UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

RODZIK LAW GROUP, PLLC; BAU PRINT AND MAIL, INC., and CATARACT CONSULTANTS, PA, *individually and on behalf of others similarly situated,* Plaintiffs, -v- HARTFORD CASUALTY INSURANCE COMPANY; and SENTINEL INSURANCE COMPANY, LTD., Defendants.	Case No. 7:20-CV-00224 **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' NATIONWIDE CLASS ACTION CLAIMS

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Pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(2) and Local Rule 7.2, defendants Hartford Casualty Insurance Company ("HCIC") and Sentinel Insurance Company, Ltd. ("Sentinel") respectfully submit this brief in support of their Motion to Dismiss Nationwide Class Action Claims.

NATURE OF THE CASE

Rodzik Law Group, PLLC, BAU Print & Mail, Inc., and Cataract Consultants, PA (collectively, "Plaintiffs") have brought suit against Hartford Casualty Insurance Company ("HCIC") and Sentinel Insurance Company under insurance policies that Plaintiffs read to cover lost business income stemming from COVID-19, which is caused by the novel coronavirus, SARS-Cov-2. Plaintiffs also seek to represent a nationwide class of HCIC and Sentinel insureds. But there is a problem: Plaintiffs are North Carolina companies, organized under North Carolina law and located in North Carolina, suing under North Carolina insurance policies. Plaintiffs lack standing and this Court lacks personal jurisdiction over HCIC and Sentinel with respect to Plaintiffs' claims on behalf of insureds in other States under the law of other States. HCIC and Sentinel therefore move to dismiss Plaintiffs' nationwide class action claims under Federal Rule of Civil Procedure 12(b)(1) and (b)(2).

STATEMENT OF THE FACTS

Rodzik Law Group, PLLC, BAU Print & Mail, Inc., and Cataract Consultants are all companies organized under the laws of North Carolina with principal places of business in New Hanover County, North Carolina. ECF No. 12 ("Am. Compl.") ¶¶ 5-7. HCIC is allegedly an Indiana company, and Sentinel a Connecticut company, both with principal places of business in Connecticut. Am. Compl. ¶¶ 8-9. Plaintiffs allege that HCIC issued a commercial property insurance policy for Rodzik and that Sentinel issued such policies for BAU and Cataract that

cover loss or damage to their North Carolina premises, including for business interruption. *See* Am. Compl. ¶¶ 27-45. Plaintiffs claim that their policies cover losses they suffered from COVID-19 and that HCIC and Sentinel wrongly denied coverage.

Plaintiffs do not claim to have any offices or other facilities outside North Carolina, and they allege no interaction with HCIC or Sentinel outside North Carolina. And the amended complaint does not identify other putative class representatives outside North Carolina, or any contacts inside the State of North Carolina between out-of-State class members and HCIC or Sentinel. Yet Plaintiffs seek to bring claims for breach of contract and for declaratory judgments on behalf of nationwide classes. *See* Am. Compl. ¶¶ 62, 72-89.

ARGUMENT

The Court should dismiss the nationwide class claims for two reasons. *First*, Plaintiffs lack standing to pursue claims under other States' laws on behalf of out-of-State policyholders who have had no contact with HCIC or Sentinel in North Carolina. *Second*, the Court does not have personal jurisdiction over HCIC or Sentinel with respect to Plaintiffs' claims purportedly on behalf of out-of-State class members, since HCIC and Sentinel are not subject to North Carolina's general jurisdiction and there is no specific jurisdiction as to claims with no connection to North Carolina. The nationwide class claims should therefore be dismissed under Rule 12(b)(1) and (b)(2). *See also* Fed. R. Civ. P. 23(c)(1)(A) (court must determine whether to certify class action "[a]t an early practicable time"), (d)(1)(D) ("[T]he court may … require that the pleadings be amended to eliminate allegations about representation of absent persons.").

I. Plaintiffs Lack Standing To Pursue Nationwide Claims

Plaintiffs have no standing to represent the interests of putative class members that contracted with HCIC and Sentinel outside North Carolina. The Constitution limits the federal courts to adjudicating actual cases or controversies, *see* U.S. CONST. art. III, § 2, which includes

the requirement that plaintiffs, "based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States." *Pye v. United States*, 269 F.3d 459, 466 (4th Cir. 2001). Accordingly, a challenge to standing is properly brought as a "motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). Because standing is "an indispensable part of the plaintiff's case," it is Plaintiffs that "bears the burden of proof" with respect to each element of standing. *Id.* (citation omitted).

The Supreme Court's "standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The Court has explained that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of *the particular claims* asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added). And the fact "[t]hat a suit may be a class action ... adds nothing to the question of standing." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)); *see also Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252 (4th Cir. 2020) ("The strictures of Article III standing are no less important in the context of class actions."). A named class "plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the

class." (citations omitted)); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."). And, again, this requirement applies "for *each* claim" that a named plaintiff "seeks to press." *DaimlerChrysler*, 547 U.S. at 352 (emphasis added).

Under this precedent, courts in this Circuit have held that "a purported class claim that does not identify a named plaintiff with standing to pursue the claim is subject to dismissal." *Manigault-Johnson v. Google, LLC*, 2019 WL 3006646, at *3 (D.S.C. Mar. 31, 2019). In *Google*, South Carolina named plaintiffs purported to bring claims on behalf of an out-of-State class based on another State's constitutional law. On defendants' motion to dismiss the out-of-State claim (and more), the court held that "Plaintiffs' proposed class claim" under out-of-State constitutional law "fails for the simple reason that Plaintiffs' complaint does not identify *a named plaintiff* with standing to pursue this claim." *Id.* Instead, since "the named Plaintiffs are South Carolina residents, … they cannot maintain this cause of action under" the law of another State. *Id.* Thus, the court concluded that the plaintiffs "lack standing to bring their … cause of action" under another State's law and, "accordingly, … dismisse[d] this claim for lack of subject matter jurisdiction." *Id.* Under this reasoning, "courts in the Fourth Circuit have dismissed claims brought under the laws of states in which no named plaintiff is alleged to have been harmed." *Mayor & City Council of Baltimore v. Actelion Pharm., Ltd.*, 2019 WL 4805677, at *8 (D. Md. Sept. 30, 2019), *appeal docketed*, No. 19-2233 (4th Cir. Nov. 5, 2019); *Hassan v. Lenovo (United States), Inc.*, 2019 WL 123002, at *2 (E.D.N.C. Jan. 7, 2019); *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 409 (D. Md. 2012).

Under this reasoning, Plaintiffs lack standing to represent the interests of out-of-State putative class members. Plaintiffs exist in one State and purchased insurance from HCIC or Sentinel in one State: North Carolina. The claims that any nonresident putative class members may have arise under the laws of the States governing their particular contracts. After all, a "claimed right to insurance coverage is a creation of state contract law." *In re U.S. Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997); *cf. Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (concluding "plaintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts"). If HCIC or Sentinel has breached another State's contract law—which they deny—Plaintiffs have suffered no harm from it. To permit three North Carolina businesses to assert breaches of *other* States' contract laws on behalf of a nationwide class would allow Plaintiffs to raise claims that they individually lack standing to bring—an approach at odds with Article III and decisions in this Circuit. Plaintiffs thus lack standing to assert common-law claims for breach of contract (or seek declaratory relief as to the meaning of contracts) under the laws of States for which they have no connection and for alleged breaches that have caused them no harm. Plaintiffs' nationwide claims should therefore be dismissed.

And the nationwide claims are properly dismissed now. In *Google*, the court rejected the view that determining a named plaintiff's standing to assert out-of-State claims could wait until class certification. The plaintiffs there "urge[d] the Court to ignore this defect because Rule 23 does not provide a specific timeline for identifying a named representative of a subclass," but the court was "not convinced by Plaintiffs' argument" and instead decided the issue on a motion to dismiss. 2019 WL 3006646, at *3. That conclusion is correct, since it is a "threshold question [whether] the plaintiffs are without standing to maintain [an] action or to represent the class or

classes allegedly adversely affected." *Donohoe v. Duling*, 465 F.2d 196, 199 (4th Cir. 1972); *see also Miller v. Pac. Shore Funding*, 287 B.R. 47, 51-52 (D. Md. 2002) ("Standing to sue is an essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made." (citation omitted)), *aff'd*, 92 F. App'x 933 (4th Cir. 2004). Absent such a requirement that standing be established at the beginning of a case, "a plaintiff would be able to bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states and drag[] defendants into expensive nationwide class discovery, potentially without a good-faith basis." *Actelion Pharm.*, 2019 WL 4805677, at *8 (quoting *In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090, at *10 (D.N.J. Oct. 20, 2011)). And to what end? "At the conclusion of that discovery, the plaintiffs would apply for class certification, proposing to represent the claims of parties whose injuries and modes of redress they would not share," thus requiring the Court to "indulge in the prolonged and expensive implications of the plaintiffs' position only to be faced with the same problem months down the road." *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 155 (E.D. Pa. July 30, 2009). "That would present the precise problem that the limitations of standing seek to avoid." *Id.* Little wonder, then, that courts in this Circuit have consistently concluded that it is appropriate to "resolve [a] standing challenge before class certification." *Zaycer*, 896 F. Supp. 3d at 407; *see also Actelion Pharm.*, 2019 WL 4805677, at *9.

The issue is, therefore, properly considered at this stage. And it is properly resolved by dismissing Plaintiffs' claims purportedly asserted on behalf of nonresident unnamed class members for lack of standing.

II. This Court Lacks Personal Jurisdiction Over HCIC And Sentinel For Plaintiffs' Claims Brought On Behalf Of Nonresident Class Members

Plaintiffs' lack of standing suffices as a basis to dismiss the nationwide class claims.

Lack of personal jurisdiction supplies a second, independent basis for the same relief. This Court's personal jurisdiction over HCIC and Sentinel derives from their specific contacts with the forum—that is, their policies insuring Plaintiffs' North Carolina businesses. HCIC and Sentinel do not contest the Court's personal jurisdiction over them for the claims of North Carolina policyholders like Rodzik, BAU, and Cataract. But this Court has no personal jurisdiction over HCIC or Sentinel for claims with no connection to the State of North Carolina.

"Exercises of personal jurisdiction" are limited "by due process constraints on the assertion of adjudicatory authority." *Daimler AG v. Bauman*, 571 U.S. 117, 121-122 (2014); *Walden v. Fiore*, 571 U.S. 277, 283 (2014) ("The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts."). Federal courts "follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG*, 571 U.S. at 125 (citing Fed. R. Civ. P. 4(k)(1)(A)). Thus, federal due process and the law of the forum state set the limits for this Court's exercise of personal jurisdiction—a single inquiry here, since "North Carolina's long-arm statute is construed to extend jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause." *Christian Sci. Bd. of Dirs. of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001).

On a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the plaintiff bears the burden to demonstrate that personal jurisdiction exists. *See Grayson v. Anderson*, 816 F.3d 262, 267 (4th Cir. 2016). Personal jurisdiction over a defendant may be "general or all-purpose jurisdiction" or "specific or case-linked jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

A. The Court Lacks General Jurisdiction Over HCIC and Sentinel

General jurisdiction—by which a defendant is subject to *any* suit—exists only where a

defendant is "essentially at home." *Goodyear*, 564 U.S. at 919. For "a corporation, the place of incorporation and principal place of business" are the paradigmatic locations. *Daimler AG*, 571 U.S. at 137. Otherwise, to be subject to general jurisdiction, a corporation's contacts must "render them essentially 'at home' in the forum state," which could occur only in an "exceptional case." *Id.* at 139 & n.19. Both HCIC and Sentinel are incorporated and have their principal places of business outside North Carolina, *see* Am. Compl. ¶¶ 8-9, and Plaintiffs allege no contacts by HCIC or Sentinel with North Carolina suggesting that this is the exceptional case where either defendant is at home outside the paradigmatic locations. So this Court lacks general jurisdiction over HCIC and Sentinel.

B. The Court Lacks Specific Jurisdiction Under *Bristol-Myers Squibb*

Specific jurisdiction, on the other hand, applies only to claims that arise out of or relate to the defendant's contacts purposefully directed at the forum and only when it "comport[s] with fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also Fidrych v. Marriott Int'l Inc.*, 952 F.3d 124, 131, 138-39 (4th Cir. 2020). That test "does not mean anything goes"—it "incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, -- S. Ct. --, 2021 WL 1132515, at *5 (Mar. 25, 2021).

While claims arising out of North Carolina insurance policies fall within those limits, the claims that Plaintiffs purportedly assert on behalf of unnamed putative class members *outside* North Carolina do not. This Court cannot exercise specific jurisdiction over HCIC or Sentinel for claims of nonresident putative class members with no adequate link to North Carolina. This conclusion follows from the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). That case held that a California court could not exercise specific jurisdiction in a mass tort action over a defendant for claims by nonresident

plaintiffs with no "adequate link" to the State of California—even if "*other* plaintiffs … who reside in California … can bring claims similar to those brought by the nonresidents." *Id.* at 1781. This means that *each* claim must arise from a defendant's forum-related activities—and it does not matter whether specific jurisdiction exists for a different claim. *See id.* at 1783.

The same logic that precluded specific jurisdiction over Bristol-Myers for claims by nonresident plaintiffs applies here. "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Bristol-Myers*, 137 S. Ct. at 1781. There is no connection between the specific claims that Plaintiffs attempt to assert on behalf of non-North Carolina putative class members and the State of North Carolina—by definition, those claims are not by North Carolina companies, are not based on North Carolina insurance law, and are not disputing coverage for North Carolina businesses. *See Ford Motor Co.*, 2021 WL 1132515, at *8 ("We found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims."). "The mere fact that" Plaintiffs each obtained an insurance policy in North Carolina—"and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Bristol-Myers*, 137 S. Ct. at 1781.

For good reason, then, courts have held that they lack personal jurisdiction over a defendant for claims with no connection to the forum State brought by a resident named plaintiff on behalf of nonresident unnamed putative class members. "Members of a nation-wide class action, aside from those class members from [the forum State], do not have a connection between the forum and the specific claims at issue." *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 724 (E.D. Mo. 2019). Thus, spraying pesticides on Missouri soybeans does not grant specific jurisdiction over claims based on other States' crops. *See id.* Or buying animal

habitats in California does not permit "specific jurisdiction over nationwide class claims related to out of state purchases." *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1036 (S.D. Cal. 2020).[1] Just so here: Under *Bristol-Myers*, HCIC and Sentinel's coverage decisions on three North Carolina companies' North Carolina insurance policies covering their North Carolina businesses cannot support specific jurisdiction over claims with no connection to North Carolina.

C. *Bristol-Myers Squibb* Is Not Distinguishable

On the other hand, the courts that have distinguished *Bristol-Myers* have relied on facial rather than substantive distinctions. For instance, some courts (including in this Circuit) have declined to apply *Bristol-Myers* to a class action because that case concerned a mass action. *See, e.g.*, *Boger v. Citrix Sys., Inc.*, 2020 WL 1033566, at *8 (D. Md. Mar. 3, 2020); *Hicks v. Houston Baptist Univ.*, 2019 WL 96219, at *6 (E.D.N.C. Jan. 3, 2019); *see also, e.g.*, *Lyngaas v. Curaden AG*, __ F.3d __, 2021 WL 1115870, at *15 (6th Cir. Mar. 24, 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020) (holding that *Bristol-Myers* does not apply to "a nationwide class action filed in federal court under a federal statute"); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 307 (D.C. Cir. 2020).

But the reasoning of *Bristol-Myers* applies equally to a class action. Courts have widely rejected that distinction for claims by nonresident named plaintiffs, holding that *Bristol-Myers* does apply to their individual claims in a class action. *See, e.g.*, *Hernandez v. Equifax Info.*

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[1] *See also, e.g.*, *Zuehlsdorf v. FCA US LLC*, 2019 WL 2098352, at *15 (C.D. Cal. Apr. 30, 2019) (dismissing "the class allegations as to the class members whose claims have no nexus with California"); *Wenokur v. AXA Equitable Life Ins. Co.*, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017) (noting that the court "lacks personal jurisdiction over the claims of putative class members with no connection to Arizona"). *Cf. Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43, 58 (D. Mass. 2018) (holding in Fair Labor Standards Act case that the failure to pay overtime in one State does not give rise to "personal jurisdiction over the claims of potential opt-in plaintiffs who do not work … in [that State]"); *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 850 (N.D. Ohio 2018) (same).

Servs. LLC, 2020 WL 4584249, at *4-5 (W.D.N.C. Aug. 10, 2020).[2] That conclusion is correct for claims asserted on behalf of nonresident *unnamed* plaintiffs as well. Like a mass action, a class action is "a species" of "traditional joinder," which "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). "A court that adjudicates claims asserted on behalf of others in a class action exercises coercive power over a defendant just as much as when it adjudicates claims of named plaintiffs in a mass action." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting); *see also* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS ("NEWBERG") § 6:25 n.5.50 (5th ed. Supp. 2020) ("A putative class representative seeking to hale a defendant into court to answer to the class must have personal jurisdiction over that defendant just like any individual litigant must." (citation omitted)). And *Bristol-Myers* made clear that due process requires personal jurisdiction over a defendant for "the specific claims at issue," 137 S. Ct. at 1781—which here include Plaintiffs' claims on behalf of nonresident putative class members. *See* NEWBERG § 6:26 (noting that "a proposed class-wide [judgment] triggers a defendant's right to class-wide due process, that is, its right to ensure the requisite territorial connection between it and the court as to the full scope of its liability"). It therefore "doesn't matter that the defendant, unlike the absent class members, is already present in court to defend against the representative's claim. A defendant's due process interests do not vanish just because it has been haled into a forum." *Lyngaas*, 2021

[2] *See also Roy*, 353 F. Supp. 3d at 56-57 ("District courts generally have extended the specific jurisdiction principles articulated in *Bristol-Myers* to the analysis of personal jurisdiction over named plaintiffs in federal class actions.") (collecting cases); *Chufen Chen v. Dunkin' Brands, Inc.*, 2018 WL 9346682, at *5 (E.D.N.Y. Sept. 17, 2018) (explaining that applying *Bristol-Myers* to "each named plaintiff in a purported class action … comports with the weight of district court authority on the subject") (collecting cases), *aff'd*, 954 F.3d 492 (2d Cir. 2020).

WL 1115870, at *22 (Thapar, J., concurring in part and dissenting in part).[3]

Thus, the reasoning of *Bristol-Myers* did not turn on the procedural nuances of a California mass action—it is a *constitutional* case. The Court tested an exercise of "the State's coercive power" for "compatibility with the Fourteenth Amendment's Due Process Clause." 137 S. Ct. at 1779 (quoting *Goodyear*, 564 U.S. at 918). Joinder of a class does not and cannot abrogate the due process rights of defendants—a class action "is not a license for courts to enter judgments on claims over which they have no power." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting); *see also In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) ("The constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case."); NEWBERG § 6:26 ("If the class prevails in the case, the goal is a binding judgment over the defendant as to the claims of the entire nationwide class—and the deprivation of the defendant's property accordingly.").

In deciding otherwise, courts in this Circuit have cited two differences between a mass action and a class action. *See Boger*, 2020 WL 1033566, at *8; *Hicks*, 2019 WL 96219, at *6. First, "each party in the *Bristol-Myers Squibb* mass action was a real party in interest." *Boger*, 2020 WL 1033566, at *7; *see Hicks*, 2019 WL 96219, at *6. Second, "the federal class action procedural framework supplies defendants due process protections—namely, the Rule 23 requirements—not applicable in mass actions." *Boger*, 2020 WL 1033566, at *8; *see Hicks*,

[3] In *Lyngaas*, a Sixth Circuit panel divided 2-1 on this issue, with Judge Thapar in dissent agreeing that federal courts lack personal jurisdiction over nonresident defendants for nonresident unnamed putative class members' claims asserted by a resident named plaintiff. Judge Thapar suggested that this issue should be decided on a motion to strike under Rule 12(f), *see id.* at *25, which is an alternative available to the Court; however formulated under Rule 12, however, the out-of-state class claims should be dismissed on the pleadings.

2019 WL 96219, at *6. Respectfully, neither of those facial differences adequately distinguishes the application of *Bristol-Myers*'s constitutional holding to class actions.

First, focusing on the party status of absent class members misapprehends the inquiry. By this motion, HCIC and Sentinel seek dismissal of the nationwide class claims of the named plaintiffs, Rodzik, BAU, and Cataract. It is therefore incorrect to view this motion as a "motion to dismiss [the] putative nonresident class members." *Boger*, 2020 WL 1033566, at *6. Rather, this motion does not seek "to dismiss nonresident putative class members; it move[s] to dismiss the named plaintiffs' claim to represent those putative class members." *Molock*, 952 F.3d at 303 (Silberman, J., dissenting). Put otherwise, this motion "is challenging the *named plaintiffs'* alleged entitlement *to bring* those claims on behalf of the putative class members." *Id.* at 302 (emphasis original). "The putative class members' claims are nominally present in the case, … even if the class members themselves are not." *Id.* So whether nonresidents are actual parties in interest in a mass action or unnamed plaintiffs in a precertification putative class action does not affect the Court's application of *Bristol-Myers* to the *claims* brought on nonresidents' behalf—the claims that HCIC and Sentinel move to dismiss.[4]

Second, Rule 23's procedural requirements cannot and do not substitute for the constitutional due-process protections owed defendants. *See Boger*, 2020 WL 1033566, at *8;

[4] In addition, since nonresidents' party status does not affect the personal jurisdiction analysis, this issue should be resolved now rather than delayed until class certification, as some courts have done. *See, e.g.*, *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020); *Molock*, 952 F.3d at 296; *Donaldson v. Primary Residential Mortg., Inc.*, 2020 WL 3184089, at *27 (D. Md. June 12, 2020). When "a named plaintiff's claim of entitlement to represent a class is defective as a matter of law, for example, because the court would lack personal jurisdiction over the defendant with respect to class claims, a defendant's motion to dismiss or narrow the representative claim on those grounds is not premature." *Molock*, 952 F.3d at 303 (Silberman, J., dissenting); *see also* NEWBERG § 6:26 n.29 (noting that "regardless of how a court resolves the 'party' question, the fact remains that the goal of the nationwide class action is to disgorge nationwide relief from the defendant in the instant forum").

Hicks, 2019 WL 96219, at *6. The "procedural safeguards of Rule 23 are meant primarily to protect the absent class members," not "to favor or protect defendants"—which "is reflected in the fact that defendants almost always vigorously oppose class certification." *PetSmart*, 441 F. Supp. 3d at 1037. Rule 23 "protect[s] the interests *of the class*" by requiring "representative parties" who have claims "typical of the claims … of the class." Fed. R. Civ. P. 23(a)(3)-(4) (emphasis added). But common questions and typical claims alone cannot justify "expos[ing] defendants to the State's coercive power." *Bristol-Myers*, 137 S. Ct. at 1779 (quoting *Goodyear*, 564 U.S. at 918). Similarity between a resident named plaintiff's individual claim and its claims asserted on behalf of unnamed nonresident plaintiffs might (or might not) satisfy Rule 23, but it does not empower a court to exercise jurisdiction over a nonresident defendant for the latter claims. That is the very mistake that the State of California made in *Bristol-Myers*, where it exercised personal jurisdiction merely "because the claims of the nonresidents were similar in several ways to the claims of the California residents." *Id.* Explaining that it "is an insufficient basis for jurisdiction" that "third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents," *id.* at 1781, the Supreme Court corrected that error. Courts applying *Bristol-Myers* should not repeat it.

D. Exercising Jurisdiction Would Be Unreasonable

Since Plaintiffs' claims on behalf of nonresident putative class members do not arise out of or relate to activities that HCIC or Sentinel purposefully directed at the State of North Carolina, the Court lacks specific jurisdiction and need not consider whether jurisdiction would comport with fair play and substantial justice—that is, "whether the exercise of personal jurisdiction would be constitutionally reasonable." *Fidrych*, 952 F.3d at 131, 138. But this consideration too counsels against exercising specific jurisdiction. On this front, "the 'primary concern' is the burden on the defendant." *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). And, as courts have recognized, the "burden … to defend a nationwide class action is significantly greater than the burden of defending an individual claim or a statewide class action." *PetSmart*, 441 F. Supp. 3d at 1036. On the other hand, "the forum State's interest in adjudicating the dispute" between nonresident putative class members and HCIC and Sentinel is nonexistent—those unnamed plaintiffs have insurance policies under other States' laws insuring businesses in other States with HCIC and Sentinel, both nonresidents. *Burger King*, 471 U.S. at 477. The State of North Carolina's interests—including its interest "in furthering fundamental substantive social policies," *Burger King*, 471 U.S. at 477—will be vindicated by adjudicating the North Carolina claims of Rodzik, BAU, and Cataract, and, possibly, a North Carolina class. Plaintiffs' "interest in obtaining convenient and effective relief" will also be wholly protected, because Plaintiffs themselves are entitled to *no* relief for the out-of-State claims it allegedly brings for nonresident class members. *Id.* Last, it would not serve "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" (*id.*) to permit Plaintiffs to expand this narrow dispute—between a nonresident insurer and North Carolina policyholder over the meaning of North Carolina insurance policies insuring North Carolina businesses—with claims purportedly brought on behalf of unnamed plaintiffs across the country.

E. This Issue Should Be Decided Now

Finally, whether this Court has personal jurisdiction over HCIC and Sentinel for Plaintiffs' claims on behalf of nonresidents is an issue to be resolved now. This case is one of many individual actions, putative statewide class actions, and putative nationwide class actions currently pending in over a dozen States that concern COVID-19 coverage under insurance policies issued by HCIC or Sentinel (or related entities) under the laws of those States. Insureds outside North Carolina are pursuing their claims in their home States. There is no benefit to

allowing non–North Carolina claims to linger in this case through class-certification briefing—and expansive, burdensome, and ultimately irrelevant nationwide class discovery—when those claims can be and are being more appropriately and efficiently litigated elsewhere. Nor do policyholders in California, Massachusetts, or elsewhere benefit from having their contract claims under their States' laws asserted by North Carolina businesses in a far-off forum—rather than in individual actions or putative statewide class actions in their home States.

This issue is, therefore, properly considered at this stage. And it is properly resolved under *Bristol-Myers*, which requires that Plaintiffs' claims purportedly asserted on behalf of nonresident unnamed class members be dismissed for lack of personal jurisdiction.

CONCLUSION

For these reasons, Plaintiffs' claims purportedly brought on behalf of a nationwide class should be dismissed for lack of standing and personal jurisdiction.

Dated: March 29, 2021

Respectfully submitted,

By: /s/ *L. Andrew Watson*

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CERTIFICATE OF SERVICE

On the date given below I caused to be served the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' NATIONWIDE CLASS ACTION CLAIMS** on all counsel of record in this case via ECF.

Dated this 29th day of March, 2021.

/s/ *L. Andrew Watson*
L. Andrew Watson