No. 20-

IN THE

Supreme Court of the United States

ALLY FINANCIAL INC.,
Petitioner,

v.

ALBERTA HASKINS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment permits a state court to exercise specific personal jurisdiction over claims against an out-of-state defendant of unnamed members of a nationwide class who do not reside in the forum and who have no other relevant connection to the forum.

PARTIES TO THE PROCEEDING

Petitioner Ally Financial Inc. was the plaintiff/counterclaim-defendant in the state trial court and the relator (petitioner) in the state court of appeals and state supreme court.

Respondents Alberta Haskins and David Duncan were the defendants/counterclaimants in the state trial court and the parties-in-interest in the state court of appeals and state supreme court. They are the named parties representing two certified counterclaimant classes.*

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* The nationwide class comprises "[a]ll persons within the [applicable statute of limitations as determined by the chart on App. 12a-13a]: (a) who are named as borrowers or buyers on a loan or financing agreement with Ally, assigned to Ally or owned by Ally; (b) whose loan or financing agreement was secured by collateral; (c) whose collateral was repossessed, voluntarily or involuntarily; and (d) whose collateral was disposed." App. 9a.

The Missouri class comprises "[a]ll persons: (a) who obtained a Missouri Certificate of Title for a motor vehicle identifying Ally as the lienholder, or who are named as borrowers or buyers with a Missouri address on a loan or financing agreement with Ally, assigned to Ally or owned by Ally; (b) whose loan or financing agreement was secured by a motor vehicle or other collateral; (c) whose motor vehicle or other collateral was repossessed, involuntarily or voluntarily; and (d) whose motor vehicle or other collateral was disposed from June 17, 2010, through [November 25, 2019]." App. 9a.

Excluded from both classes are "all persons: against whom Ally has obtained a deficiency judgment; who filed for Chapter 7 bankruptcy after the date on their presale notice and whose bankruptcy ended in discharge rather than dismissal; and who filed for Chapter 13 bankruptcy pending after the date in the presale notice and whose bankruptcy is still pending or ended in discharge rather than dismissal." App. 9a-10a.

The Honorable Katherine Hardy Senkel was the presiding judge in the state trial court and the nominal respondent in the state court of appeals and state supreme court.

CORPORATE DISCLOSURE STATEMENT

Ally Financial Inc. is a publicly traded corporation. It has no parent corporation, and no publicly held corporation owns more than ten percent of its stock.

RELATED PROCEEDINGS

The trial court proceeding in this matter is ongoing in *Ally Financial Inc.* v. *Haskins*, No. 16JE-AC01713-01, in the Circuit Court of Jefferson County, Missouri.

The Court of Appeals of Missouri, Eastern District, denied Ally's first petition for a writ of prohibition in this matter on December 17, 2019, in *State ex rel. Ally Financial Inc.* v. *Hardy Senkel*, No. ED108501.

The Supreme Court of Missouri denied Ally's second petition for a writ of prohibition in this matter on March 17, 2020, in *State ex rel. Ally Financial Inc.* v. *Hardy Senkel*, No. SC98285.

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The order of the Supreme Court of Missouri (App. 1a-2a) is not reported but is available at 2020 Mo. LEXIS 90. The opinions of the Court of Appeals of Missouri (App. 3a-5a) and the Circuit Court of Jefferson County, Missouri (App. 7a-10a) are not reported.

JURISDICTION

The Supreme Court of Missouri denied Ally's petition for a writ of prohibition on March 17, 2020. App. 1a. On March 19, 2020, this Court extended the deadline to file petitions for a writ of certiorari in all cases to 150 days after the judgment below—in this case, to August 14, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides: "No State shall … deprive any person of life, liberty, or property, without due process of law …."

STATEMENT

This case presents an issue of great importance that has sharply divided the lower courts: Whether a state court (or a federal court under Fed. R. Civ. P. 4(k)(1)(A), which applies in most circumstances, *see infra* note 7) may exercise specific personal jurisdiction over claims against an out-of-state defendant brought by unnamed members of a nationwide class who do not reside in the forum and have no other relevant connection to the forum. This issue has taken on increasing significance as multistate class actions, some claiming

billions of dollars in damages, have proliferated. Those class actions, many raising claims under the varying laws of all 50 states, exert enormous pressure on defendants to settle, lest they face gigantic verdicts from local courts in jurisdictions where the defendants are not citizens. And yet the basis on which a trial court in one state, whose jurisdiction is normally bounded by that state's borders, could adjudicate such claims, remains unclear at best.

This case provides a salient example. It began as a garden-variety breach-of-contract suit between petitioner Ally Financial Inc., and respondents Alberta Haskins and David Duncan, in which Ally sought to recover the deficiency balance after respondents had failed to make the financing payments on their vehicle. Respondents then brought a counterclaim against Ally, in which they alleged that Ally's actions in connection with its repossession and sale of their vehicle violated various provisions of the Uniform Commercial Code ("UCC") and their contracts.

Respondents claim to represent a nationwide class comprising hundreds of thousands of individuals affected by Ally's repossession of vehicles in all 50 states and the District of Columbia over time periods ranging from four to twenty-five years, depending on the state.[1] Some states' versions of the relevant UCC provisions authorize statutory damages even for technical violations, and by dint of the sheer size of the class alone,

[1] Ally repossessed approximately 510,000 vehicles during the relevant limitations periods. *See* Class Members' Mem. to Support Mot. for Summ. J. 1, *Ally Fin. Inc.* v. *Haskins*, No. 16JE-AC01713-01 (Mo. 23d Jud. Cir. Ct. June 3, 2020) ("Class Members' MSJ Mem."). Ally estimates that approximately 390,000 of those vehicles had accountholders who meet the definition of the nationwide class. *See supra* note * (class definition).

respondents' claim for damages under just one provision is in the billions of dollars.[2] Respondents rely principally on those statutory-damages provisions for their claim for relief; neither they nor the unnamed class members claim to have suffered any actual harm from Ally's alleged deviations from the UCC.

Although the nationwide class includes some Missouri residents, no other class members have claims that arise out of or relate to Ally's conduct in Missouri. Those class members purchased vehicles and executed retail installment sales contracts outside of Missouri; made payments outside of Missouri; defaulted on their individual contracts outside of Missouri; and had their vehicles repossessed and sold outside of Missouri.

Even so, Ally's constitutional arguments against the appropriateness of the nationwide class action in this case were cursorily rejected by the Missouri courts. Greater scrutiny of nationwide class actions is warranted, because they represent an evasion of the strict limits on specific jurisdiction over out-of-state defendants that this Court has consistently articulated, most recently in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017). At a minimum, the Could should hold this petition for its decision in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, No. 19-368, and *Ford Motor Co.* v. *Bandemer*, No. 19-369 (to be argued Oct. 7, 2020), which, although not involving class actions, are likely to clarify further the constitutional limits on specific jurisdiction over claims brought

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[2] *See* Class Members' MSJ Mem. 15 ("Aggregate damages under UCC § 9-625(c)(2) for the classes [i.e., the nationwide class and the Missouri-only subset] are $4,642,298,512.51.").

against out-of-state defendants by nonresidents of a state with no relevant connection to that state.[3]

1. Ally, a Delaware corporation headquartered in Michigan, operates one of the largest online automotive finance businesses in the country. Ally, however, does not provide the original financing for vehicles purchased by consumers. Rather, after a consumer obtains financing from an automotive dealer by entering into a retail installment sales contract, Ally purchases the contract from the car dealer. Over time, Ally collects the purchase price, plus a finance charge, from the consumer. Ally's Resp. in Opp. to Haskins's Statement of Uncontroverted Facts at 19, *Ally Fin. Inc.* v. *Haskins*, No. 16JE-AC01713-01 (Mo. 23d Jud. Cir. Ct. Aug. 3, 2020) ("RSUF").

To hedge against the risk that the consumer will default on the contract, Ally takes a security interest in the vehicle. Most consumers make their payments on time and in full. If a default does occur, Ally works with the consumer to avoid the need for repossession, which is expensive for Ally and almost never results in repayment of the full amount financed. Repossessions occur on only about two to three percent of Ally's accounts. The average loss to Ally usually exceeds $8500. *See* RSUF 19-21.

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[3] The Court may also consider this petition in connection with any petition that may be filed seeking review of the Seventh Circuit's decision in *Mussat* v. *IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), which rejected a constitutional challenge to a nationwide class action and concluded that the reasoning of *Bristol-Myers* does not govern class actions, *see id.* at 448-449, and any petition that may be filed seeking review of the D.C. Circuit's decision in *Molock* v. *Whole Foods Market Group*, 952 F.3d 293 (D.C. Cir. 2020), which involved similar issues, *see id.* at 305-308 (Silberman, J., dissenting).

If repossession and sale of a vehicle become necessary, Ally sends a pre-sale notice to the consumer. This notice describes the consumer's right to redeem the vehicle by paying the full balance due on the contract, plus finance charges and expenses. Ally's notices state that the consumer must pay the redemption amount by certified check or similar means guaranteeing the funds are available—not, for example, by personal check.[4] If the consumer does not redeem the vehicle and the default persists, Ally may sell the vehicle and credit the net proceeds to the consumer's account. RSUF 20, 22-23, 29. Typically, the contract reserves to Ally the right to sue for any deficiency balance on the account, which Ally may exercise if the deficiency is substantial.

2. In 2008, Missouri residents Alberta Haskins and David Duncan financed the purchase of a used 2006 Chevrolet Colorado. Four years later they defaulted on the contract. After several attempts to secure repayment, including repeatedly deferring installment payments and repossession based on respondents' promises to pay, Ally repossessed and sold the truck, crediting respondents with the proceeds. But a $4000 balance on their account remained. To recover that deficiency, Ally brought this suit against respondents in the Circuit Court of Jefferson County, Missouri. *See* Petition on Deficiency, *Ally Fin. Inc.* v. *Haskins*, No. 16JE-AC01713-01 (Mo. 23d Jud. Cir. Ct. Mar. 30, 2016).

In March 2017, respondents filed a second amended answer and counterclaim, in which they purported to represent a nationwide class of individuals (including a

[4] For security reasons, and because Ally has no physical storefronts, Ally does not accept cash payment for redemptions. RSUF 25.

Missouri-only subclass) whose vehicles Ally had repossessed and sold.

Among other theories, the counterclaim alleges that Ally's pre-sale notices to consumers violated several provisions of the UCC because the notices (1) stated that any redemption payments must be made with guaranteed funds (such as a certified check, or through payment services such as Western Union) and (2) failed to identify co-buyers living at different addresses who were sent copies of the notice. A signal problem with adjudicating those claims on a nationwide basis, however, is that states vary widely in how (or whether) they have adopted the UCC provisions on which respondents rely.[5] The states also have varying statutes of limitations. *See* App. 11a-13a.

Ally opposed respondents' motion for class certification. Ally argued that the proposed class definitions

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[5] As the D.C. Circuit has observed, "'[t]he Uniform Commercial Code is not uniform.'" *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016-1017 (D.C. Cir. 1986) (quoting White & Summers, *Uniform Commercial Code* 7 (2d ed. 1980)). For example, not all states have adopted the same version of UCC § 9-625(c)(2), on which respondents chiefly rely to claim massive statutory damages. California and Louisiana did not adopt it at all, and Georgia, Illinois, North Dakota, and Oregon do not allow damages under that provision in a class action. O.C.G.A. § 10-1-36.1(a); 810 ILCS 5/9-625(c)(2); N.D. Cent. Code § 41-09-120(3)(b); Or. Rev. Stat. § 79.0625(3)(b). In addition, in Maryland, vehicle contracts are governed by the state's Retail Installment Sales Act (Md. Com. Law §§ 12-624, 12-625), rather than Article 9 of the UCC. *See* Md. Com. Law § 9-201(c)(2), (3). States have also enacted separate consumer protection statutes that set differing requirements for pre-sale notices and that depart from the UCC. *See*, *e.g.*, Cal. Civ. Code §§ 2983.2 (notice), 2983.3 (right to reinstate); Conn. Gen. Stat. § 36a-785; D.C. Mun. Regs. tit. 16, §§ 340-345; N.Y. Pers. Prop. Law § 316; Ohio Rev. Code §§ 1317.12, 1317.16; 12 Pa. Cons. Stat. §§ 6254 (pre-sale notice), 6259 (right to redeem).

failed to meet the Missouri class-action rules for several reasons, including because putative class members residing in different states would have claims subject to differing standards of liability, statutes of limitations, and remedies. The circuit court certified both the nationwide class and the Missouri-only subclass. *See* Order, *Ally Fin. Inc.* v. *Haskins*, No. 16JE-AC01713-01 (Mo. 23d Jud. Cir. Ct. May 9, 2018).

3. Events subsequent to the filing of Ally's opposition cast further doubt on the appropriateness of the certification order.[6] As relevant here, this Court held in *Bristol-Myers Squibb Co.* v. *Superior Court of California* that, even in a "mass action," specific personal jurisdiction requires a case-specific connection between the forum and each plaintiff's claim. 137 S. Ct. 1773, 1781 (2017). Ally moved to decertify both classes. App. 33a-45a. Ally argued that under this Court's decision in *Bristol-Myers*, the Missouri court lacked personal jurisdiction over any nonresident class members' claims that did not arise in the state. *See* App. 34a, 37a-45a.

The circuit court denied Ally's decertification motion in a three-page opinion. App. 7a-10a. Although the court did modify the class definitions to account for the potential effects of res judicata and judicial estoppel,

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[6] For example, the trial court denied Ally's motion for summary judgment on the ground that resolving the counterclaims would necessitate inquiries into the intent of the contracting parties—including the consumer and the dealer—which would differ across class members. *See* Order Denying Ally's Mot. for Partial Summ. J., *Ally Fin. Inc.* v. *Haskins*, No. 16JE-AC01713-01 (Mo. 23d Jud. Cir. Ct. Nov. 25, 2019). Discovery also confirmed that tens of thousands of class members had agreed to arbitrate their disputes with Ally or had forfeited their claims against Ally by failing to raise them in deficiency actions or disclose them in bankruptcy. App. 37a.

see App. 9a; *supra* note *, the court made no mention of personal jurisdiction.

4. Ally sought review of the circuit court's ruling by filing a petition for a writ of prohibition in the Missouri Court of Appeals. App. 25a-32a; *see* Mo. Const. art. V, § 4.1. Again, Ally urged that decertification was necessary because the court lacked personal jurisdiction over the claims of out-of-state class members without a connection to the state under *Bristol-Myers*. *See* App. 26a-32a.

The Missouri Court of Appeals denied the petition in a two-page order that did not even acknowledge the jurisdictional issues. App. 3a-5a. Instead, the court of appeals denied the petition based solely on its *sua sponte* determination that a writ of prohibition is not a valid mechanism for reviewing the denial of a decertification motion under Missouri law. According to the court of appeals, Ally should have sought review within ten days of the denial of decertification under a Missouri procedure that allows discretionary appellate review of orders granting or denying class certification in the first instance, but does not mention orders denying *decertification* of a class. App. 3a-4a; *see* Mo. Rev. Stat. § 512.020(3)(a); Mo. R. Civ. P. 52.08(f), 84.035(a). That holding was unprecedented: no Missouri authority establishes that this permissive appeal mechanism applies to orders denying decertification motions. And even if it did, Missouri case law makes clear that the court of appeals had authority to issue a writ of prohibition. *See State ex rel. Coca-Cola Co.* v. *Nixon*, 249 S.W.3d 855, 859 (Mo. 2008) (permissive appeal mechanism for class certification orders does not displace authority of Missouri appellate courts to issue writs of prohibition); *see also State ex rel. Gen. Credit Acceptance Co.* v. *Vincent*, 570 S.W.3d 42, 45 (Mo. 2019)

(granting writ of prohibition to vacate class certification order).

5. Ally then sought a writ of prohibition from the Missouri Supreme Court. App. 15a-23a; *see* Mo. Const. art. V, § 4.1. Ally's petition there raised the same issue of personal jurisdiction (App. 16a-22a) that Ally had raised in the lower courts. Respondents filed an opposition, but they did not argue that the Missouri Supreme Court should decide the case on the grounds that the court of appeals had invoked. *See* App. 52a (arguing that whether the court of appeals correctly deemed Ally's petition untimely "isn't properly before the Court"). They instead directly confronted Ally's jurisdictional arguments, asking the Missouri Supreme Court to hold that Ally had no valid personal jurisdiction objection with respect to the nationwide class claims. *See* App. 53a-59a.

On March 17, 2020, the Missouri Supreme Court denied Ally's petition without opinion. App. 1a.[7]

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[7] This Court has jurisdiction to review the Missouri Supreme Court's judgment as a "final decision" under 28 U.S.C. § 1257(1), even though further proceedings are to come in the state courts. The Missouri courts have definitively rejected Ally's federal due process claim. *See Cox Broad. Co.* v. *Cohn*, 420 U.S. 469, 477-478 (1975). This Court has often reviewed personal-jurisdiction issues in similar postures, where the state courts had rejected a personal-jurisdiction defense and further proceedings on the merits were to come. *See Bristol-Myers Squibb Co.* v. *Superior Ct.*, 137 S. Ct. 1773 (2017); *J. McIntyre Mach., Ltd.* v. *NiCastro*, 564 U.S. 873 (2011); *Asahi Metal Indust., Ltd.* v. *Superior Ct.*, 480 U.S. 102 (1987); *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). That includes cases where the state supreme court denied review rather than rendering a decision on the merits. *See Calder* v. *Jones*, 465 U.S. 783, 787 (1984).

REASONS FOR GRANTING THE PETITION

I. WHETHER A STATE COURT MAY ADJUDICATE CLAIMS BY UNNAMED CLASS MEMBERS WITH NO CONNECTION TO THE FORUM IS AN IMPORTANT ISSUE THIS COURT SHOULD RESOLVE

A. Due Process Does Not Permit Specific Jurisdiction Over Claims With No Connection To The Forum

"Because a state court's assertion of jurisdiction exposes defendants to the State's coercive power, it is subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Bristol-Myers Squibb Co.* v. *Superior Ct.*, 137 S. Ct. 1773, 1779 (2017) (quotation cleaned). As this Court has explained many times, a state court's exercise of personal jurisdiction over claims that are asserted against a nonresident and that have no relevant connection to the forum violates fundamental principles of fairness and federalism. By confining states' adjudicatory powers to claims that are asserted against their residents or arise within their borders, the Due Process Clause serves important principles of fair notice; it allows people "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). The Due Process Clause also operates as "an instrument of interstate federalism," ensuring that no particular state can become a universal forum for disputes arising anywhere in the country, *id.* at 293-294, and shielding defendants from "the coercive power of a State that may have little legitimate interest in the claims in question," *Bristol-Myers*, 137 S. Ct. at 1780.

A state court may exercise personal jurisdiction over a claim against a defendant under two circumstances. First, the court may proceed on the claim if the defendant is "essentially at home" in the forum—*i.e.*, if the defendant is subject to the state's "general jurisdiction." *E.g.*, *Daimler AG* v. *Bauman*, 571 U.S. 117, 127 (2017). A corporate defendant may be "at home" in a state if it is incorporated or has its principal place of business there. *See id.* at 137-138. Absent general jurisdiction—which is indisputably not present in this case—a court may adjudicate a claim only if that specific claim "arise[s] out of or relate[s] to" the defendant's forum contacts—*i.e.*, if the court has "specific jurisdiction" over the particular claim against the particular defendant. *See Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919, 929 (2011).

These constitutional principles are fully applicable when a group of plaintiffs collectively sues on claims against an out-of-state defendant. Even if those plaintiffs are all pursuing similar claims, the Due Process Clause requires the court to distinguish between the individuals' claims that have a relevant connection with the forum (because, for example, they involve state residents and arise out of conduct directed to the forum) and those that do not (such as those that arise out of conduct occurring in another state).

In *Bristol-Myers*, this Court rejected an attempt to relax these constitutional requirements for multistate "mass actions." Plaintiffs from 34 states brought a consolidated lawsuit in California state court. They alleged that the defendant had tortiously marketed and sold a drug in each of the plaintiffs' states, where the plaintiffs had purchased and ingested it to the detriment of their health. 137 S. Ct. at 1781. Even though the claims brought by all the plaintiffs were effectively

identical, this Court ruled that "settled principles" of specific jurisdiction prevented California courts from deciding the non-California residents' claims. *Id.* at 1781-1782. Because those plaintiffs "[were] not California residents and d[id] not claim to have suffered harm in that State," their claims lacked the requisite connection to the forum. *Id.*; *see BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (specific jurisdiction unavailable "[b]ecause neither [plaintiff] alleges any injury from work in or related to" the forum state).

It did not matter that the defendant had allegedly engaged in similar tortious conduct in the forum state. *Bristol-Myers*, 137 S. Ct. at 1781. "The mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California" was not enough because "'a defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction.'" *Id.* (quoting *Walden* v. *Fiore*, 571 U.S. 277, 286 (2014)). Under a contrary rule, any company doing business in California would expose itself to lawsuits in that state arising from the company's activities anywhere in the country—rendering specific jurisdiction only "a loose and spurious form of general jurisdiction." *Id.*

In dissent, Justice Sotomayor observed that the Court had "not confront[ed] the question whether its opinion [in *Bristol-Myers*] would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." 137 S. Ct. at 1789 n.4. The Court had no occasion to explicate its opinion's effect on class action practice because *Bristol-Myers* was not a class action. In the intervening years, however, courts have divided sharply on that recurring question in class actions. Given the importance of the issue, this Court's guidance is sorely needed. This Court should

grant review to decide whether due process requires a demonstration of personal jurisdiction over the claims of unnamed class members. And even though *Bristol-Myers* did not directly address the question, the principles the Court articulated in that decision make clear that a state court may not exercise jurisdiction over a claim against an out-of-state defendant brought on behalf of an unnamed class member that has no relevant connection to the forum.

B. The Issue Of Personal Jurisdiction Over Out-of-State Class Members' Claims Arises Frequently, And Often With Staggering Financial Stakes

Lower courts frequently confront whether due process permits them to exercise specific jurisdiction over claims by out-of-state class members against out-of-state defendants. In the last three years alone, more than 60 federal district court opinions have addressed the issue—with numerous opinions coming down on both sides of the issue, *compare, e.g.*, *Krogstad* v. *Nationwide Biweekly Admin, Inc.*, 2020 WL 4451035, at *4 (D. Nev. Aug. 3, 2020), *with, e.g.*, *Carpenter* v. *PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020), and dozens more sidestepping the issue or postponing its resolution, *see, e.g.*, *Gadomski* v. *Equifax Info. Servs., LLC*, 2020 WL 3841041, at *6 (E.D. Cal. July 8, 2020). And although state court opinions are less frequently reported, particularly at the trial-court level, the issue arises there, as well. *See, e.g.*, *Stisser* v. *SP Bancorp, Inc.*, 174 A.3d 405, 435 (Md. Ct. Spec. App. 2017) (no personal jurisdiction where plaintiffs failed to "identify … any [class members] who were Maryland residents or that any alleged harm would be felt in th[at] state"); *Osborne* v. *Subaru of Am., Inc.*, 243 Cal.

Rptr. 815, 819 (Ct. App. 1988) (questioning whether "courts of this state have personal jurisdiction to adjudicate the claims of nonresident plaintiff[class members]").

That so many courts have been forced to wrestle with the question is unsurprising: The question potentially arises in every class action involving nonresident plaintiff class members and a nonresident defendant—regardless of what the case is about, or whether it is proceeding in state or federal court. *See, e.g.*, *Baskin-Robbins Franchising LLC* v. *Alpenrose Dairy, Inc.*, 825 F.3d 28, 34 & n.2 (1st Cir. 2016) (with few exceptions, Rule 4(k) of the Federal Rules of Civil Procedure directs federal district courts to apply state-court personal jurisdiction analysis).[8]

And there are many such cases. Class action plaintiffs frequently bring lawsuits that include purported class members across states—often in all 50 states. Issacharoff & Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1661-1663, 1700 (2008). The Federal Judicial Center estimated that, of the class actions filed in federal court between 1994 and 2001, 71 percent had class members from three or more states, and 34 percent had class members from all 50 states. Willging & Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 6, 17 (Fed. Judicial Ctr. 2005). And those percentages

[8] Under the 1993 amendments to Rule 4(k), federal district courts apply the same personal jurisdiction rules as state courts unless (1) Congress has instructed otherwise; (2) the claim is asserted by a third-party defendant or a person subject to compulsory joinder; or (3) the claim is one of federal law asserted against a defendant outside the personal jurisdiction of any one state's courts. *See* 4A Wright & Miller, *Fed. Prac. & Proc.* §§ 1068.1, 1075 (4th ed. 2020).

have only grown since the Class Action Fairness Act of 2005 relaxed the federal statutory jurisdictional requirements for class actions worth $5 million or more. *See* 28 U.S.C. § 1332(d)(2); Lee & Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Penn. L. Rev. 1723, 1750-1751 (2008).

Multistate class actions often carry potentially devastating financial consequences for the defendants. One survey found that U.S. corporations spent more than $2.64 billion defending against class actions in 2019—the highest total ever recorded, and an increase of 7.3 percent from the previous year. Carlton Fields, P.A., *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 11 (2020). More than half of U.S. companies face one or more class actions in any given year, *id.* at 12, with the number of class actions per company in-creasing steadily over time, *see id.* at 14 (6.3 actions per company in 2017; 7.8 in 2018; and 10.2 in 2019). And it stands to reason that multistate and nationwide class actions contribute disproportionately to those costs. The pending nationwide class action against Ally, for example, seeks more than $4.6 billion in statutory damages alone. *See supra* note 2.

As this Court has recognized, potential liability of that size can generate an *in terrorem* effect, forcing defendants to settle even meritless class actions because an adverse judgment would be too catastrophic to risk. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into

settling questionable claims."); *see also* S. Rep. No. 109-14, at 20 (2005) (describing class actions as "a powerful tool" that "can give a class attorney unbounded leverage" and "force corporate defendants to pay ransom to class attorneys by settling"). The effect is especially acute when it comes to statutory damages, which, when aggregated in class actions, create "absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent." Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009). "[O]nce a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Id.* These extreme consequences of multistate class actions make it all the more important for this Court to decide whether such actions are constitutional when brought outside the defendant's home forum.

C. The Issue Divides Lower Courts

Since this Court's decision in *Bristol-Myers*, federal district courts have divided sharply as to whether claims of unnamed plaintiff class members must satisfy the due process requirements of personal jurisdiction. *See* 2 *Newberg on Class Actions* § 6:26 (5th ed. 2020) ("To date, district courts decisions have advanced divergent interpretations of *Bristol-Myers Squibb*'s effect on class action practice."); 4 Wright & Miller, *Federal Practice and Procedure* § 1067.2 (4th ed. 2020) ("Lower courts have divided over whether the *Bristol-Myers* decision applies with equal force to class actions."). Although a majority of courts to reach the issue have refused to apply the "settled principles" of

Bristol-Myers to claims of unnamed plaintiffs in certified class actions, a substantial number of courts have faithfully applied this Court's logic and scrutinized the claims of absent class members as part of the personal jurisdiction analysis.

Federal appellate judges across circuits have also split on the issue. In *Mussat* v. *IQVIA, Inc.*, 953 F.3d 441, 443, 447-448 (7th Cir. 2020), the Seventh Circuit held that "the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action," and gave reasoning applicable to both putative and certified classes. In *Molock* v. *Whole Foods Market Group, Inc.*, 952 F.3d 293, 297-298 (D.C. Cir. 2020), by contrast, the D.C. Circuit distinguished between putative and certified classes, holding that members of the former, at least, are not "parties" whose claims must satisfy personal jurisdiction requirements. Judge Silberman dissented from that half measure, and further explained that, while *Bristol-Myers* "avoided opining on whether its reasoning in the mass action context would apply also to class actions," "logic dictates that it does." *Id.* at 305-310.[9]

A significant number of district courts have adopted the position set out in Judge Silberman's *Molock* dissent: Personal jurisdiction over the defendant must exist with respect to each "specific claim[]" of each specific plaintiff, 952 F.3d at 306 (quoting *Bristol-Myers*, 137 S. Ct. at 1781), and unnamed plaintiff class members assert "claims" against defendants—and subject defendants to the court's binding adjudicatory power—just as much as any plaintiff whose name appears in the case caption, *id.* at 307. *See, e.g.*, *Carpenter*, 441 F.

[9] A pending Ninth Circuit case also presents the issue. *See Moser* v. *Health Ins. Innovations, Inc.*, No. 19-80111.

Supp. 3d at 1035-1036; *see also* 2 *Newberg on Class Actions* § 6:26 ("[T]he Supreme Court's recent cases point to the conclusion that neither general nor specific jurisdiction exists over nationwide class suits except in the defendant's home states.").

On this view, there is no meaningful difference between a claim asserted by an unnamed member of a 600-person class and the claim asserted by one of the 678 named plaintiffs in the *Bristol-Myers* mass tort lawsuit. *See* 137 S. Ct. at 1778. As Judge Silberman explained, "like the mass action in *Bristol-Myers*, a class action is just a species of joinder, which merely enables a federal court to adjudicate claims of 'multiple parties at once, instead of in separate suits.'" *Molock*, 952 F.3d at 306 (Silberman, J., dissenting) (quoting *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion)). Further, "[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." *Id.* at 307 (Silberman, J., dissenting). "A defendant is therefore entitled to due process protections—including limits on assertions of personal jurisdiction—with respect to all claims in a class action for which a judgment is sought." *Id.*

By contrast, several courts have concluded that these settled due-process principles have no application to claims of unnamed class members. Some courts—including the Seventh Circuit—have decided that unnamed class members should not be considered "parties" for purposes of personal jurisdiction (even once the class has been certified). *E.g.*, *Mussat*, 953 F.3d at 447; *Al Haj* v. *Pfizer Inc.*, 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018). Courts have also reasoned that the

procedural safeguards in Rule 23 (and presumably in state-law equivalents) are sufficient to assure due process to the defendant. *E.g.*, *Sotomayor* v. *Bank of Am., N.A.*, 377 F. Supp. 3d 1034, 1038 (C.D. Cal. 2019). And still others have concluded that *Bristol-Myers* did not *mandate* such analysis and that resolving the implications of Supreme Court decisions is best left to this Court in the first instance. *E.g.*, *Graves* v. *CAM2 Int'l LLC*, 2020 WL 3968040, at *6 n.6 (W.D. Mo. July 13, 2020) (declining to apply *Bristol-Myers* absent express appellate direction); *Velazquez* v. *State Farm Fire & Cas. Co.*, 2020 WL 1942784, at *11 (E.D. Pa. Mar. 27, 2020), *report and recommendation adopted*, 2020 WL 1939802 (E.D. Pa. Apr. 22, 2020); *Gress* v. *Freedom Mortg. Corp.*, 386 F. Supp. 3d 455, 465 (M.D. Pa. 2019). These divisions will certainly persist until this Court addresses and resolves the question.

D. Adjudicating Claims Of Unnamed, Out-of-State Class Members With No Connection To The Forum Violates Due Process

This Court should grant review and make explicit what is implicit in *Bristol-Myers* and other decisions: Personal jurisdiction must exist over the defendant with respect to *each* claim in the case, and the claims of unnamed class members are no exception.

1. The rationale of *Bristol-Myers* extends equally to unnamed class members. *See Molock*, 952 F.3d at 306 (Silberman, J., dissenting). As *Bristol-Myers* makes clear, personal jurisdiction must exist over each "specific claim[]" asserted by each plaintiff against each defendant. 137 S. Ct. at 1782. Even when two or more persons sue the same defendant on the same legal theory for the same underlying conduct, their "claims" remain distinct. *See id.* (characterizing co-plaintiffs as

"third parties" bringing "similar" but distinct claims). And because personal jurisdiction cannot result from a third party's unilateral conduct, each plaintiff's claim must be analyzed separately for connection to the forum. *Id.*

Members of a certified class assert "claims" in the same sense as any other plaintiffs. Just like the mass action in *Bristol-Myers*, a class action is a species of traditional joinder that "merely enables a … 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); *see Snyder* v. *Harris*, 394 U.S. 332, 333 (1969) (unnamed members of the same class understood to bring "separate and distinct claims"). And just as with the mass claims in *Bristol-Myers*, each class member's claim "exposes [the] defendant[] to the State's coercive power." 137 S. Ct. at 1789. It follows that each absent class member's claims must be analyzed separately, as well. Neither class actions nor mass actions are exempt from the "ordinary principles of personal jurisdiction." *Molock*, 952 F.3d at 310 (Silberman, J., dissenting).

2. A contrary rule would collapse "the essential difference" between specific and general jurisdiction in the consequential class-action realm. *Goodyear*, 564 U.S. at 927. If unnamed class members were immune from personal-jurisdiction analysis, a plaintiff injured in one state could sue a defendant in any state in which it did a minimal amount of business, as long as another plaintiff had allegedly suffered a similar injury there. That is precisely what this Court's personal-jurisdiction cases forbid. *See Daimler*, 571 U.S. at 132 ("As *International Shoe* itself teaches, a corporation's 'continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable

to suits unrelated to that activity.'" (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 318 (1945))). Such "exorbitant exercises" of personal jurisdiction "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id.* at 139 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). And they would contravene the "decisive" federalism interest in preventing states from monopolizing the sovereign power to try cases and deciding claims in which they "have little legitimate interest." *Bristol-Myers*, 137 S. Ct. at 1780.

3. Lower courts have offered no persuasive justifications for cabining *Bristol-Myers*.

a. The Seventh Circuit held in effect that unnamed class members should not "count" for purposes of determining personal jurisdiction, *see Mussat*, 953 F.3d at 447, but it offered no persuasive justification for why that would be so. It relied primarily on this Court's statement that unnamed class members are considered "parties" for some purposes and not others, depending on the procedural rules at issue. *Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002). But that language merely observes that whether and how a given procedural requirement applies to unnamed class members must be determined by the law governing the procedural requirement itself. Here, the relevant governing law is this Court's personal-jurisdiction jurisprudence, which imposes requirements on any claim that seeks to expose a defendant to the coercive power of the state. *See Bristol-Myers*, 137 S. Ct. at 1780-1781.

Contrary to the suggestion of the Seventh Circuit and some district courts, *e.g.*, *Al Haj*, 338 F. Supp. 3d at

820, it does not appear that this Court has *ever* excused unnamed members of a certified class from complying with jurisdictional prerequisites. Although, as the Seventh Circuit observed, "nonnamed class members cannot defeat complete diversity" under 28 U.S.C. § 1332, *see Devlin*, 536 U.S. at 10, that is because nondiverse class members have historically been understood to be covered by the district court's ancillary jurisdiction, *see Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 365 (1921), and now are covered by the district court's supplemental jurisdiction under 28 U.S.C. § 1367(a), *see Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 560 (2005). It is not (*contra* the Seventh Circuit) because "absent class members are not considered parties" when assessing the complete diversity requirement. *Mussat*, 953 F.3d at 447.

Similarly, the claims of unnamed class members have long been considered "separate and distinct" for purposes of Section 1332's amount-in-controversy requirement for diversity cases—just as if they were separate named parties. *See Snyder*, 394 U.S. at 335-337. Because class members' claims are separate and distinct, they cannot be aggregated to meet the jurisdictional-amount threshold in § 1332. *See id.*; Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 Rev. Litig. 31, 36-37 (2019).

And there is broad agreement across circuits that unnamed class members must satisfy Article III's case-or-controversy requirement before any judgment can be entered. McLaughlin & McGovern, *Absent Class Members and Article III Standing*, New York Law Journal (June 10, 2020), https://bit.ly/2WUAkJB; *see also Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III

does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). By the same token, because unnamed class members are parties to the "case or controversy" for Article III purposes, they can continue to litigate the class action even after the named plaintiff's case becomes moot. *See Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975) (Article III case or controversy "may exist … between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"). To the extent unnamed class members are exempt from any procedural requirements, such as, under a minority view, discovery,[10] none of those requirements bears on the court's *power* to decide the case.

The Seventh Circuit's reasoning also elides the critical difference between putative and certified classes. It is one thing to say that unnamed class members are not "parties" before the class is even certified. After all, judgments are not binding on merely putative class members, whose rights are not and may never be before the court, *see Smith* v. *Bayer Corp.*, 564 U.S. 299, 315-316 & n.11 (2011), and who by some accounts "are *always* treated as nonparties," *Molock*, 952 F.3d at 297. "[C]lass certification," on the other hand, "brings unnamed class members into the action and triggers due process limitations on a court's exercise of personal jurisdiction over their claims." *Id.* at 298; *see also In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1037 (11th Cir. 2015) ("Certification of a class is the critical

[10] Although "a few courts" have stated that "absent class members are not 'parties' and thus are not subject to party-related discovery devices," "[m]ost courts" hold "that discovery from absent class members is not forbidden but rather is disfavored." 3 *Newberg on Class Actions* § 9:11.

act which reifies the unnamed class members and, critically, renders them subject to the court's power."). Once the act of certification happens, as it has in Ally's case, the Seventh Circuit's "nonparty" argument loses any persuasive force it might have had.

b. Some courts have suggested that due-process limits on personal jurisdiction are superfluous in class actions given the class certification requirements in Federal Rule of Civil Procedure 23 and state-law analogues. *E.g.*, *Munsell* v. *Colgate-Palmolive Co.*, 2020 WL 2561012, at *8 (D. Mass. May 20, 2020). But Rule 23 and personal jurisdiction are not substitutes; they serve wholly different purposes. Rule 23 exists principally to ensure that class members' claims are sufficiently similar to warrant class adjudication. *See* Fed. R. Civ. P. 23(a) (commonality, typicality, adequacy); *id.* 23(b)(3) (common questions must predominate); *see, e.g.*, *Coca-Cola*, 249 S.W.3d at 860 ("Class actions are designed to provide an 'economical means for disposing of similar lawsuits'" (quoting *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403 (1980))). It is the precise teaching of *Bristol-Myers*, however, that mere "similar[ity]" among claims is irrelevant to personal jurisdiction, which is concerned with the relationship between each claim and *the forum*, not the relationships among the claims themselves. *See* 137 S. Ct. at 1781; *Molock*, 952 F.3d at 307-308 (Silberman, J., dissenting).

Nor do class-action rules like Rule 23 achieve the purposes served by the personal-jurisdiction doctrine. The "primary" concern of personal jurisdiction is "the burden on the defendant," *Bristol-Myers*, 137 S. Ct. at 1780, whereas Rule 23's focus is the interests of absent class members unable to appear in court to protect their rights, *see Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985). Rule 23 does nothing to protect

defendants from "the coercive power of a State that may have little legitimate interest in the claims in question," and nothing to protect the states' federalism interest in adjudicating disputes germane to occurrences within their borders. *Bristol-Myers*, 137 S. Ct. at 1780. And *state* law analogues to Rule 23 are even less suited to protect these federalism interests. Even in class actions, federal personal-jurisdiction doctrine retains an essential role. *Molock*, 952 F.3d at 307-308 (Silberman, J., dissenting).

c. Finally, there is nothing "impractical[]" about ensuring that the claims of unnamed class members have a constitutionally sufficient connection to the forum, as at least one district court has suggested. *See Dennis* v. *IDT Corp.*, 343 F. Supp. 3d 1363, 1366-1367 (N.D. Ga. 2018). Although this Court need not prescribe one specific procedure, a straightforward solution would be to build the forum-connection requirement into the definition of the class itself. *See* Spencer, 39 Rev. Litig. at 49-50. If nothing else, due process should prevent courts from entertaining multistate class actions where the class definition on its face encompasses hundreds of thousands of claims unrelated to the forum, as the Missouri courts have done below.

II. AT A MINIMUM, THE COURT SHOULD HOLD THIS PETITION FOR ITS UPCOMING DECISION IN *FORD*

Even if the Court does not at this point grant plenary review to decide whether *Bristol-Myers* applies to the claims of certified class members, the Court should hold Ally's petition pending the upcoming disposition of *Ford Motor Co.* v. *Montana Eighth Judicial District Court* (No. 19-368) ("*Gullett*") and *Ford Motor Co.* v. *Bandemer* (No. 19-369), which have been consolidated and set for argument in October 2020. Those cases pre-

sent the question whether specific jurisdiction's "arising out of or relating to" requirement is satisfied "when none of the defendant's forum contacts caused the plaintiff's claims." The Court's decision in *Ford* is likely to elucidate the scope of *Bristol-Myers* and to affect the proper disposition of this case.

The facts of the *Ford* cases and this case are parallel in many relevant respects. In *Gullett*, the personal representative of the decedent, who was a Montana resident, brought suit for wrongful death against Ford in Montana based on an accident that occurred in Montana, even though Ford is not "at home" in Montana and the vehicle was assembled in Kentucky and first sold to a retail consumer in Washington. In *Bandemer*, a plaintiff brought suit against Ford in Minnesota for personal injuries based on an accident that occurred in Minnesota, even though Ford is not "at home" in Minnesota and the vehicle was designed in Michigan, assembled in Ontario, and first sold at retail in North Dakota.[11] Even though Ford was not subject to general jurisdiction in either Montana or Minnesota and even though Ford had not committed any tortious act in either state, the state courts upheld personal jurisdiction over Ford in both cases—much as the Missouri state courts upheld jurisdiction over Ally in this case.[12]

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[11] *See* Pet. Br. 5-8, *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, No. 19-368 (U.S. Feb. 28, 2020).

[12] Indeed, Ally's brief in support of its motion to decertify the nationwide class presaged this precise issue. Ally wrote: ""Just because a company like Ford, for example, sells cars in Iowa and in California, does not mean there is jurisdiction in California for injuries that occurred in Iowa simply because Ford engages in the same type of activity—selling cars—in both states.…' Nor does the fact that [the Missouri trial court] has specific personal jurisdiction over Ally with respect to Missouri residents' claims give it

If the state courts did not have jurisdiction over the lawsuits in the *Ford* cases, then it is hard to see how the Missouri courts could have jurisdiction over the out-of-state class members' claims in this case. Indeed, Ally's arguments against personal jurisdiction over these claims are even stronger than Ford's arguments against jurisdiction. *Gullett* and *Bandemer* were brought on behalf of residents of a state in the courts of the state where they resided based on accidents that occurred in those states. Here, by comparison, the absent class members' claims at issue are asserted in Missouri (a) by non-resident plaintiffs (b) against a non-resident defendant (c) based on conduct that occurred outside the state. If the Missouri courts can exercise jurisdiction over such claims, then it is hard to discern any meaningful due-process constraint to personal jurisdiction over nationwide class actions.

Even if this Court does not grant plenary review in this case, the Court's decision in *Ford* will represent an "intervening development" that the Missouri courts were unable to consider, *see Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996), warranting this Court's standard practice of vacating and remanding the case for reconsideration by the lower courts. The same would be true of any decision this Court might issue in *Mussat* or *Molock*, should the losing parties seek this Court's review. Either way, the Missouri courts' summary rejection of Ally's federal personal-jurisdiction defense should not stand, and remand is the only way "to guarantee[] to [Ally] full and fair consideration of [its] rights." *Stutson* v. *United States*, 516 U.S. 193, 197 (1996).

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such jurisdiction over the same or similar claims asserted by residents of other states." App. 40a (quoting *State ex rel. Norfolk S. Ry. Co.* v. *Dolan*, 512 S.W.3d 41, 49 (Mo. 2017)).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, No. 19-368, and *Ford Motor Co.* v. *Bandemer*, No. 19-369, and then disposed of as appropriate in light of the decision in those cases. The Court may also wish to consider this petition in connection with any petition to be filed in *Mussat* v. *Mussat, Inc.*, 953 F.3d 441 (7th Cir. 2020), or *Molock* v. *Whole Foods Group*, 952 F.3d 293 (D.C. Cir. 2020).

Respectfully submitted.

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AUGUST 2020

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

No. SC98285
PROHIBITION
Jefferson County Circuit Court No. 16JE-AC01713-01
Eastern District Court of Appeals No. ED108501

January Session, 2020

STATE EX REL.
ALLY FINANCIAL INC.,
Relator,

v.

THE HONORABLE KATHERINE HARDY SENKEL,
Respondent.

Now at this day, on consideration of the petition for a writ of prohibition herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 2020, and on the 17th day of March, 2020, in the above- entitled cause.

WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 17th day of March, 2020.

signature, Clerk

signature, Deputy Clerk

APPENDIX B

IN MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED108501
Writ of Prohibition
JEFFERSON COUNTY CIRCUIT COURT
Cause No. 16JE-AC01713-01

STATE OF MISSOURI, EX REL.
ALLY FINANCIAL INC.,
Relator,

v.

HON. KATHERINE HARDY SENKEL,
Respondent.

ORDER

Relator has filed a Petition for Writ of Prohibition along with Suggestions in Support and Exhibits on December 12, 2019. In its petition, Relator requests this Court issue a writ of prohibition barring Respondent from taking any action other than vacating two orders entered by her—orders denying decertification of a nationwide class and selecting the statute of limitations applicable to cross-claims raised by the nationwide class. The focus of Relator's Petition for Writ of Prohibition is the certification of a nationwide class by Respondent in the underlying litigation.

A party seeking immediate redress from an order granting or denying class certification is directed to file

a petition for permission to appeal said order with the court of appeals. Said petition must be filed within 10 days of the entry of the underlying order from which the appeal is taken. Rule 84.035(a). Accordingly, we review Relator's Petition for Writ of Prohibition as a petition seeking permission to appeal Respondent's orders denying decertification of the nationwide class and the ancillary order addressing the statute of limitations that will apply to said nationwide class.

The orders challenged by Relator were both entered by Respondent on November 25, 2019. Relator's petition seeking permission to appeal the orders was due no later than December 5, 2019 Relator's petition was filed December 12, 2019 and is therefore untimely filed. Accordingly, Relator's Petition for Writ of Prohibition, which we treat as a Petition for Permission to Appeal Respondent's orders denying decertification of the nationwide class and determining the applicable statute of limitations for the nationwide class is DENIED.

A writ petition is the appropriate procedure for obtaining review of the court of appeals' denial of a petition for permission to appeal from an order granting class certification. *State ex rel. Gen. Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42, 46 (Mo. 2019); *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. 2008). Pursuant to Rule 84.035(j), Relator may seek review of Respondent's orders denying decertification of the nationwide class and determining the applicable statute of limitations for the nationwide class by petition for an original remedial writ to be filed in the Missouri Supreme Court.

SO ORDERED.

DATED: 12/17/19 signature

Kurt S. Odenwald, Judge
Writ Division VII
Missouri Court of Appeals, Eastern District

cc: Hon. Katherine Michelle Hardy-Senkel
Jesse Rochman
Martin Daesch
James Onder
Todd Ruskamp
Daniel Schwaller

APPENDIX C

CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

Case No. 16JE-AC01713-01
Division 13

ALLY FINANCIAL INC.,
Plaintiff,

v.

ALBERTA HASKINS AND,
DAVID DUNCAN,
Defendants.

Filed November 25, 2019

ORDER:

1. Ally's Motion to Decertify is **DENIED**. A central aspect of this class action is a determination of whether Ally violated any statutory provisions under the UCC governing redemption and its form UCC notices. The claims asserted here "present a classic case for treatment as a class action." *State ex rel. Gen. Credit Acceptance Co., LLC v. Vincent*, No. SC97175, 2019 WL 1446936, at *2 (Mo. banc Apr. 2, 2019) ("*GCAC*"). However, the Supreme Court found problems with the class definition in *GCAC* as it was "presently defined" because it included "large numbers of individual claims precluded by final deficiency judgments or estopped by their failure to disclose the claims in bankruptcy." *Id.* at 1. *GCAC*, 2019 WL 1446936, at *1. Ally alleges the

same problems in *GCAC* exist here. Class Representatives contend the problems in *GCAC* don't exist here because Ally failed to produce sufficient evidence to show the classes include "large numbers of individual claims precluded by final deficiency judgments or estopped by their failure to disclose the claims in bankruptcy." Without conceding there are problems with the class definitions as presently defined, Class Representatives have agreed to exclude all persons: against whom Ally has obtained a deficiency judgment; who filed for Chapter 7 bankruptcy after the date on the presale notice and whose bankruptcy ended in discharge rather than dismissal; and who filed for Chapter 13 bankruptcy pending after the date on the presale notice and whose bankruptcy is still pending or ended in discharge rather than dismissal. With these modifications, *GCAC* supports certification, not decertification.

2. Modification is the appropriate remedy, not decertification. *Id.* at *5 ("The overly broad class definition is not necessarily fatal, because an overly broad "class definition may be modified consistent with the precepts of ... Rule 52.08 in order to remove the uninjured putative members."); *see also Messner v. Northshore University HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) ("Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem is more of an art than a science. Either problem can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis."); *In re Nexium Antitrust Litigation*, 777 F.3d 9, 22 (1st Cir. 2015) (same). The Court rejects Ally's arguments for decertification. However, the Court makes these modifications to the class definitions:

Class 1:

All persons within the class period in Exhibit A to this Order:

a. who are named as borrowers or buyers on a loan or financing agreement with Ally, assigned to Ally or owned by Ally;

b. whose loan or financing agreement was secured by collateral;

c. whose collateral was repossessed, voluntarily or involuntarily; and

d. whose collateral was disposed.

Class 2:

All persons:

a. who obtained a Missouri Certificate of Title for a motor vehicle identifying Ally as the lienholder, or who are named as borrowers or buyers with a Missouri address on a loan or financing agreement with Ally, assigned to Ally or owned by Ally;

b. whose loan or financing agreement was secured by a motor vehicle or other collateral;

c. whose motor vehicle or other collateral was repossessed, involuntarily or voluntarily; and

d. whose motor vehicle or other collateral was disposed from June 17, 2010, through the present.

Excluded from Class 1 and Class 2 are all persons: against whom Ally has obtained a deficiency judgment;

who filed for Chapter 7 bankruptcy after the date on their presale notice and whose bankruptcy ended in discharge rather than dismissal; and who filed for Chapter 13 bankruptcy pending after the date in the presale notice and whose bankruptcy is still pending or ended in discharge rather than dismissal. Under Paragraph 5 of this Order, Ally must identify everyone on the class list who falls within these exclusions within 30 days after this Order. Everyone on the class list (including supplements to it) submitted by Ally that is not identified as being within these exclusions are properly within Class 1 and Class 2 and cannot later be excluded based on res judicata or estoppel.

* * *

SO ORDERED:

November 25, 2019	signature
Dated	Judge Katherine M. Hardy-Senkel

APPENDIX D

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, MISSOURI

Case No. 16JE-AC01713-01

ALLY FINANCIAL INC.,

Plaintiff,

v.

ALBERTA HASKINS AND,
DAVID DUNCAN,

Defendants.

Filed November 25, 2019

ORDER ON DISPUTED STATUTES OF LIMITATION

This Court's May 9, 2018 Order certifying a nationwide class directed the parties to confer regarding the statutes of limitations applicable to the nationwide class' counterclaim and allowed either party to file a motion to have the Court determine that question if the parties were unable to agree. The parties are unable to reach agreement on the applicable statute of limitations in 23 states. After both parties submitted briefs on the issue, the Court heard oral argument on the issue on April 15, 2019 and took the issue under submission. After considering the parties' briefs and oral arguments, the Court determines the applicable statutes of limitation for the 23 disputed states as set forth below.

SO ORDERED.

DATED: NOV. 25, 2019 signature
Judge Katherine M. Hardy-Senkel

Exhibit A – Class Period

Consumer's State in Presale Notice	**Disposition on or after this Date**	**Consumer's State in Presale Notice**	**Disposition on or after this Date**
Alabama	June 17, 2010	Montana	June 17, 2014
Alaska	June 17, 2013	Nebraska	June 17, 2012
Arizona	June 17, 2012	Nevada	June 17, 2013
Arkansas	June 17, 2013	New Hampshire	June 17, 2013
California	June 17, 2013	New Jersey	June 17, 2010
Colorado	June 17, 2013	New Mexico	June 17, 2012
Connecticut	June 17, 2010	New York	June 17, 2013
Delaware	June 17, 2013	North Carolina	June 17, 2013
District of Columbia	June 17, 2013	North Dakota	June 17, 2010
Florida	June 17, 2012	Ohio	June 17, 2010
Georgia	June 17, 1996	Oklahoma	June 17, 2013
Hawaii	June 17, 2010	Oregon	June 17, 2010

Idaho	June 17, 2013	Pennsylvania	June 17, 2010
Illinois	June 17, 2011	Rhode Island	June 17, 2006
Indiana	June 17, 2006	South Carolina	June 17, 2013
Iowa	June 17, 2014	South Dakota	June 17, 2010
Kansas	June 17, 2013	Tennessee	June 17, 2015
Kentucky	June 17, 2006	Texas	June 17, 2012
Louisiana	June 17, 2016	Utah	June 17, 2013
Maine	June 17, 2010	Vermont	June 17, 2010
Maryland	June 17, 2013	Virginia	June 17, 2014
Massachusetts	June 17, 2012	Washington	June 17, 2013
Michigan	June 17, 2010	West Virginia	June 17, 2006
Minnesota	June 17, 2010	Wisconsin	June 17, 2013
Mississippi	June 17, 2013	Wyoming	June 17, 2008
Missouri	June 17, 2010		

APPENDIX E

IN THE SUPREME COURT OF MISSOURI

No. SC98285
No. ED 108501
Court of Appeals for
the Eastern District
No. 16JE-AC01713-01
Circuit Court of Jefferson County

STATE OF MISSOURI, EX REL.
ALLY FINANCIAL INC.,
Relator,

v.

HON. KATHERINE HARDY SENKEL,
Respondent.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

Relator Ally Financial Inc. ("Ally") respectfully submits these suggestions in support of its petition for a writ of prohibition barring the Honorable Katherine Hardy Senkel (Respondent) from taking any further action other than vacating, in whole or in part, her orders denying decertification of the nationwide and Missouri-only counterclaim classes in the underlying action and selecting the statutes of limitation applicable to the nationwide class' counterclaims.

I.

INTRODUCTION

Like *State ex rel Gen. Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42 (Mo. 2019) ("*GCAC*"), the underlying action is one of many the Onder Law Firm has pursued in Missouri state courts challenging a creditor's pre- and post-sale notices following default and repossession of a car bought on credit.

Uniquely in this matter, the circuit court certified a nationwide class, which Respondent has wrongly declined to decertify. This Court should grant this petition to review and reverse that ruling. The petition raises several interrelated questions of first impression in Missouri regarding certification of multi-state or nationwide classes on claims governed by different states' laws. Appellate guidance on those issues is sorely needed, as the record in this case demonstrates. Review is also needed now because repeated erroneous rulings in the underlying case will make the underlying action just as unmanageable on appeal from a judgment as it will be to try.

Issues of first impression raised by this petition include (1) what must be shown about possible variances in state laws applicable to the class' claim(s), (2) who bears the burden of making that showing on class certification and decertification motions, (3) whether Missouri courts should refrain from certifying multistate or nationwide classes on claims that raise novel issues of law under other states' laws, (4) whether Missouri trial courts must "rigorously analyze" whether Rule 52.08's requirements are satisfied and enter orders evidencing that careful consideration of the Rule's requirements, (5) whether Missouri may exercise specific personal jurisdiction over Ally to adjudicate claims of class mem-

bers who do not reside in Missouri and whose claims arise from occurrences and transactions that took place outside this state, and (6) whether the class definition is impermissibly overbroad in including many thousands of class members who have agreed to arbitrate their claims.

An additional question of first impression is raised by Court of Appeals' order denying Ally's petition, incorrectly treating the petition which challenges an order denying a motion to decertify a previously certified class as a petition for permission to appeal an order granting class action certification governed by Rule 52.08(f) and Rule 84.035's 10-day filing deadline. The Court of Appeals' order is contrary to the unanimous view of all federal circuits interpreting Fed. R. Civ. P. 23(f)'s identical provisions.

* * *

The circuit court's orders also ignored Ally's challenge to personal jurisdiction. Ally is not subject to general jurisdiction in Missouri. Missouri may exercise specific jurisdiction over it only on claims that arise from Ally's contacts with Missouri. *See Bristol-Myers Squibb Co. v. Superior Court*, __ U.S. __, 137 S. Ct. 1773, 1781 (2017) ("*Squibb*"). The claims of non-Missouri class members do not arise from any activity or occurrence that took place in Missouri. Missouri could not exercise personal jurisdiction over Ally to resolve those claims if the class members sued here individually or in a mass action. *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 233 (Mo. 2017) ("*Bayer*"). A class action is a purely procedural device that does not expand a state's jurisdictional reach.

* * *

Issuance of a writ of prohibition is appropriate to resolve these important legal questions and to provide guidance to circuit courts in handling other similar class actions. The challenged order is not appealable. The remedy by appeal from a final judgment is not adequate. Dealing with a 430,000-member nationwide class action under the varying laws of 51 jurisdictions will cause great delay and enormous expense. Ally's potential exposure to the nationwide class will put substantial pressure on Ally to settle without regard to the merits of the case. And Respondent clearly erred in entering the challenged orders as shown below.

* * *

IV.

THE PETITION SHOULD BE GRANTED TO ANSWER QUESTIONS OF FIRST IMPRESSION REGARDING CERTIFICATION OF A NATIONWIDE CLASS

* * *

D. Missouri Courts Lack Specific Personal Jurisdiction Over Ally With Respect To Claims Of Non-Resident Class Members

This petition also raises an issue of first impression as to whether Missouri state courts may exercise personal jurisdiction over Ally to adjudicate claims of non-resident class members if the claims arise from activities or transactions that occurred outside Missouri.[29]

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[29] Although no published Missouri appellate decision addresses this point, the circuit court denied certification of a nationwide class on this ground in *Ameri-credit Financial Services, Inc. d/b/a GM Financial v. Bell*, Case No. 15SLAC24506-01 (Mo. Cir. Ct. Aug. 12, 2019) (order decertifying nationwide class).

In order to hear claims against a defendant, a state court must have either general or specific personal jurisdiction over the defendant. *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014).

Missouri courts cannot assert general personal jurisdiction over Ally. Missouri is not Ally's state of incorporation or principal place of business. Ally's Missouri contacts are not "so extensive and all-encompassing that Missouri, in effect, becomes another home state." *Id.* at 137; *see also State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 46-48 (Mo. 2017); *Bayer*, 536 S.W.3d at 232.

Specific personal jurisdiction is proper only if the underlying claim arises from or is related to the defendant's activities in the forum state. *Daimler*, 571 U.S. at 131-32; *see also Norfolk S.*, 512 S.W.3d at 48-49. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Squibb*, 137 S. Ct. at 1780.

The claims of class members who reside outside Missouri do not arise from or relate to Ally's activities in Missouri or any other contacts Ally has with Missouri. Instead, Ally financed non-resident class members' car purchases in the states of their residence, repossessed their cars in those states, and sent them pre- and post-sale notices to their residential addresses in those other states. A1192. Any injury that non-residents of Missouri suffered from the allegedly defective notices was suffered where they lived, not in Missouri.

It is not enough that Ally may engage in similar conduct in Missouri affecting Missouri residents. "[A] national company cannot be sued anywhere simply be-

cause it "does the same 'type' of business in the forum state as in the rest of the country." *Norfolk S.*, 512 S.W.3d at 49.

Also, "[t]he mere fact that other plaintiffs were [injured by similar conduct as nonresidents were] does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, 'a defendant's relationship with a … third party, standing alone, is an insufficient basis for jurisdiction.' This remains true even when third parties [here, Missouri residents] can bring claims similar to those brought by the nonresidents." *Squibb*, 137 S. Ct. at 1781. Thus, *Squibb* rejected the notion that "nonresident plaintiffs can gain 'piggyback' jurisdiction by joining their claims with the claims of plaintiffs with a connection to the forum state." *Bayer*, 536 S.W.3d at 233.

The general due process principals that *Squibb* explicated apply to class actions as well as to the mass actions at issue in *Squibb* and *Bayer*. The class action is merely a procedural tool for efficient adjudication of many similar claims. That procedural device does not enlarge a state's jurisdiction over a nonresident defendant.

While *Shutts* distinguished class actions for purposes of asserting jurisdiction over nonresident members of a plaintiff class, "the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant." *Bristol-Myers Squibb Co.*, 137 S.Ct. at 1783 (citing *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 808-12 (1985)). And, as *Shutts*, itself, held, a court may exercise personal jurisdiction over nonresident plaintiff class members precisely because states "place fewer burdens upon absent

class plaintiffs than they do upon absent defendants."[30] *Shutts*, 472 U.S. at 811. Class actions impose greater not lessened burdens on defendants. So the class procedure does not allow a state to exercise greater specific personal jurisdiction over non-residents' claims against a nonresident defendant.

While lower federal courts have split on this issue, the better reasoned decisions hold that "[t]he 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." *In re Dental Supplies Antitrust Litig.*, 16 Civ. 696 (BMC)(GRB), 2017 U.S. Dist. LEXIS 153265, at *37 (E.D. N.Y. Sept. 20, 2017).[31]

By suing Haskins and Duncan in Missouri, Ally consented to jurisdiction of the Missouri courts over Haskins' and Duncan's own claims against Ally. *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938); *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974). But that consent

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[30] As *Shutts* pointed out, most states protect absent class members through procedures similar to Federal Rule of Civil Procedure 23. "[A]bsent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. … [They] are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages …." *Shutts*, 472 U.S. at 809-10.

[31] *See also McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 U.S. Dist. LEXIS 177892, at *10 (N.D. Ill. Oct. 26, 2017); *Roy v. FedEx Ground Package Sys.*, No. 3:17-cv-30116-KAR, 2018 U.S. Dist. LEXIS 200010, at *12-13 (D. Mass. Nov. 27, 2018); *Gazzillo v. Ply Gem Indus.*, No. 1:17-CV-1077 (MAD/CFH), 2018 U.S. Dist. LEXIS 180303, at *19 (N.D. N.Y. Oct. 22, 2018); but see *Swinter Group, Inc. v. Serv. of Process Agents, Inc.*, No. 4:17-cv-2759-RLW, 2019 WL 266299 (E.D. Mo. Jan. 18, 2019).

does not extend to claims by parties other than Haskins and Duncan. Consent to jurisdiction is both case and party specific. *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018).[32] Similarly, "defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties." *Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835 (9th Cir. 2005).

In short, Missouri lacks personal jurisdiction over Ally to adjudicate nonresident class members claims that arise from activities or transactions which occurred wholly outside Missouri. For this additional reason, the requested writ should issue vacating the order denying decertification of the nationwide class.

* * *

VI.

CONCLUSION

For the reasons stated above, Ally requests that the Court issue a preliminary order and permanent writ of prohibition directing Respondent to take no further action on Haskins/Duncan's counterclaims except to decertify the nationwide and Missouri-only classes and to take no action inconsistent with this Court's opinion in the matter.

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[32] *See also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 50 n. 5 (2d Cir. 1991)); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86-87 (1st Cir. 1990).

Dated: December 27, 2019 Respectfully submitted,

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APPENDIX F

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I.

INTRODUCTION

Like *State ex rel Gen. Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42 (Mo. 2019) ("*GCAC*"), the underlying action is one of many the Onder Law Firm has

pursued in Missouri state courts challenging a creditor's pre- and post-sale notices following default and repossession of a car bought on credit.

Uniquely in this matter, the circuit court certified a nationwide class, which Respondent has wrongly declined to decertify. This Court should grant this petition to review and reverse that ruling. The petition raises several interrelated questions of first impression in Missouri regarding certification of multi-state or nationwide classes on claims governed by different states' laws. Appellate guidance on those issues is sorely needed, as the record in this case demonstrates. Review is also needed now because repeated erroneous rulings in the underlying case will make the underlying action just as unmanageable on appeal from a judgment as it will be to try.

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The circuit court's orders also ignored Ally's challenge to personal jurisdiction. Ally is not subject to general jurisdiction in Missouri. Missouri may exercise specific jurisdiction over it only on claims that arise from Ally's contacts with Missouri. *See Bristol-Myers Squibb Co. v. Superior Court*, _____ U.S. _____, 137 S. Ct. 1773, 1781 (2017) ("*Squibb*"). The claims of non-Missouri class members do not arise from any activity or occurrence that took place in Missouri. Missouri could not exercise personal jurisdiction over Ally to resolve those claims if the class members sued here individually or in a mass action. *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 233 (Mo. 2017) ("*Bayer*"). A class action is a purely procedural device that does not expand a state's jurisdictional reach.

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Issuance of a writ of prohibition is appropriate to resolve these important legal questions and to provide guidance to circuit courts in handling other similar class actions. The challenged order is not appealable. The remedy by appeal from a final judgment is not adequate. Dealing with a 430,000-member nationwide class action under the varying laws of 51 jurisdictions will cause great delay and enormous expense. Ally's potential exposure to the nationwide class will put substantial pressure on Ally to settle without regard to the merits of the case. And Respondent clearly erred in entering the challenged orders as shown below.

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[26] Although no published Missouri appellate decision addresses this point, the circuit court denied certification of a nationwide class on this ground in *Americredit Financial Services, Inc. D/B/A GM Financial v. Bell*, Case No. 15SL- AC24506-01 (Mo. Cir. Ct. Aug. 12, 2019) (order decertifying nationwide class).

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It is not enough that Ally may engage in similar conduct in Missouri affecting Missouri residents. "[A] national company cannot be sued anywhere simply because it "does the same 'type' of business in the forum state as in the rest of the country." *Norfolk S.*, 512 S.W.3d at 49.

Also, "[t]he mere fact that other plaintiffs were [injured by similar conduct as nonresidents were] does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, 'a defendant's relationship with a … third party, standing alone, is an insufficient basis for jurisdiction.' This remains true even when third parties [here, Missouri residents] can bring claims similar to those brought by the nonresidents." *Squibb*, 137 S. Ct. at 1781. Thus, *Squibb* re-

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ic personal jurisdiction over non-residents' claims against a non- resident defendant.

While lower federal courts have split on this issue, the better reasoned decisions hold that "[t]he 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." *In re Dental Supplies Antitrust Litig.*, 16 Civ. 696 (BMC)(GRB), 2017 U.S. Dist. LEXIS 153265, at *37 (E.D. N.Y. Sept. 20, 2017).[28]

By suing Haskins and Duncan in Missouri, Ally consented to jurisdiction of the Missouri courts over Haskins' and Duncan's own claims against Ally. *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938); *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974). But that consent does not extend to claims by parties other than Haskins and Duncan. Consent to jurisdiction is both case and party specific. *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018).[29] Similarly, "defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by

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[28] *See also McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 U.S. Dist. LEXIS 177892, at *10 (N.D. Ill. Oct. 26, 2017); *Roy v. FedEx Ground Package Sys.*, No. 3:17-cv-30116-KAR, 2018 U.S. Dist. LEXIS 200010, at *12-13 (D. Mass. Nov. 27, 2018); *Gazzillo v. Ply Gem Indus.*, No. 1:17-CV-1077 (MAD/CFH), 2018 U.S. Dist. LEXIS 180303, at *19 (N.D. N.Y. Oct. 22, 2018); but see *Swinter Group, Inc. v. Serv. of Process Agents, Inc.*, No. 4:17-cv-2759- RLW, 2019 WL 266299 (E.D. Mo. Jan. 18, 2019).

[29] *See also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 50 n. 5 (2d Cir. 1991)); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86-87 (1st Cir. 1990).

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In short, Missouri lacks personal jurisdiction over Ally to adjudicate non-resident class members claims that arise from activities or transactions which occurred wholly outside Missouri. For this additional reason, the requested writ should issue vacating the order denying decertification of the nationwide class.

* * *

VI.

CONCLUSION

For the reasons stated above, Ally requests that the Court issue a preliminary order and permanent writ of prohibition directing Respondent to take no further action on Haskins/Duncan's counterclaims except to decertify the nationwide and Missouri-only classes and to take no action inconsistent with this Court's opinion in the matter.

Dated: December 12, 2019 Respectfully submitted,

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APPENDIX G

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, MISSOURI

Case No. 16JE-AC01713-01

ALLY FINANCIAL INC.,

Plaintiff,

v.

ALBERTA HASKINS AND
DAVID DUNCAN,

Defendants.

PLAINTIFF ALLY FINANCIAL INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DECERTIFY THE NATIONWIDE AND MISSOURI CLASSES

I.

INTRODUCTION

Counterclaimants Alberta Haskins and David Duncan ("Haskins/Duncan") defaulted on their car loan from Ally Financial Inc. ("Ally"). Ally repossessed the car and sold it at auction, leaving a deficiency still owing on the loan. Ally filed this suit to collect that deficiency. Haskins/Duncan counterclaimed, alleging that Ally's pre- and post-sale notices were improper because they did not "indicate to the recipient no one else owes money" on the loan, demanded an accelerated balance, and required redemption amounts to be paid in certified funds. For those alleged defects (which Ally de-

nies), Haskins/Duncan seek not only to avoid a deficiency judgment but also to obtain a large damage award against Ally for themselves and both nationwide and Missouri classes of defaulted borrowers.

By this motion, Ally seeks to decertify the nationwide class (Class 1) and Missouri class (Class 2) for straightforward and well-grounded legal reasons.

The nationwide class should be decertified because wide variations in applicable state law show that the class cannot satisfy Rule 52.08(b)(3)'s predominance and superiority requirements and because the Court lacks personal jurisdiction over Ally with respect to claims by class members who do not reside in Missouri.

Both the nationwide and the Missouri classes should be decertified because the class definitions are overly broad, including many class members who have suffered no injury or are barred from recovery—or alternatively viewed, Ally's affirmative defenses defeat predominance—and because the intent of the parties, which the Court has held to be a critical issue in this case, defeats predominance.

"Missouri courts consistently recognize a certified class may subsequently be modified or decertified later before a decision on the merits." *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 79 (Mo. App. W.D. 2011). "Rule 52.08, therefore, charges the circuit court with the duty to monitor its class certification order in light of the evidentiary developments in the case." *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 116 (Mo. App. W.D. 2012) (internal quotations and citations omitted).

Here, developments since the May 2018 class certification order[1] demonstrate that the Court should now decertify the nationwide class, as it does not and cannot satisfy the predominance and superiority criteria required for certification under Rule 52.08(b)(3).

First, "the application of varying state laws not common to the class precludes class certification." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 486-87 (Mo. 2003) ("*Am. Family*"). Here, state laws vary widely on an array of issues critical to the nationwide class' counterclaim.

Though adopted in every state, the Uniform Commercial Code ("UCC"), in fact, "is not uniform,"[2] but instead has been "adopted on a state-by-state basis, with varying degrees of tailoring, for each state's specific needs." *Pinks v. M&T Bank Corp.*, No. 1:13-cv-01730, 2017 U.S. Dist. LEXIS 50892, at *16 (S.D. N.Y. March 31, 2017) (citation omitted).

The text of the UCC provisions at issue in this case has not been uniformly adopted by all states. Also,

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[1] Those developments include the production of class member data revealing the overbreadth of the class definitions, the Court's order denying summary judgment which deemed intent to be a key triable issue of fact, Haskins/Duncan's failure to address state law variances previously, and the parties' subsequent disagreement on the applicable statutes of limitation for a majority of states. Of particular importance, the Missouri Supreme Court will soon decide *State ex rel. General Credit Acceptance Co., LLC v. Vincent*, No. SC 97175 providing important new guidance on the issues discussed in part VI below. These post-certification developments are more thoroughly addressed in Part II.B. (pp. 6-8) below.

[2] *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016-17 (D.C. Cir. 1986) (*quoting* James J. White & Robert S. Summers, Uniform Commercial Code 7 (2d ed. 1980)).

those UCC provisions are modified or superseded by state laws governing consumer transactions which vary even more widely from state to state. In addition, the counterclaim raises novel issues that neither the UCC's text nor any state's appellate decisions resolve. Missouri has no interest in resolving novel issues under the laws of other states, and doing so would improperly infringe on those states' sovereign right to determine their own law.

State law also varies as to whether strict compliance with UCC requirements is required or reasonable compliance suffices as well as whether non-compliance automatically bars a deficiency judgment or only creates a presumption that the creditor may rebut. State law also varies on whether a deficiency may be asserted as an offset or counterclaim to a borrower's action for damages under § 9-625.

The statutes of limitation applicable to the nationwide class' claim vary as well. Most states have yet to decide which statute of limitations applies to a claim for statutory damages under UCC § 9-625(b). Those which have decided the issue disagree as to whether it is a claim for a statutory penalty or one for breach of contract. State law also varies as to when the claim accrues.

For these reasons, three courts have found claims similar to the nationwide class' counterclaim cannot satisfy the predominance and manageability requirements for class certification. *See Pinks*, 2017 U.S. Dist. LEXIS 50892, at *16-20; *Jenkins v. Hyundai Motor Financing Co.*, No. 2:04-cv-00720, 2008 U.S. Dist. LEXIS 23073, at *7 (S.D. Ohio March 24, 2008); *Henry v. Consumer Portfolio Servs.*, No. D047979, 2007 Cal. App. Unpub. LEXIS 2886, at *21, 30-31 (Cal. App. April 10,

2007). This Court should follow their lead and decertify the nationwide class.

Second, this Court lacks personal jurisdiction over Ally with regard to claims by non-Missouri members of the nationwide class. By filing this suit to collect a deficiency from two individual Missouri residents, Ally did not consent to this court's jurisdiction for claims against it by other non-residents of Missouri. Ally is not "at home" in Missouri or subject to its general jurisdiction. Ally has insufficient contacts with Missouri to permit this Court to exercise specific jurisdiction over it with regard to claims of members of the nationwide class who reside in other states. *Bristol-Myers Squibb Co. v. Superior Court*, __ U.S. __, 137 S. Ct. 1773 (2017); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017); *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 U.S. Dist. LEXIS 177892, at *8-13 (N.D. Ill. Oct. 26, 2017).

Third, both the nationwide class and the Missouri class are overbroad and additional predominant individual issues are raised by Ally's affirmative defenses. Many class members agreed to arbitrate their claims against Ally. Others are bound by deficiency judgments entered against them, or by class action judgments. Still more class members filed bankruptcy petitions and no longer own the claim on which the nationwide class sues and/or are judicially estopped from suing on it as they did not list it in their bankruptcy schedules. *Strable v. Union Pacific R. Co.*, 396 S.W.3d 417, 422-23, 426 (Mo. App. E.D. 2013); *Mayo v. USB Real Estate Sec., Inc.*, No. 08-cv-00568, 2012 U.S. Dist. LEXIS 135454, at *11-17 (W.D. Mo. Sep. 21, 2012). Some class members did not buy their vehicles for personal, family or household purposes and so do not have the claim asserted for the nationwide class.

Finally, in denying summary judgment, this Court held that the parties' contract was ambiguous giving rise to a question of fact "as to the intent of the parties as to its meaning." Intent of the parties is a predominant individual issue, precluding class certification.

The nationwide class does not and cannot satisfy Rule 52.08(b)(3)'s predominance and manageability requirements for all four reasons stated above. The Missouri class cannot do so for the last two reasons stated. Both classes should be decertified.

* * *

V.

THE COURT LACKS PERSONAL JURISDICTION OVER ALLY ON CLAIMS BY NON-RESIDENTS

The nationwide class should be decertified for the additional and independent reason that this Court lacks personal jurisdiction over Ally with respect to claims by non-residents of Missouri who allege wrongs done to them in other states.

In order to hear claims against defendant, a court must have either general or specific personal jurisdiction over the defendant. *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014). Here, the Court lacks general jurisdiction over Ally as Ally was not incorporated in Missouri and does not have its principal place of business in this state. Nor is this an exceptional case in which Ally's Missouri contacts "are so extensive and all-encompassing that Missouri, in effect, becomes another home state." *Id.* at 137; *see also State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 46-48 (Mo. 2017); *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 232 (Mo. 2017).

Specific personal jurisdiction is proper if the underlying claim arises from or is related to the defendant's activities in the forum state. *Daimler*, 571 U.S.. at 131-32; *see also Norfolk S.*, 512 S.W.3d at 48-49. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780.

Since the Court lacks general personal jurisdiction over Ally, it may only assert specific jurisdiction over it, and so it can only hear claims that arise from Ally's activities in Missouri. The Court may exercise such jurisdiction over Haskins/Duncan and other Missouri residents since their claims arise from Ally's business activities in—hence, contacts with—Missouri. However that is not true of the claims of other states' residents. Haskins/Duncan do not allege and cannot show that the claims of non-resident members of the nationwide class arise from Ally's business activities in Missouri or any other contacts Ally may have with Missouri. Instead, Ally financed non-resident class members' car purchases in the states of their residence, repossessed their cars in those states, and sent them pre- and post-sale notices to their residential addresses in those other states. Declaration of Abner Rodriguez, ¶ 3. Any injury that non-residents of Missouri suffered from the allegedly defective notices was suffered where they lived, not in Missouri.

The mere fact that Ally conducts the same type of business in other states as it does in Missouri is an insufficient basis for a Missouri court to exert specific personal jurisdiction over non-residents' claims against Ally. As the Missouri Supreme Court has held, a national company cannot be sued anywhere simply because it "does the same 'type' of business in the forum

state as in the rest of the country." *Norfolk S.*, 512 S.W.3d at 49.

> Just because a company like Ford, for example, sells cars in Iowa and in California, does not mean there is jurisdiction in California for injuries that occurred in Iowa simply because Ford engages in the same 'type' of activity—selling cars—in both states. Such an argument goes even further than the pre-*Daimler* approach to *general* jurisdiction that *Daimler* rejected as providing no authority for general jurisdiction over a company. To say this same conduct confers specific jurisdiction over suits the facts of which have no relationship to the forum state would be to turn specific jurisdiction on its head. There would never be a need to discuss general jurisdiction, for every state would have specific jurisdiction over every national business corporation.

Id.

Nor does the fact that this Court has specific personal jurisdiction over Ally with respect to Missouri residents' claims give it such jurisdiction over the same or similar claims asserted by residents of other states. To paraphrase *Bristol-Myers Squibb Co.*: "The relevant plaintiffs are not [Missouri] residents and do not claim to have suffered harm in [this] State. In addition, … all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the [Missouri] courts cannot claim specific jurisdiction." *Bristol-Myers Squibb Co.*, 137 S.Ct. at 1782. "The mere fact that other plaintiffs were [injured by similar conduct as nonresidents were] does not allow the State to assert specific jurisdiction over the nonresidents' claims. As

we have explained, 'a defendant's relationship with a … third party, standing alone, is an insufficient basis for jurisdiction.' This remains true even when third parties (here, the plaintiffs who reside in Missouri) can bring claims similar to those brought by the nonresidents." *Id.* at 1781. Or as the Missouri Supreme Court put it more succinctly: "[N]onresident plaintiffs can gain 'piggyback' jurisdiction by joining their claims with the claims of plaintiffs with a connection to the forum state." *Bayer Corp.*, 536 S.W.3d at 233.

To be sure, *Bristol-Myers Squibb Co.* was a mass action, not a class action. But the Supreme Court's reasoning is not limited to mass actions. *See Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 874 (N.D. Ill. Dec. 11, 2017) ("Nothing in *Bristol-Myers* suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.'").

Nor is there anything special about class actions that permits a court to assert specific personal jurisdiction over a defendant on claims it could not hear under any other procedure, such as a mass action. While *Shutts* distinguished class actions for purposes of asserting jurisdiction over nonresident members of a plaintiff class, "the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant." *Bristol-Myers Squibb Co.*, 137 S.Ct. at 1783 (*citing Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 808-12 (1985)). And, as *Shutts*, itself, held, a court may exercise personal jurisdiction over nonresident plaintiff class members precisely because states "place fewer burdens upon absent class plaintiffs

than they do upon absent defendants."[24] *Shutts*, 472 U.S. at 811. Class actions impose greater not lessened burdens on defendants. So the class procedure does not allow a state to exercise greater specific personal jurisdiction over nonresidents' claims against a non-resident defendant.

While the lower federal courts have split on the issue, better reasoned decisions hold that *Bristol-Myers Squibb Co.'s* analysis applies to claims of non-resident plaintiff class members just as it does to non-resident plaintiffs in a mass action. One leading case found *Bristol-Myers Squibb Co.* "instructive in considering whether the Court has personal jurisdiction over the claims" of non-resident class members. *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 U.S. Dist. LEXIS 177892, at *10 (N.D. Ill. Oct. 26, 2017). As the class members had no injury arising from the defendant's forum-related activities in Illinois but instead were injured in the states where they purchased defendant's products, the court held it lacked jurisdiction over their claims. *Id.*, at *11.

> Because the only connection to Illinois is that provided by [the named plaintiff's] purchase of [defendant's product], which cannot provide a basis for the Court to exercise personal jurisdiction over the claims of nonresidents where [defendant] has no other connection to this fo-

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[24] As *Shutts* pointed out, most states protect absent class members through procedures similar to Federal Rule of Civil Procedure 23. "[A]bsent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. … [They] are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages … ." *Shutts*, 472 U.S. at 809-10.

> rum, the Court dismisses all claims pertaining to [defendant's products] brought on behalf of non-Illinois residents … without prejudice.

Id.

As another court confronting the application of *Bristol-Myers* to a class action observed: "[t]he 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." *In re Dental Supplies Antitrust Litig.*, 16 Civ. 696 (BMC)(GRB), 2017 U.S. Dist. LEXIS 153265, at *37 (E.D. N.Y. Sept. 20, 2017).

> "Nothing in *Bristol-Myers* suggests that its basic holding is inapplicable to class actions; 'rather, the Court announced a general principle—that due process requires a "connection between the forum and the specific claims at issue." '" "That principle applies with equal force whether or not the plaintiff is a putative class representative." Rather, in this court's view, "the Court's concerns about federalism suggest that it seeks to bar nationwide class actions in forums where the defendant is not subject to general jurisdiction."

Roy v. FedEx Ground Package Sys., No. 3:17-cv-30116-KAR, 2018 U.S. Dist. LEXIS 200010, at *12-13 (D. Mass. Nov. 27, 2018) (citations omitted); *see also Gazzillo v. Ply Gem Indus.*, No. 1:17-CV-1077 (MAD/CFH), 2018 U.S. Dist. LEXIS 180303, at *19 (N.D. N.Y. Oct. 22, 2018).

By suing Haskins and Duncan in Missouri, Ally consented to jurisdiction of the Missouri courts over

Haskins' and Duncan's own claims against Ally. *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938); *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974); *Kline v. Zueblin (In re American Export Group Int'l Servs., Inc.)*, 167 B.R. 311, 313-14 (Bankr. D.D.C. 1994). But that consent does not extend to claims by parties other than Haskins and Duncan. Consent to jurisdiction is both case and party specific.

> [A] party's consent to jurisdiction in one case … extends to that case alone and in no way opens that party up to other lawsuits in the same jurisdiction in which consent was given.

Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 88 (2d Cir. 2018) (internal quotes omitted) (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 50 n. 5 (2d Cir. 1991)); *see also Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86-87 (1st Cir. 1990) (consent to jurisdiction of *Sandstrom I* does not confer personal jurisdiction over *Sandstrom II* which was refiled after voluntary dismissal of *Sandstrom I*).

Likewise, "defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties." *Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835 (9th Cir. 2005). *Bristol-Myers Squibb* strongly supports that principle: Specific personal jurisdiction is to be determined for each claimant individually. That the Court has specific personal jurisdiction over the defendant with respect to one plaintiff's claim—whether by reason of contacts or consent—is insufficient reason to allow the Court to exercise jurisdiction with respect to a different plaintiff's claims. That is particularly true in this instance

where class members' claims arise from entirely different transactions—different car sales, loan agreements, repossessions, notices and resales. *See China Nat'l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F. Supp. 2d 579, 591-92 (S.D. N.Y. 2012).

In short, Ally has not consented to this Court's jurisdiction of non-residents' claims against it, and under *Bristol-Myers Squibb Co.*, this Court lacks personal jurisdiction over Ally with respect to those claims. Accordingly, the nationwide class should be decertified.

* * *

VIII.

CONCLUSION

For the reasons stated above, the Court should decertify the nationwide and Missouri classes.

Dated: February 27, 2019 SHOOK, HARDY, & BACON L.L.P.

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APPENDIX H

IN THE SUPREME COURT OF MISSOURI

No. SC98285
Case No. 16JE-AC01713-01

STATE EX REL.
ALLY FINANCIAL INC.,
Relator,

v.

THE HONORABLE KATHERINE HARDY SENKEL,
Respondent.

Proceeding in Prohibition from the
Circuit Court of Jefferson County, Missouri

SUGGESTIONS TO OPPOSE THE ISSUANCE OF A WRIT

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Martin L. Daesch, #40494
Jesse B. Rochman, #60712
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Class Counsel

Date: January 14, 2020

I. INTRODUCTION

Ally treated the motion for class certification like it was a dress rehearsal. Ally had multiple chances to seek interlocutory review of the issues presented here, but either failed—or chose not—to avail itself of those opportunities and is dilatory in seeking this writ.

This is a class action about "form documents" and uniform practices. (A1142-1148). The class claims are based on interpreting form UCC presale and post-sale notice of disposition of the collateral; a "central aspect of the class action is a determination of whether Ally violated any statutory provisions under the UCC governing redemption and its form UCC notices." (A1519). This case "present[s] a classic case for treatment as a class action." (*Id.* quoting *State ex rel. Gen. Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42, 47 (Mo. banc 2019) ("*GCAC*")). Like *GCAC*, Class Representatives allege Ally violated UCC §§ 9-602 and 9-623 by its uniform practice of restricting redemption payments and "providing presale notices restricting redemption payments[.]" *GCAC*, 570 S.W.3d at 45 n. 1. Ally calls this the "principal claim" for the class.

After having failed to seek interlocutory review on three prior occasions, Ally seeks a writ of prohibition barring Respondent "from taking any further action other than vacating, in whole or in part, her orders denying decertification" of the Nationwide Class and Missouri Class (both defined below). (Pet. p. 1). If "the remedy of appeal is available, prohibition will be denied." *State ex rel. Anheuser–Busch, LLC v. Moriarty*, No. SC97845, 2019 WL 7161285, at *4 (Mo. banc Dec. 24, 2019). Interlocutory appeal was available to Ally when the circuit court granted class action certification for the Nationwide Class and Missouri Class on May 9,

2018 (A1142-1150). Rule 52.08(f); Section 512.020(3). Ally, however, neither sought permission to appeal from the Court of Appeals nor a writ of prohibition from this Court regarding the order granting class action certification.

When Respondent denied Ally's motion for decertification on November 25, 2019, the Court of Appeals found the remedy of appeal was available to Ally again but Ally was late in seeking it. (A1525).[1] Although this Court has found prohibition appropriate to review class certification in limited circumstances, "the very absence of a prompt appeal by the party aggrieved by the decision on certification suggests that the concerns justifying" this Court's prior writs are, "at the least, less significant in the particular case." *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) (cited in Relator's Suggestions p. 15). "If the decision whether or not to certify the class was truly outcome determinative" or would cause Ally considerable hardship and expense, "one would not expect the losing party to continue the litigation for months before launching a new challenge to the ruling. Any value in permitting a belated interlocutory appeal is overridden by the desirability of the [circuit] court's proceeding expeditiously." *Id.*; *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11th Cir. 2007) (The "ten–day deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy.");

[1] Ally argues while the remedy of appeal was available to Ally for the "initial order certifying … a class," it wasn't available for Respondent's order denying Ally's motion for decertification. (Suggestions pp. 14–17). If true, Ally could've avoided the issue by seeking relief from the original order granting class certification or filing its petition with the Court of appeals within 10 days after the order denying decertification.

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000) ("By their nature, interlocutory appeals are disruptive, time–consuming, and expensive[.] We should err, if at all, on the side of allowing the [circuit] court an opportunity to fine–tune its class certification order, rather than opening the door too widely to interlocutory appellate review.").

Section 512.020 provides Ally "with the opportunity to appeal once a final judgment is entered in the underlying case." Anheuser–Busch, 2019 WL 7161285, at *5; *see, e.g., Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119 (Mo. banc 1979) (reviewing class certification after trial); Lucas *Subway Midmo V. Mandatory Poster*, 524 S.W.3d 116 (Mo. App. 2017) (reviewing class certification after summary judgment); *see also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1386 (11th Cir. 1998) ("the certification issue can be effectively reviewed on appeal after final judgment."). Because Ally "may seek relief by appeal after a final judgment," a writ of prohibition "would be inappropriate." *Anheuser–Busch*, 2019 WL 7161285, at *5; *see also* Rule 84.22(a). A writ of prohibition is also inappropriate because no discretion was abused. *State ex rel. Health Midwest Development v. Daugherty*, 965 S.W.2d 841 (Mo. banc 1998) ("Relator has the burden of showing that the trial court's ruling is beyond judicial discretion.").

* * *

Third, it's uncontested Respondent had personal jurisdiction over Class Representatives' and the Missouri Class members' claims. Respondent correctly rejected Ally's personal jurisdiction arguments for the Nationwide Class for four independent reasons:

1. Ally (the plaintiff below) consented or submitted to the circuit court's exercise of personal jurisdiction ***by instituting this action***. *Moore v. Rohm & Haas Co.*, 446 F.3d 643 (6th Cir. 2006).

2. Ally admitted the circuit court had jurisdiction in its first responsive pleading (A385 ¶ 4). *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 46 (Mo. banc 2017) ("because personal jurisdiction is an individual right, a defendant may waive jurisdictional objections by consenting to personal jurisdiction").

3. Ally waived personal jurisdiction by failing to raise it by motion under Rule 55.27(a)(2) or include it in its initial responsive pleading as an affirmative defense (A392-393). *Barron v. Abbott Laboratories, Inc.*, 529 S.W.3d 795, 797 n. 2 (Mo. banc 2017) ("Abbott waived personal jurisdiction. See Rule 55.27(g)."); *McCurley v. Royal Seas Cruises, Inc.*, 2019 WL 3006469, at *4 (S.D. Cal. July 10, 2019) ("[Rule 12(h)(1)] provide[s] a strict waiver rule with respect to [the lack of personal jurisdiction] defense… defendants wishing to raise [this] defense[ ] must do so in their first defensive move, be it a Rule 12 motion or a responsive pleading.").

4. The many cases that have addressed the issue have "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, Inc.*, 2018 WL 1981481, at *7 (D. N.J. April 27, 2018).

* * *

Decertification is a "harsh" remedy. *State ex rel. Union Planters Bank, NA v. Kendrick*, 142 S.W.3d 729, 743 (Mo. banc 2004). "***Only if*** another appropriate remedy cannot be found must the class be decertified." *Id.* (emphasis added). Respondent didn't abuse her discretion by refusing to decertify the classes.

* * *

IV. ANALYSIS

Ally's writ spans 66 pages, in an "unfocused, scattershot attack" on Respondent's decision, effectively seeking de novo review. As one court observed, "such wholesale attacks rarely produce results, tend to cloud the real issues, and in themselves cast doubts on [Ally's] claims." *Standard Petrol Co. v. Faugno Acquisition*, 191 A.3d 147, 330 Conn. 40 (2018). None of Ally's arguments have merit or show "extreme necessity" for using the "extraordinary remedy" of the writ of prohibition. *State ex rel. Peters–Baker v. Round*, 561 S.W.3d 380, 384 (Mo. banc 2018).

A. Whether the Court of Appeals erred isn't before this Court.

Ally's argues review is appropriate over whether the "Court of Appeals erred in treating Ally's petition as one seeking permission to appeal under Rule 52.08(f) and in denying it as untimely under Rule 84.035(a)." *See* Relator's Suggestions pp. 14-17. Ally's writ, however, is directed at the circuit court—not the Court of Appeals. Ally also doesn't ask this Court to order the Court of Appeals to grant it permission to appeal. The issue it wants this Court to address isn't properly before the Court and would only serve as an advisory

opinion seeking relief beyond what is requested in its petition. *Cope v. Parson*, 570 S.W.3d 579, 586 (Mo. banc 2019) ("This Court is not authorized to issue advisory opinions."); *Norman v. Wright*, 100 S.W.3d 783, 786 (Mo. banc 2003) ("The relief awarded … is limited to that sought by the pleadings.").

B. Prohibition is unnecessary because Respondent has personal jurisdiction over the Nationwide Class.

Ally asserts Respondent erred in not decertifying the Nationwide Class because it lacks personal jurisdiction over Ally regarding any non-Missouri residents. *See* Relator's Suggestions pp. 42-46. Ally never raised this argument to oppose the motion to certify the Nationwide Class (A523-53) despite it being available to Ally. Respondent may decline reconsideration based on an argument previously available to Ally. *Smith*, 289 S.W.3d at 688; 3 Newberg on Class Actions § 7:34 (5th ed.); *City Select Auto Sales*, 96 F.Supp.3d at 414 ("in the absence of *materially* changed or clarified circumstances courts should not condone a series of rearguments on the propriety of class certification" and "noting that material changes do not include the assertion of 'new arguments in order to get a second bite at the apple.'"). Regardless, Ally has failed to show Respondent acted beyond judicial discretion in denying the motion to decertify because Respondent correctly rejected Ally's personal jurisdiction argument for four independent reasons.

1. Ally (the plaintiff) consented or submitted to the circuit court's exercise of personal jurisdiction over the Nationwide Class by *instituting* this action.

Each case cited by Ally involves a ***defendant*** objecting to personal jurisdiction. Here, Ally is the ***plaintiff***. Ally consented or submitted to the Court's exercise of personal jurisdiction by instituting this action. *Adam v. Saenger*, 303 U. S. 59, 67-68 (1938); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *In re American Export Group Int'l Servs., Inc.*, 167 B.R. 311, 313 (Bankr. D. D.C. 1994). "Courts have consistently held that a court always has personal jurisdiction over a named plaintiff because that party, by choosing the forum, has consented to the personal jurisdiction of that court." *Moore*, 446 F.3d at 645-46; *see also McAninch v. Wintermute*, 491 F.3d 759 (8th Cir. 2007) ("A plaintiff consents to personal jurisdiction by virtue of the act of bringing the suit in the given forum.'"). This personal jurisdiction is founded upon the party generally appearing before a court by suing. *Lewis v. United Joint Venture*, No. 4: 10-MC-00061 (N.D. Ohio Dec. 16, 2010) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 700 (6th Cir. 1978) ("In *Pennoyer v. Neff*, the Supreme Court specifically recognized that personal jurisdiction could be founded upon voluntary appearance."). A party who makes a general appearance is subject "to the jurisdiction of the court for ***all purposes***." *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377 (Mo. banc 1979) (emphasis added).

Bristol–Myers hasn't changed this principle because it was based on a "straightforward application … of settled principles of personal jurisdiction[.]" *Bris-*

tol–Myers Squibb Co. v. Superior Court of California, San Francisco Cnty., 137 S.Ct. 1773, 1783 (2017). Rather, it supports a finding of personal jurisdiction. Ally asks this Court to treat "putative class members" as if they were "named plaintiffs." By conflating the two, Ally's argument is inherently flawed, and Ally's reliance on non–class action cases (like *Bristol–Myers*) is unpersuasive. Ally suggests this consent extends only to claims by Haskins and Duncan, and not absent class members. See Relator's Suggestions pp. 45-46 (citing *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018)). But *Charles Schwab* doesn't support Ally's argument. No one argued below because Ally is the plaintiff it has consented to personal jurisdiction in Missouri for any ***other lawsuit***. Rather, Ally's consent to personal jurisdiction by suing extends only to this case, which is what *Charles Schwab* holds, and here there is but one case. *Charles Schwab*, 883 F.3d at 88 ("[A] party's consent to jurisdiction in ***one case*** . . . extends to that case alone" and "in no way opens that party up to ***other lawsuits*** in the same jurisdiction in which consent was given.") (emphasis added); *Swinter Grp., Inc. v. Serv. of Process Agents, Inc.*, 2019 WL 266299, at *2 (E.D. Mo. Jan. 18, 2019) (regardless of the number of absent class members "there is but one 'suit': the present action between the [named parties].").

2. Ally admitted the circuit court had jurisdiction over the Nationwide Class in its first responsive pleading.

Class Representatives alleged a "consumer class action" involving "all 50 states," and this Court had "jurisdiction." (A81-82). Ally admitted this Court had "jurisdiction" in its answer. (A385 ¶ 4). So, Ally admitted

there was "subject matter jurisdiction and personal jurisdiction," *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. banc 2009), which means it waived any personal jurisdiction objections. *Dolan*, 512 S.W.3d at 46 ("because personal jurisdiction is an individual right, a defendant may waive jurisdictional objections by consenting to personal jurisdiction"). This admission is irrevocable and cannot be undone by an amendment of the pleadings. *Pearlstone v. Costco Wholesale Corp.*, 2019 WL 3997316, at *2 (E.D. Mo. Aug. 23, 2019).

3. Ally waived its personal jurisdiction objections to the Nationwide Class.

If Ally didn't consent to the circuit court's jurisdiction by instituting this action or its admission (it did), Ally waived its personal jurisdiction objections under Rule 55.27(g) because Ally failed to raise the objection by motion under Rule 55.27(a)(2) or include the objection in its answer as an affirmative defense. *Barron*, 529 S.W.3d at 797 n. 2 (Mo. banc 2017) ("Abbott waived personal jurisdiction. See Rule 55.27(g).").[37] "The United States Supreme Court's recent decision in *Bristol–Myers Squibb Co. v. Superior Court of California, San Francisco Cnty.*, 137 S.Ct. 1773 (2017), therefore, has no application to this" case and Ally's reliance on it is misplaced. *Id.*; *see also McCurley*, 2019 WL 3006469, at *4 ("[Rule 12(h)(1)] provide[s] a strict waiver rule

[37] In each case cited by Ally, the defendant hadn't consented to or waived personal jurisdiction because it timely moved to dismiss the class action based on its personal jurisdiction objection. *See, e.g., In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9 (E.D. N.Y. Sept. 20, 2017) (personal jurisdiction raised by motion to dismiss); *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43 (D. Mass. 2018) (same); *Gazzillo v. Ply Gem Indus.*, Inc., 2018 WL 5253050, at *2 (N.D. N.Y. Oct. 22, 2018) (same).

with respect to [the lack of personal jurisdiction] defense…. defendants wishing to raise [this] defense[ ] must do so in their first defensive move, be it a Rule 12 motion or a responsive pleading.").

4. Ally admits the circuit court has personal jurisdiction over the named Class Representatives, which is all that matters for the personal jurisdiction analysis for the Nationwide Class.

Bristol–Myers doesn't apply to putative class actions as the courts have "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." Logitech, 2018 WL 1981481, at *7; *see also Haj v. Pfizer Inc.*, No. 17 C 6730, 201 8 WL 3707561, at *3 (N.D. Ill. Aug. 3, 2018) (rejecting the same arguments raised by Ally and holding, "had the Supreme Court truly sought to bar certification of nationwide or multistate class actions on due process grounds in all but the one or two States where the defendant is subject to general jurisdiction, it [is] implausible that it would have done so obliquely").

Ally contends the federal courts are "split" on the issue, but "the better reasoned decisions" hold *Bristol–Myers* applies to class action. *See* Relator's Suggestions p. 45. It's not really a split, nearly all federal cases reject Ally's argument about personal jurisdiction. *Logitech*, 2018 WL 1981481, at *7. And federal courts have continued to universally reject Ally's arguments. *Krumm v. Kittrich Corp.*, No. 4:19 CV 182 CDP, 2019 WL 6876059, at *4 (E.D. Mo. Dec. 17, 2019) ("I agree with the 'better reasoned decisions' of the numerous courts across the country that have declined

to extend BMS to the class action context."); *Hicks v. Houston Baptist Univ.*, 2019 WL 96219, at *1 (E.D. N.C. Jan. 3, 2019) ("The proposed, unnamed class members in plaintiff's complaint are not parties to this litigation, and thus not a part of 'the suit.' Therefore, the court should not consider them in determining whether it has jurisdiction over defendant in this case."); *Swinter*, 2019 WL 266299, at *2; *Curran v. Bayer Healthcare LLC*, 2019 WL 398685, at *3 (N.D. Ill. Jan. 31, 2019) ("In *Al Haj*, the court explained that to apply *Bristol–Myers* to class actions would be to hold that although absent class members are not parties for purposes of diversity of citizenship, amount in controversy, Article III standing, and venue, they are parties for purposes of personal jurisdiction over the defendant. This Court agrees with *Al Haj* that that cannot be right." (internal quotes, brackets, and citations omitted)).

The conclusion by nearly all federal courts rejecting Ally's argument is supported by the dissent of Justice Sotomayor in *Bristol–Myers*, as she explained, "The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." *Bristol–Myers*, 137 S. Ct. at 1789 n. 4. The majority didn't weigh–in on the opinion's applicability to class actions. The Supreme Court of the United States didn't intend to overturn years of class action precedent *sub silentio*, which follows language in *Bristol–Myers* explaining it resolved the case with a "straightforward application … of settled principles of personal jurisdiction," and cautioned its opinion "will not result in a parade of horribles" that would

transform the legal landscape in the country. *Id.* at 1777.

Ally asks this court to treat this class action like it's a mass action[38] and justifies the request by emphasizing the superficial similarities. Ally's focus on unnamed putative class members doesn't affect personal jurisdiction; only the named parties matter. Class Representatives are the only named parties, and Ally doesn't contest the court's personal jurisdiction over them. This Court has personal jurisdiction because Ally instituted this action, consented to it in its answer, waived it by its conduct, and because this is a class action where Ally concedes personal jurisdiction for the named parties.

* * *

V. CONCLUSION

By its terms, Rule 52.08 "creates a categorical rule entitling a [party] whose suit meets the specified criteria to pursue [her] claim as a class action." *Shady Grove Orthopedic Associates v. Allstate Ins.*, 130 S. Ct. 1431, 1438 (2010). Those criteria are numerosity, commonality, typicality, adequacy, predominance, and superiority. Ally only directly challenges predominance, superiority, and the implicit requirement that a class definition cannot be overbroad. Judge Bartels granted

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[38] There are material distinctions between mass tort actions, like those involved in Bristol–Meyers, and class actions, which is what is brought here. *Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1332 (D. Minn. 2018). "In a mass tort action, each plaintiff is a real party in interest to the complaints; by contrast, in a putative class action, one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the named plaintiffs are the only plaintiffs actually named in the complaint." *Id.* at 1333. Rule 52.08 also provides due process procedural safeguards that don't exist in mass actions. *Id.*

class certification after rejecting nearly every argument raised by Ally on decertification. Her order was never challenged, is presumed correct, and triggered the only 10-day window for Ally to seek interlocutory review. "Where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Day*, 827 F.3d at 832.

The only changes prompting Ally's motion for decertification were the judge and strategy—Ally wanted to seek interlocutory review and needed to manufacture a way to do so because it could no longer seek review of the initial certification order. Ally fails to explain why it didn't seek interlocutory review of the initial certification order; fails to cite any change in controlling law or evidence on the issues presented in this writ; admits and consents to personal jurisdiction; pleads affirmative defenses of statute of limitations contrary to its arguments; fails to properly raise the affirmative defense of arbitration—all of which establishes Ally failed to carry its heavy burden to show Respondent abused her broad discretion to deny decertification. As the case progresses, Respondent will maintain the discretion to narrow, expand, subclass, or even decertify the Nationwide Class altogether. However, this discretion, if it's exercised, should only be exercised by Respondent under Rule 52.08(c)(1) and not by this Court through an extraordinary writ based on a dilatory petition requesting the "harsh" remedy of decertification. *Kendrick*, 142 S.W.3d at 743.

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