014), for the proposition that a plaintiff can never bring claims on behalf of persons from a state other than where they live. *Dzlieak* says no such thing. Rather, the cited portions of *Dzielak* address the plaintiffs' consumer protection claims and what law should apply to the named plaintiffs' individual claims. In addition to the statutory consumer protection claims, the *Dzielak* plaintiffs asserted claims on behalf of a national class for breach of express warranty,

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[2] *See* Twin City Class Brief at 4-5 and n. 3 (citing *Ponzio v. Mercedes-Benz USA, LLC*, 2020 WL 1183733, at *14 (D.N.J. Mar. 11, 2020); *In re Magnesium Oxide Antitrust Litig,* 2011 WL 5008090, at *10 (D.N.J. Oct 20, 20110); *Federman v. Bank of Am., N.A.*, 2014 WL 12774688, at * 11 (D.N.J. Dec. 16, 2014); *McGuire v. BMW of N. Am. LLC*, 2014 WL 2566132, at *6 (D.N.J. June 6, 2014); *Sameran v. Blackberry Corp*, 2016 WL 3647966, at *6 (D.N.J. July 6, 2016); *In re Ductile Iron Pipe Fittings (DIPF) Indirect Purchaser Antitrust Litig.*, 2013 WL 5503308, at *11 (D.N.J. Oct 2, 2013)).

breach of implied warranty of merchantability and unjust enrichment. *See Dzlielak*, Civil Action No. 12-89, ECF 29 at 19, ¶48; 22, ¶72; 23, ¶77; 25, ¶85 (D.N.J. Apr. 30, 2012). The Court found ***no standing issues*** with respect to those claims, even though they were asserted on behalf of persons from states other than where the plaintiffs resided. Rather, it performed a choice-of-law analysis to determine what law should apply to each claim and determined which claims should proceed against which defendants. *See Dzielak*, 26 F. Supp. 3d at 321-31. With respect to the breach of express warranty claims, the Court found that there was a conflict of laws only with respect to Michigan law regarding privity, and thus applied New Jersey law with respect to the express warranty claims except for those arising under Michigan law. *Id.* at 322-23. With respect to the claim for implied warranty of merchantability, there was a conflict with respect to privity under Ohio, California, and Florida law. The Court dismissed the claims under the laws of those states for lack of privity, then proceeded to analyze whether there was a breach of implied warranty of merchantability under New Jersey law. *Id.* at 327-30. With respect to the unjust enrichment claims, the parties agreed that there was no conflict, so the Court applied New Jersey law to analyzing the merits of the claim. *Id.* at 330-31.

Following the Court's analysis in *Dzielak*, the first step in any choice-of-law analysis is to determine whether an actual conflict exists between potentially applicable laws. If there is no conflict, then there is no choice-of-law issue to be resolved, and the law of the forum applies. *P.V. v. Camp Jaycee*, 197 N.J. 132, 143 (2008); *Dzlielak*, 26 F. Supp. 3d at 332. Here, while Twin City complains throughout its brief that a New Jersey plaintiff asserting claims on behalf of a nationwide class would be completely improper, nowhere does it identify any conflicts between the laws of the State of New Jersey and the laws of any other potentially applicable law. Indeed, the law with respect to breach of contract claims is the same throughout the country. As one court

noted, "A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004). Moreover, standardized agreements, such as the insurance policies involved here, are to be "interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." Restatement (Second) of Contracts, § 211(2).

Simply put, Twin City has identified no conflict of law relating to the claims asserted in Eye Center's complaint. Without a conflict, New Jersey law would apply to all of the claims asserted in Eye Center's complaint. Thus, Twin City's contention that the claims of non-New Jersey class members arise under the laws of other states is actually false, since in the absence of a conflict of law, New Jersey law would apply to Eye Center's claims as well as the claims of all potential class members throughout the country.

c) Standing To Assert Claims On Behalf Of Residents Of Other States Is A Class Certification Issue

Even if the Court were inclined to revisit its decision in *Rickman*, it should stay the course because the line of cases holding that claims asserted by non-resident defendants must be dismissed for lack of standing are contrary to applicable law relating to standing and class certification, as well as contrary to logic and common sense.

In order to invoke the jurisdiction of a federal court, the plaintiff must demonstrate "1) ... an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The injury-in-fact requirement is intended to distinguish between a person with a with a direct stake in the outcome of the litigation, from a person with a mere interest in the problem, or to put it another

way, to filter out those with merely generalized grievances who are bringing suit to vindicate an interest common to the entire public. *Id.* A financial harm is a "classic" and "paradigmatic" form of injury in fact. *Id.* at 163. The injury must be both concrete and particularized, in that it must affect the plaintiff in a personal and individual way. *Id.* at 167.

Here, there is no question, and Twin City concedes, that Eye Care has standing to assert its own claims. Eye Center alleges a an injury in fact, that it was not paid its business interruption claim and, thus, suffered a monetary loss, it was Twin City that was supposed to pay the claim and did not, and that its injury is likely to be redressed by a favorable judicial decision, a judgment against Twin City for the amount Twin City should have paid for Eye Center's business interruption claim and did not.

With respect to claims that Eye Center is asserting on behalf of the putative class, *Amchem* held that any standing issues that would not exist but for class certification are "logically antecedent" to the existence of Article III standing and, thus, the class certification issues should be decided prior to examining standing. *Amchem*, 521 U.S. at 613; *Clark*, 213 F.R.D. at 204; *see also In re FieldTurf Artificial Turf Mktg. & Sales Practices Litig.*, 2018 WL 4188459, at *8 (D.N.J. Aug. 31, 2018) (whether plaintiffs have standing to assert claims for violation of laws of states where they do not reside is an issue that arises only if a national class is certified). As Judge Linares explained in *In re Liquid Aluminum Sulfate Antitrust Litig.*,

> The Court also rejects Defendants' argument that the named IPP Plaintiffs lack standing to bring state law claims under the laws of a state in which they do not reside. . . .As IPP correctly note, the United States Supreme Court has made it clear that District Courts should defer addressing standing questions concerning putative class members who are not named until after class certification when certification of the class is "logically antecedent" to the issue of standing. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 592, 612 (1997). It is true that class certification here is "logically antecedent" to the issue of standing. This is because class discovery will unveil the various members of the currently unknown class. Indeed, this Court has

> previously ruled on a nearly identical issue and declined to rule on standing until the Court addresses class certification.

2017 WL 3131977, at *19 (D.N.J. July 20, 2017) (citing *In re Hypodermic Prods. Antitrust Litig.*, 2007 WL 19559225, at *15 (D.N.J. June 29, 2007)); *Warma Witter Kreisler, Inc. v. Samsung Elecs. Am., Inc.*, 2009 WL 4730187, at *2 (D.N.J. Dec. 3, 2009)). As *Neale* explained, once Article III has been satisfied for the representative plaintiffs, which Eye Center concededly has, any other "standing" issues relate to compliance with Rule 23, not Article III standing. *Neale*, 794 F.3d at 359. Here, Article III standing has been conceded for the named plaintiff, so that is the end of the standing inquiry for the time being.

While obviously not binding on this Court, in *Langen v. Johnson & Johnson Consumer Cos., Inc.*, 897 F.3d 88 (2d Cir. 2018), the Second Circuit explained that whether a plaintiff has Article III standing to assert claims on behalf of putative class members from other states is really focusing on the wrong question. The issue is not whether the named plaintiff has standing to assert claims *in their individual capacity* on behalf of class members from other states. The issue is whether the named plaintiffs may assert claims *in a representative capacity* on behalf of class members from other states, which is purely a class certification issue under Rule 23.

> This approach of considering variations in state laws as questions of predominance under Rule 23(b)(3), rather than standing under Article III, makes sense. For one, it acknowledges the obvious truth that class actions necessarily involve plaintiffs litigating injuries that they themselves would not have standing to litigate. *See In re Bayer Corp.,* 701 F. Supp. 2d at 377[3] ("Whether the named plaintiffs have standing to bring suit under each of the state laws alleged is 'immaterial' because they are not bringing those claims on their own behalf, but are only seeking to represent other, similarly situated consumers in those states."). Since class action plaintiffs are not required to have individual standing to press any of the claims belonging to their unnamed class members, it makes little sense to dismiss the state law claims of unnamed class members for want of standing when there was no

[3] *In re Bayer Corp. Combination Aspirin Prods., Mktg, & Sales Practices Litig.*, 701 F. Supp. 2d 356 (E.D.N.Y. 2010).

> requirement that the named plaintiffs have individual standing to bring those claims in the first place. *See id.*

Langen, 897 F.3d at 95.

The First Circuit believed that *Lanigan* was in accord with its own decisions with respect to a resident's standing to assert claims on behalf of a non-resident. *In re Asacot Antitrust Litigation*, 907 F.3d 42, 50 (1st Cir. 2018).

> Our conclusion is in line with our prior precedent, in which we required only that a plaintiff make a single purchase in order to satisfy standing for a claim brought under multiple state laws. *See Nexium*, 777 F.3d at 31-32[4]. It also accords with direction from the Supreme Court that, once the named plaintiff establishes injury and membership in the class, the inquiry should shift "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' " *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed. 532 (1975) (quoting Fed.R.Civ.P. 23(a)).

Id. at 51. *Langen* also fits hand-in-glove with the Third Circuit's observation in *Neale* that with respect to standing, "Herein lies the key: a class action is a *representative* action brought by a named plaintiff or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court's jurisdiction and they are held accountable for satisfying jurisdiction." *Neale*, 794 F.3d at 364 (emphasis in original).

The Seventh Circuit has taken a somewhat different approach, but came to the same conclusion that the issue of whether a resident could assert claims on behalf of non-resident class members is not an Article III standing issue. In *Morrison v. YTB Intern., Inc.*, 649 F.3d 533 (7th Cir. 2011), the district court had dismissed the Illinois Consumer Fraud Act claims asserted on behalf of non-Illinois class members for lack of standing. *Id.* at 535. The Seventh Circuit held this analysis was incorrect.

> The district court's language was imprecise. There's no problem with standing. Plaintiffs have standing if they have been injured, the defendants caused that injury,

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[4] *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

> and the injury can be redressed by a judicial decision.. Plaintiffs allege that they are victims of a pyramid scheme that saddled them with financial loss, which YTB caused. The judiciary can redress that injury by ordering YTB to pay money to the victims. Nothing more is required for standing. If the Illinois Consumer Fraud Act law does not apply because events were centered outside Illinois, then plaintiffs must rely on some other state's law; this application of choice-of-law principles has nothing to do with *standing,* though it may affect whether a class should be certified—for a class action arising under the consumer-fraud laws of all 50 states may not be manageable, even though an action under one state's law could be. That a plaintiff's claim under his preferred legal theory fails has nothing to do with subject-matter jurisdiction.

Id. at 536 (emphasis in original).

In an ordinary case, a plaintiff is asserting only his or her own claims, so there is no issue whether they could assert claims under the laws of somewhere other than where they live, or at least that would not be applicable under a choice-of-law analysis. It goes without saying that Eye Center cannot assert claims in its own name on behalf of anyone else. It was not harmed if, for example, Twin City failed to pay some other insured from Indiana. That is Twin City's standing argument (Twin City Brief at 8), but Eye Center does not allege that it was individually harmed because Twin City did not pay some other insured, nor is that the real issue before the Court. The issue here, is whether Eye Center can assert claims in a representative capacity on behalf of other similarly situated Twin City insureds, whether they are from New Jersey or elsewhere. That is a standing issue that would not exist but for the fact that they are being asserted in a class action. Eye Care cannot assert claims on behalf of anyone else individually, but if it satisfies the criteria of Rule 23(a) and (b), it can assert claims on behalf of other insureds in a representative capacity. The question of whether it would be appropriate for Eye Care to assert claims on behalf of a national class under Rule 23 is "logically antecedent" to the issue of whether Eye Care *and the class* have standing to assert claims against Twin City.

Based upon the foregoing, the Court's analysis in *Rickman* was plainly correct. Any "standing" issues with respect to claims on behalf of absent class members are class certification issues, not Article III issues. The line of cases that Twin City urges the Court to follow did not necessarily come to the wrong answer, but it was the answer to the wrong question. The issue is not whether the named plaintiffs *in their individual capacities* have standing to assert claims arising under the laws of states other than where they reside. The issue is whether, *as class representatives*, they can assert claims on behalf of putative class members from other states. That is a question under Rule 23, not Article III standing. Indeed, whether a named plaintiff has standing to assert claims on behalf of *anyone else*, whether they might be from the same state, other states or Timbuktu, depends upon whether they satisfy the appropriate criteria under Rule 23. Cases such as this one involving form contracts "present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such." *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983); *see also Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67 (E.D.N.Y. 2004) (certifying national class for breach of insurance policy for use of "betterment" deduction form repair reimbursements based upon uniform policy language and uniform course of conduct.); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 695 (S.D. Fla. 1997) (certifying national class for failure to pay auto insurance Med Pay coverage.)[5]; 1 Newberg on Class Actions § 3.24 ("courts have noted that claims arising . . . out of form contracts are often particularly appropriate for class action treatment").

[5] In *Kleiner*, plaintiffs from Georgia and North Carolina were certified as representatives of a class with members from Georgia, North Carolina, Virginia, Tennessee and South Carolina. *Kleiner*, 97 F.R.D. at 694-95. *Steinberg* was a single-plaintiff case, with a plaintiff from New York representing a national class. *Steinberg*, 224 F.R.D. at 75-76. *Leszczynski* involved four Florida plaintiffs who were certified as representatives for a national class. 176 F.R.D. at 670-72.

Although the case did not address standing *per se*, holding that named plaintiffs have no standing to assert claims on behalf of class members from other states would run contrary to the reasoning in *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc). *Sullivan* involved claims that De Beers had illegally monopolized the diamond market. Those allegations were settled on a class basis with two classes, a nationwide class of direct purchasers settling claims for violation of the federal Sherman Act, and a multi-state class of indirect purchasers asserting claims under state antitrust, consumer protection and unjust enrichment statutes and the common law. *Sullivan*, 667 F.3d at 287. For the indirect purchasers, the plaintiffs (and class representatives for the settlement class) were two individuals from California and a California corporation. *Sullivan v. DB Investments*, Civil Action No. 04-2819 (SRC)(MAS), ECF No. 1, ¶¶ 4-6 (D.N.J. June 14, 2004); ECF No. 19-2 (Apr. 22, 2005); ECF No. 304 (May, 22, 2008).

In *Sullivan*, the Third Circuit set forth a number of criteria under which multi-state classes involving issues of state law could be certified under Rule 23, which include considerations of the variations in state law and whether states with similar laws could be grouped together. *Sulllivan*, 667 F.3d at 301-02. Even though Article III standing is a threshold question, since without an Article III case or controversy, there would have been no jurisdiction to decide the issues before them, *see Neale*, 794 F.3d at 358-59, the Third Circuit was unconcerned whether three California plaintiffs had Article III standing to assert claims on behalf of class members from over 30 other states. Rather, the Court's sole concern was whether common issues of law predominated. *Sullivan*, *id.* If the California plaintiffs in *Sullivan* had no standing to assert claims on behalf of class members from other states, then the *Sullivan* court had no power to decide what it decided. That is not a basic issue that the entire Third Circuit bench, including a spirited dissent, is likely to have overlooked. Moreover, the only way to reconcile *Sullivan* with Twin City's standing

theory is that the Sullivan plaintiffs had no standing to litigate claims on behalf of class members from other states, but they had the ability to settle claims on behalf of those very same class members. That scenario makes no sense.

II

THERE IS PERSONAL JURISDICTION OVER TWIN CITY WITH RESPECT TO CLAIMS OF ABSENT CLASS MEMBERS

Twin City also argues that the allegations regarding the proposed national class should be dismissed for lack of personal jurisdiction with respect to the claims of absent class members. According to Twin City, *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), precludes personal jurisdiction over it with respect to the claims of non-New Jersey class members. That is not the case.

In *Bristol-Myers*, over 600 consumers, most of whom were not from California, brought product liability suits in California relating to personal injury claims that they alleged resulted by their taking the drug Plavix. The Court found that there was no personal jurisdiction over Bristol-Myers Squibb with respect to the claims of non-California plaintiffs. The Court explained that personal jurisdiction must be examined on plaintiff-by-plaintiff basis and the fact that there is specific jurisdiction with respect to the claims of resident plaintiffs does not support specific jurisdiction over the claims of non-resident plaintiffs. 137 S. Ct. at 1381-82.

As an initial matter, as noted above, Twin City concedes that there is personal jurisdiction over it in New Jersey with respect to Eye Care's claims. Twin City's issue is personal jurisdiction over it with respect to the claims of unnamed, non-New Jersey class members. *Bristol-Myers* did not address personal jurisdiction in the class action context, and most courts considering the issue have held that it does not apply to class actions.

Bristol-Myers addressed a mass tort situation. Contrary to Twin City's assertion, it does not apply to class actions.

> [M]ost of the courts that have encountered this issue have found that *Bristol-Myers* does not apply in the federal class action context. But, more importantly, these cases universally held that in a putative class action 1) courts are only concerned with the

> jurisdictional obligations of the named plaintiffs; and 2) unnamed class members are irrelevant to the question of specific jurisdiction.

Chernus v. Logitech, 2018 WL 1981481, at *7 (D.N.J. Apr. 27, 2018) (compiling cases).[6] *Accord Gress v. Freedom Mort. Corp.*, 386 F. Supp. 3d 455, 464-65 (M.D.Pa. 2019) ("a majority of district courts who have faced these questions have determined that *Bristol-Myers Squibb* does not apply to class actions" (compiling cases)).

While the Third Circuit has not yet addressed the issue, the Seventh Circuit rejected outright the idea the *Bristol-Myers* applied to class actions.

> Before the Supreme Court's decision in *Bristol-Myers*, there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant. For cases relying on specific jurisdiction over the defendant, minimum contacts, purposeful availment, and relation to the claim were assessed only with respect to the named plaintiffs. Even if the links between the defendant and an out-of-state unnamed class member were confined to that person's home state, that did not destroy personal jurisdiction. Once certified, the class as a whole is the litigating entity, and its affiliation with a forum depends only on the named plaintiffs.
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> The Supreme Court has regularly entertained cases involving nationwide classes where the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional problem IQVIA raises. Although IQVIA and its *amici* insist that class actions have always required minimum contacts between all class members and the forum, this is nothing more than *ipse dixit.* Decades of case law show that this has not been the practice of the federal courts. What is true, however, is that this issue has not been examined closely. The current debate was sparked by the Supreme Court's decision in *Bristol-Myers*—a case that did *not* involve a certified class action, but instead was brought under a different aggregation device. A closer look at that decision illustrates why it does not govern here.

Mussat v. IQVIA, Inc., 953 F.3d 441, 445 (7th Cir. 2020) (internal citations omitted).

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[6] In *Chernus*, Judge Wolfson ultimately decided that the issue of whether there was personal jurisdiction over absent class members was not ripe because, prior to class certification, absent class members are not parties to the case. *Chernus*, 2018 WL 1981481, at *8. This is the same reasoning that the D.C. Circuit followed in *Molock*, *infra.*

The court then discussed the differences between the mass tort actions in *Bristol-Myers*. *Id.* at 445-47. In doing so, it rejected the argument advanced by Twin City here that "the reasoning of *Bristol-Myers* did not turn on the procedural nuances of a California mass action." (Twin City Brief at 14):

> Procedural formalities matter, however, as the Supreme Court emphasized in *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161, 171 L.Ed. 155 (2008), where it stressed the importance of class certification as a pre-requisite for binding a nonparty (including an unnamed class member) to the outcome of a suit. *Id.* at 894, 128 S.Ct. 2161. With that in mind, it rejected the notion of "virtual representation" as an end-run around the careful procedural protections outlined in Rule 23. *Id.* at 901, 128 S.Ct. 2161. Class actions, in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class.
>
> *Bristol-Myers* neither reached nor resolved the question whether, in a Rule 23 class action, each unnamed member of the class must separately establish specific personal jurisdiction over a defendant. In holding otherwise, the district court failed to recognize the critical distinction between this case and *Bristol-Myers*. The *Bristol-Myers* plaintiffs brought a coordinated mass action, which as we noted earlier does not involve any absentee litigants. In a section 404 case, all of the plaintiffs are named parties to the case. The statute allows the trial court to consolidate their cases for resolution of shared legal issues before moving on to individual issues. In a Rule 23 class action, by contrast, the lead plaintiffs earn the right to represent the interests of absent class members by satisfying all four criteria of Rule 23(a) and one branch of Rule 23(b). The absent class members are not full parties to the case for many purposes.

Id. at 446-47.

In different contexts, the D.C. Circuit and Fifth Circuits have concluded that the issue of personal jurisdiction over absent class members does not arise until a class is certified, since until a class is certified, putative class members are not parties to the litigation.[7] In *Molock v. Whole*

[7] This is in accord with Third Circuit law. *See North Sound Capital LLC v. Merck & Co., Inc.*, 938 F.3d 482, 492 (3d Cir. 2019) ("It is axiomatic that an unnamed class member is not 'a party to the class-action litigation before the class is certified.'" (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011)).

Foods Market Group, Inc., 952 F.3d 293 (D.C. Cir. 2020)[8], the D.C. Circuit noted that while class members of certified classes are treated as parties to the litigation for some purposes, but not for others, "putative class members—at issue in this case—are *always* treated as nonparties." *Id.* at 297 (emphasis in original). As a result, the court found that the defendant's motion to dismiss the claims of non-resident putative class members for lack of personal jurisdiction was premature. *Id.* at 298. "Motions to dismiss nonparties for lack of personal jurisdiction are thus premature—not to mention 'novel and surely erroneous.'" *Id.* (quoting *Smith*, 364 U.S. at 315.

In *Cruson v. Jackson National Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020), the Fifth Circuit was presented with the issue of whether the defendant had waived the defense of lack of personal jurisdiction under Rule 12(h) with respect to the claims of absent class members by failing to raise it in its answer or with its initial Rule 12 motions. *Id.* at 250-51. The court found that the defense had not been waived because it was not "available" at the time the initial Rule 12 motions were filed since putative class members are not parties to the litigation prior to class certification. *Id.* at 251. While the Fifth Circuit found that the district court's holding that the defendant had waived its personal jurisdiction defense was erroneous, *id.* at 250-52, it took no position as to the merits of the personal jurisdiction argument, other than to note that there was a split of opinion on the issue. *Id*. at 247, n. 4.

Twin City insists that the personal jurisdictional issue be decided now, notwithstanding the authorities cited above that hold personal jurisdiction with respect to absent class members is not an issue until a class is certified. If the Court is inclined to rule on the merits of Twin City's

[8] Twin City quotes extensively from the dissenting opinion in *Molock* as to why deciding personal jurisdictional issues before class certification is not premature.. (*See* Twin City Brief at 14-15, 17) Eye Care relies upon the *Molock* majority's explanation as to why the dissent is incorrect. *See Molock*, 952 F.3d at 300.

arguments now, then Twin City's motion should be denied because *Bristol-Myers* does not apply to the claims of unnamed class members. Eye Care respectfully suggests that the Seventh Circuit's reasoning in *Mussat* is persuasive, and is in accord with the majority of district court decisions on the issue, including decisions from this District.

Moreover, as is noted above, members of a certified class are not "parties" to the litigation for all purposes. In particular, absent class members are not "parties" for jurisdictional purposes. *See Dewey v. Volkswagen AG*, 681 F.3d 170, 180-81 (3d Cir. 2012); *Molock*, 952 F.3d at 297. It would be anomalous for absent class members to be non-parties for subject matter purposes, which goes to the power of the Court to decide the matter, but parties for purposes of personal jurisdiction and a determination with respect to the convenience of the defendant, not the convenience of the absent class members. Moreover, in class actions, personal jurisdiction over the defendant is determined with respect to only the named plaintiffs. *See Chernus*, 2018 WL 1981481, at *7 (collecting cases). It makes little sense that a certified class would contain the seeds of its own destruction if a class could satisfy all of the criteria of Rule 23, particularly with respect to predominance of common legal and factual issues, and "the desirability or undesirability of concentrating the claims in the particular forum", only to have the claims of portions of the already certified class dismissed because there was suddenly no personal jurisdiction over the claims of some of the unnamed class members. Indeed, it would seem to "serve the interstate judicial system's interest in obtaining the most efficient resolution of controversies", (Twin City Brief at 19 (quoting *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 477 (1985), to have all of the claims in a certifiable class heard in one action, rather than certifying a class, then breaking it up for lack of personal jurisdiction over some of the class members.

CONCLUSION

For the reasons set forth above, Twin City's motion to dismiss Eye Care's national class allegations should be denied.

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