APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

FLORENCE MUSSAT, M.D., S.C., on behalf of itself and all others similarly situated,
Plaintiff-Appellant,

v.

IQVIA, INC., et al.,
Defendants-Appellees.

No. 19-1204

Argued: September 27, 2019

Decided: March 11, 2020

Rehearing and Rehearing En Banc Denied:
May 14, 2020*

Before Wood, Chief Judge, and Kanne and Barrett, Circuit Judges.

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* Judge Joel M. Flaum did not participate in the consideration of this matter.

Opinion

WOOD, Chief Judge.

Florence Mussat, an Illinois physician doing business through a professional services corporation, received two unsolicited faxes from IQVIA, a Delaware corporation with its headquarters in Pennsylvania. These faxes failed to include the opt-out notice required by federal statute. Mussat's corporation (to which we refer simply as Mussat) brought a putative class action in the Northern District of Illinois under the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of itself and all persons in the country who had received similar junk faxes from IQVIA in the four previous years. IQVIA moved to strike the class definition, arguing that the district court did not have personal jurisdiction over the non-Illinois members of the proposed nationwide class.

The district court granted the motion to strike, reasoning that under the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, —— U.S. ——, 137 S. Ct. 1773, 198 L.Ed.2d 395 (2017), not just the named plaintiff, but also the unnamed members of the class, each had to show minimum contacts between the defendant and the forum state. Because IQVIA is not subject to general jurisdiction in Illinois, the district court turned to specific jurisdiction. Applying those rules, see *Walden v. Fiore*, 571 U.S. 277, 283–86, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014), it found that it had no jurisdiction over the claims of parties who, unlike Mussat, were harmed outside of Illinois. We granted Mussat's petition to appeal from that order under Federal

Rule of Civil Procedure 23(f). We now reaffirm the Rule 23(f) order, and we hold that the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute. We reverse the order of the district court and remand for further proceedings.

I

Before examining the personal-jurisdiction issue, we must assure ourselves that this appeal falls within the scope of Rule 23(f), which "permit[s] an appeal from an order granting or denying class-action certification under this rule." Fed. R. Civ. P. 23(f). IQVIA argues that the order before us neither grants nor denies class status and thus it is an ordinary interlocutory order that must await final judgment before review is possible. See 28 U.S.C. § 1291. It is true that the district court's order does not say, in so many words, that it is granting or denying class certification. But that is not the end of the story. Here is what the district court did: pursuant to Federal Rule of Civil Procedure 12, it granted IQVIA's motion to strike Mussat's class definition, insofar as Mussat proposed to assert claims on behalf of people with no contacts to Illinois. IQVIA observes that Mussat is still free to seek certification of an Illinois-only class. More fundamentally, it contends that the plain language of Rule 23(f) forecloses jurisdiction over this appeal because the order responded to a motion to strike, not a motion to certify (or decertify) a class. Because Rule 23(f) allows interlocutory appeals only from orders "under *this* rule," IQVIA concludes, an appeal is not permitted here, where the district court made its decision pursuant to Rule 12. We review this

jurisdictional question *de novo*. *Marshall v. Blake*, 885 F.3d 1065, 1071 (7th Cir. 2018).

This is not the first time we have seen a Rule 12 motion to strike used this way in a putative class action. In *In re Bemis Co., Inc.*, 279 F.3d 419 (7th Cir. 2002), the Equal Employment Opportunity Commission (EEOC) brought a lawsuit against Bemis Company on behalf of a class of African American employees. Bemis answered, arguing that the EEOC had not complied with Rule 23. The EEOC moved to strike that part of the answer, and the district court granted the motion. Bemis then appealed under Rule 23(f). Just as IQVIA has done here, the EEOC argued that this court had no jurisdiction to hear the appeal "because the district court's order did not grant or deny class certification." 279 F.3d at 421. We were not persuaded. We concluded that "[t]he rejection of [Bemis's] position was the functional equivalent of denying a motion to certify a case as a class action, a denial that Rule 23(f) makes appealable." *Id*.

Our holding in *Bemis* has received the endorsement of the Supreme Court. In *Microsoft v. Baker*, —— U.S. ——, 137 S. Ct. 1702, 198 L.Ed.2d 132 (2017), the Court confirmed that "[a]n order striking class allegation is functionally equivalent to an order denying class certification and therefore appealable under Rule 23(f)." *Id*. at 1711 n.7. In so doing, it cited *Bemis* with approval. *Id.* Given the Court's endorsement of our reasoning, we see no reason to find that *Bemis* was wrongly decided, as IQVIA urges. The cases are clear: Rule 23(f) grants the courts of appeals jurisdiction to hear interlocutory appeals of orders that expressly or as a

functional matter resolve the question of class certification one way or the other.

The fact that Mussat still has an opportunity to seek certification of a much narrower class does not change anything. The district court's order eliminates all possibility of certifying the nationwide class Mussat sought, and so to that extent it operates as a denial of certification for one proposed class. Rule 23(f) appeals are not limited to cases in which the district court has definitively rejected any and all possible hypothetical classes. To the contrary, we have held that Rule 23(f) permits a party to appeal the partial denial of a class. See *Matz v. Household Int'l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (holding that the court had jurisdiction under Rule 23(f) over a district court order partially decertifying a class by eliminating 3,000 to 3,500 members); see also *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014) (holding that orders modifying class definitions may be appealed so long as the alteration is "material").

The district court's order striking the nationwide class was the functional equivalent of an order denying certification of the class Mussat proposed. We therefore have jurisdiction over this appeal under Rule 23(f).

II

On to personal jurisdiction. IQVIA makes two principal arguments: first, it contends that the Supreme Court's decision in *Bristol-Myers* requires a decision in its favor; and second, it urges that

Federal Rule of Civil Procedure 4(k) does the same. We address these points in that order.

Before the Supreme Court's decision in *Bristol-Myers*, there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant. See, *e.g.*, *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 815, 818–19 (N.D. Ill. 2018) (noting that the defendant could not produce any pre-*Bristol-Myers* decision holding that "in a class action where defendant is not subject to general jurisdiction, specific jurisdiction must be established not only as to the named plaintiff(s), but also as to the absent class members"). For cases relying on specific jurisdiction over the defendant, minimum contacts, purposeful availment, and relation to the claim were assessed only with respect to the named plaintiffs. Even if the links between the defendant and an out-of-state unnamed class member were confined to that person's home state, that did not destroy personal jurisdiction. Once certified, the class as a whole is the litigating entity, see *Payton v. Cnty. of Kane,* 308 F.3d 673, 680–81 (7th Cir. 2002), and its affiliation with a forum depends only on the named plaintiffs.

The Supreme Court has regularly entertained cases involving nationwide classes where the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional problem IQVIA raises. See, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (nationwide class action brought in California court;

defendant headquartered in Arkansas and incorporated in Delaware); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (nationwide class action brought in Kansas court; defendant headquartered in Oklahoma and incorporated in Delaware); see also *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("Nothing in Rule 23 ... limits the geographical scope of a class action that is brought in conformity with that Rule."). Although IQVIA and its *amici* insist that class actions have always required minimum contacts between all class members and the forum, this is nothing more than *ipse dixit*. Decades of case law show that this has not been the practice of the federal courts. What is true, however, is that this issue has not been examined closely. The current debate was sparked by the Supreme Court's decision in *Bristol-Myers*—a case that did *not* involve a certified class action, but instead was brought under a different aggregation device. A closer look at that decision illustrates why it does not govern here.

In *Bristol-Myers*, 600 plaintiffs, most of whom were not California residents, filed a lawsuit in California state court against Bristol-Myers Squibb, asserting state-law claims based on injuries they suffered from taking Plavix, a blood thinning drug. 137 S. Ct. at 1777. Bristol-Myers sold Plavix in California, but it had no other contacts with the state. The plaintiffs brought their case as a coordinated mass action, which is a device authorized under section 404 of the California Civil Procedure Code, but which has no analogue in the Federal Rules of Civil Procedure. That statute provides in relevant part as follows:

> When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party .... A petition for coordination... shall be supported by a declaration stating facts showing that the actions are complex ... and that the actions meet the standards specified in Section 404.1. On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate....

In other words, rather like the multi-district litigation process in federal court, see 28 U.S.C. § 1407, section 404 permits consolidation of individual cases, brought by individual plaintiffs, when the necessary findings are made. The *Bristol-Myers* suit itself began as eight separate actions, brought on behalf of 86 California residents and 592 residents of 33 other states. 137 S. Ct. at 1778.

In the Supreme Court, Bristol-Myers argued that the California courts did not have jurisdiction over it with respect to the claims of the plaintiffs who were not California residents and had not purchased, used, or been injured by Plavix in California. The Court agreed. *Id.* at 1783–84. It noted that its holding constituted a "straightforward application ... of settled principles of personal jurisdiction." *Id*. at 1783. (Interestingly, the California courts had held that they had *general* jurisdiction over Bristol-Myers, but that theory dropped out of the case after the

Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014).)

Although *Bristol-Myers* arose in the context of consolidated individual suits, the district court in our case thought that the *Bristol-Myers* approach to personal jurisdiction should be extended to certified class actions. It held that the Due Process Clause of the Fourteenth Amendment precludes the exercise of personal jurisdiction over a defendant where "nonresident, absent members [of a class] seek to aggregate their claims with an in-forum resident, even though the defendant allegedly injured the nonresidents outside of the forum." (Actually, in federal court it is the Fifth Amendment's Due Process Clause that is applicable, but the mention of the Fourteenth Amendment made no difference here.) This meant, the court realized, that nationwide class actions will, as a practical matter, be impossible any time the defendant is not subject to general jurisdiction. This would have been far from the routine application of personal-jurisdiction rules that *Bristol-Myers* said it was performing. Nonetheless, the district court felt compelled to reach that result.

Procedural formalities matter, however, as the Supreme Court emphasized in *Taylor v. Sturgell,* 553 U.S. 880, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008), where it stressed the importance of class certification as a pre-requisite for binding a nonparty (including an unnamed class member) to the outcome of a suit. *Id.* at 894, 128 S.Ct. 2161. With that in mind, it rejected the notion of "virtual representation" as an end-run around the careful procedural protections outlined in Rule 23. *Id.* at 901, 128 S.Ct. 2161. Class

actions, in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class.

Bristol-Myers neither reached nor resolved the question whether, in a Rule 23 class action, each unnamed member of the class must separately establish specific personal jurisdiction over a defendant. In holding otherwise, the district court failed to recognize the critical distinction between this case and *Bristol-Myers*. The *Bristol-Myers* plaintiffs brought a coordinated mass action, which as we noted earlier does not involve any absentee litigants. In a section 404 case, all of the plaintiffs are named parties to the case. The statute allows the trial court to consolidate their cases for resolution of shared legal issues before moving on to individual issues. In a Rule 23 class action, by contrast, the lead plaintiffs earn the right to represent the interests of absent class members by satisfying all four criteria of Rule 23(a) and one branch of Rule 23(b). The absent class members are not full parties to the case for many purposes.

The proper characterization of the status of absent class members depends on the issue. As the Supreme Court recognized in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), "[n]onnamed class members ... may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id*. at 9–10, 122 S.Ct. 2005. For example, absent class members are not considered parties for assessing whether the

requirement of diverse citizenship under 28 U.S.C. § 1332 has been met. *Id.* at 10, 122 S.Ct. 2005 ("[N]onnamed class members cannot defeat complete diversity...."). As long as the named representative meets the amount-in-controversy requirement, jurisdiction exists over the claims of the unnamed members. *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 566–67, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) (relying on the supplemental jurisdiction statute, 28 U.S.C. § 1367, and recognizing that the statute overruled *Zahn v. Int'l Paper Co.,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973)). Nor are absent class members considered when a court decides whether it is the proper venue. *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974) (holding that Rule 23 does not "require the establishment of venue for nonrepresentative-party class members"). We see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.

This brings us to IQVIA's second major point: that allowing the non-Illinois unnamed class members to proceed would be inconsistent with Federal Rule of Civil Procedure 4(k), which governs service of process. Rule 4(k)(1) states, in relevant part, that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." IQVIA reads Rule 4(k) broadly, as not

requiring merely that a plaintiff comply with state-based rules on the service of process, but also establishing an independent limitation on a federal court's exercise of personal jurisdiction. Because Illinois law would not authorize some of the absent members of the putative class to sue IQVIA in Illinois, the argument goes, Rule 4(k) prohibits the federal district court in Illinois from exercising jurisdiction.

Aside from the fact that IQVIA's position is in tension with Federal Rule of Civil Procedure 82, which stipulates that the rules "do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts," there is a simpler problem with it: IQVIA is mixing up the concepts of service and jurisdiction. Rule 4(k) addresses *how* and *where* to serve process; it does not specify *on whom* process must be served. It is true that, with certain exceptions, a federal district court has personal jurisdiction only over a party who would be subject to the jurisdiction of the state court where the federal district court is located. But, as discussed above, a district court need not have personal jurisdiction over the claims of absent class members at all. The rules permit a variety of representatives to sue in their own names: an executor, an administrator, a guardian, and a trustee, to name a few. See Fed. R. Civ. P. 17(a)(1). If any of those is a defendant, the court will assess personal jurisdiction with respect to that person, not with respect to the person being represented. So, too, with class actions: if the court has personal jurisdiction over the defendant with respect to the class representative's claim, the case

may proceed. Nothing in the Federal Rules governing service of process contradicts this.

The rules for class certification support a focus on the named representative for purposes of personal jurisdiction. Rule 23(b)(3), for example, governs damages class actions. Among the factors it lists is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." The Committee Note to this provision mentions that a court should consider the desirability of the forum "in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought." Fed. R. Civ. P. 23(b)(3), Committee Note to 1966 amendment. These provisions recognize that a class action may extend beyond the boundaries of the state where the lead plaintiff brings the case. And nothing in the Rules frowns on nationwide class actions, even in a forum where the defendant is not subject to general jurisdiction.

Finally, it is worth recalling that the Supreme Court in *Bristol-Myers* expressly reserved the question whether its holding extended to the federal courts at all. 137 S. Ct. at 1784 ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."). In addition, the opinion does not reach the question whether its holding would apply to a class action. *Id*. at 1789 n.4 (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action."). Fitting this problem into the broader edifice of class-action law,

we are convinced that this is one of the areas *Scardelletti* identified in which the absentees are more like nonparties, and thus there is no need to locate each and every one of them and conduct a separate personal-jurisdiction analysis of their claims.

III

Despite its insistence to the contrary, IQVIA urges a major change in the law of personal jurisdiction and class actions. This change is not warranted by the Supreme Court's decision in *Bristol-Myers*, nor by the alternative arguments based on Rule 4(k) that IQVIA puts forth. We therefore REVERSE the judgment of the district court and REMAND for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

Florence MUSSAT, M.D., S.C., on Behalf of Plaintiff and the Class Members Defined Herein,
Plaintiff,

v.

IQVIA INC., and John Does 1–10,
Defendants.

Case No. 17 C 8841

Signed: 10/26/2018

MEMORANDUM OPINION AND ORDER

Virginia M. Kendall, United States District Judge

Florence Mussat, M.D., S.C. sued IQVIA Inc. on behalf of a putative class, alleging that IQVIA violated the Telephone Consumer Protection Act by sending it two "unsolicited advertisements" via fax. (Dkt. 1.) Mussat sought to represent the putative class without geographic restriction, including non-Illinois residents who did not receive the alleged faxes in Illinois. *Id.* After another district court applied *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), to a federal class action under the Act, IQVIA moved to strike Mussat's class definition, arguing that this Court lacks personal jurisdiction over

IQVIA with respect to the unnamed putative class members who are not Illinois residents. *Id.* Because those individuals also did not receive the alleged faxes in Illinois, their claims do not relate to IQVIA's contacts with Illinois, so IQVIA contends that this Court lacks specific jurisdiction over it. *Id.* Mussat claims that Supreme Court precedent permits the maintenance of a nationwide class action without the plaintiff's satisfaction of the "minimum contacts" analysis. (Dkt. 51.) The focus of the personal jurisdiction inquiry, however, is the defendant's relationship to the forum state, and because Mussat's lawsuit does not arise out of or relate to IQVIA's contacts with this forum, the Court grants its motion to strike Mussat's class definition.

BACKGROUND

Mussat is an Illinois corporation with its principal place of business in Illinois. (Dkt. 15.) IQVIA is a Delaware corporation with its principal place of business in Pennsylvania. *Id.* Mussat sued IQVIA under the Telephone Consumer Protection Act, seeking to represent a geographically unrestricted putative class of individuals, including:

> (a) all persons with fax numbers (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. § 1658), (c) were sent faxes by or on behalf of defendant IQVIA, promoting its good or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. § 227.

Id. Mussat contends that IQVIA violated the Act by sending junk faxes to the unnamed members of the putative class. *Id.*

On February 27, 2018, Mussat amended its complaint. *Id.* IQVIA then amended its answer on March 21, just nine days following *Practice Mgmt. Support Services, Inc. v. Cirque Du Soleil, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018). (Dkt. 26.) In its answer, IQVIA expressly denied the existence of this Court's personal jurisdiction over it—whether it be general or specific—regarding the claims of the unnamed putative class members residing outside Illinois. *Id.* IQVIA also contested Mussat's class definition and affirmatively pled a consistent personal jurisdiction defense. *Id.*

STANDARD OF REVIEW

A court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). In so doing, the court exercises considerable discretion. *See Delta Consulting Grp., Inc. v. R. Randle Const., Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009). Courts generally disfavor motions to strike that serve only to delay, but favor those that serve to expedite the case by removing any unnecessary clutter. *See, e.g.*, *Sapia v. Bd. of Educ. of City of Chicago*, No. 14-CV-07946, 2018 WL 1565600, at *4 (N.D. Ill. Mar. 31, 2018) (citing *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)).

Courts will strike pleadings that are insufficient as a matter of law, "meaning they bear no relation to the controversy or would prejudice the movant." *See,*

e.g., *Gress v. Reg'l Transportation Auth.*, No. 17-CV-8067, 2018 WL 3869962, at *5 (N.D. Ill. Aug. 15, 2018) (citations omitted). The moving party bears the burden of showing the "challenged allegations are so remote to the plaintiff's claim that they lack merit ..." *See, e.g., id.* (citation omitted). Should the request for relief be unrecoverable as a matter of law, the court will strike it. *See, e.g.*, *Fed. Deposit Ins. Corp. for Valley Bank v. Crowe Horwath LLP*, No. 17 CV 04384, 2018 WL 1508485, at *2 (N.D. Ill. Mar. 27, 2018).

ANALYSIS

IQVIA argues that this Court cannot assert personal jurisdiction over it regarding the nonresident putative class members' claims because those claims do not arise out of, or relate to, IQVIA's contacts with Illinois. Mussat, in response, claims that IQVIA "waived" its personal jurisdiction defense, and even if it did not, its contention is contrary to Supreme Court precedent, which supports the further proposition that *Bristol-Myers* does not apply to class actions.

I. Forfeiture

As an initial matter, IQVIA did not forfeit (voluntary relinquish) its personal jurisdiction defense. A party that moves under Rule 12 "must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). True enough, IQVIA did not assert a lack of personal jurisdiction when it moved to dismiss on March 14, 2018. (Dkt. 24–25.) So, if this personal

jurisdiction argument was "available" to IQVIA, then its motion to strike is improper because IQVIA omitted the defense "from a motion in the circumstances described in Rule 12(g)(2)." Fed. R. Civ. P. 12(h)(1)(A). If, however, the argument was not available to IQVIA at the time it moved to dismiss, then it did not forfeit that defense because it made it "by motion under this rule" and included it "in an amendment allowed by Rule 15(a)(1) as a matter of course." *Id.* at 12(h)(1)(B). A defense is available if the standard that governs it would have been the same if relied on earlier. *See Am. Fid. Assur. Co. v. Bank of New York Mellon*, 810 F.3d 1234, 1237 (10th Cir.), *cert. denied*, 137 S. Ct. 90 (2016).

Here, IQVIA's personal jurisdiction defense was not available to it when it moved to dismiss on March 14. First, on its face, *Bristol-Myers* did not apply to class actions. See 137 S. Ct. 1773, 1787 n.4 (2017) (Sotomayor, J., dissenting) (observing that "[t]he 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.") (citations omitted). Second, no court applied the Supreme Court's holding or reasoning to a class action under the Telephone Consumer Protection Act until two days before IQVIA filed its motion to dismiss on other grounds. *See Practice Mgmt. Support Services, Inc. v. Cirque Du Soleil, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018) (Durkin, J.). Following that decision, IQVIA timely amended its first responsive pleading

"as a matter of course" under Rule 15(a)(1) on March 21, just nine days later. (Dkt. 26.)

Mussat could not seriously expect IQVIA to know this defense was available to it at the time it could have first raised it. *Cf. Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (noting that a party does not waive a defense when controlling precedent previously foreclosed it). IQVIA timely raised the defense following the intervening decision in *Practice Mgmt. Support Services, Inc.*, once it was apparent the defense was cognizable under *Bristol-Myers*. *See Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004). It would have, in fact, been bordering on futile for IQVIA to assert the defense under precedent at the time. *See, e.g.*, *VitalGo, Inc. v. Kreg Therapeutics, Inc.*, No. 16-CV-5577, 2017 WL 6569633, at *5 (N.D. Ill. Dec. 21, 2017); *Alvarez v. NBTY, Inc.*, No. 17-cv-00567-BAS-BGS, 2017 WL 6059159, at *6 (S.D. Cal. Dec. 6, 2017); *see also In re Micron Tech., Inc.*, 785 F.3d 1091, 1094 (Fed Cir. 2017) (stating that a venue defense raised after an intervening decision was not available, thus making the waiver rule inapplicable).

Even if IQVIA did forfeit its defense, the Court would exercise its discretion to excuse the forfeiture. *See* Fed. R. Civ. P. 12(f)(1) (stating that the "court may act on its own" to strike material); *see, e.g.*, *Leibowitz v. Bowman Int'l, Inc.*, No. 15 C 3021, 2016 WL 6804580, at *9 (N.D. Ill. Nov. 17, 2016) (quoting *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1399 (7th Cir. 1991) (clarifying that a court acting under Rule 12(f) has the discretion "to consider a motion to strike at any point in a case," even when the court's attention "was prompted by an untimely filed

motion.")); *Fed. Deposit Ins. Corp. v. Giannoulias*, No. 12 C 1665, 2014 WL 3376892, at *1 (N.D. Ill. July 10, 2014) (recognizing that courts "retain discretion to strike material from a pleading after the motion deadline in Rule 12(f)(2) has passed" because 12(f)(1) does not impose a similar time period)).

Indeed, this Court has the independent obligation to identify and apply the law correctly. *See, e.g.*, *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 877 (N.D. Ill. 2017) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)); *see also ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001) (excusing forfeiture and reasoning that "[f]ederal courts are entitled to apply the right body of law, whether the parties name it or not"). Other courts to consider the issue in this context excused the forfeiture. *See, e.g., Practice Mgmt. Support Services, Inc.*, 301 F. Supp. 3d at 863–64; *America's Health & Resource center Ltd. v. Alcon Laboratories, Inc.*, 16-cv-04539, at *8–9 (N.D. Ill. June 15, 2018) (order striking the plaintiff's class definition to the extent it included non-Illinois residents). Finally, excusing the forfeiture in this case would not prejudice Mussatt because, as will be made clear below, Mussatt is free to pursue its claims on behalf of unnamed, nonresident class members in a court that has general jurisdiction over IQVIA.

II. Personal Jurisdiction

Moving to the merits of the personal jurisdiction defense, this Court joins the litany of other courts in this District and elsewhere to hold that the Due

Process Clause of the Fourteenth Amendment precludes the exercise of personal jurisdiction over a defendant in a putative class action where nonresident, absent members seek to aggregate their claims with an in-forum resident, even though the defendant allegedly injured the nonresidents outside of the forum. *See, e.g.*, *Chavez v. Church & Dwight Co.*, 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018) (Tharp, J.); *Practice Mgmt. Support Services, Inc.*, 301 F. Supp. 3d at 864 (Durkin, J.); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (Leinenweber, J.); *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017) (Ellis, J.); but *see, e.g., Haj v. Pfizer Inc.*, No. 17 C 6730, 2018 WL 3707561, at *1 (N.D. Ill. Aug. 3, 2018) (Feinerman, J.).

A. Bristol-Myers

In *Bristol-Myers*, a group of primarily non-resident plaintiffs, which the defendant pharmaceutical manufacturer allegedly harmed outside of the forum, filed a mass tort action in California state court. *See* 137 S. Ct. at 1778. There, although the state court did not have general jurisdiction over the defendant, the state supreme court held that the trial court did have specific jurisdiction over the defendant with respect to the nonresidents' claims because those individuals could aggregate their claims with the residents'. *See id.* The Supreme Court reversed that decision, holding that the "mere fact that *other* plaintiffs were [injured] in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert

specific jurisdiction over the nonresidents' claims." *Id.* at 1781 (emphasis in original).

The Court reasoned that the "primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State." *Id.* at 1779 (citations omitted). Indeed, "the *suit* must arise out of or relate to the defendant's contacts with the *forum*." *Id.* at 1780 (internal quotation marks and brackets omitted). The Court left open, however, "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." *Id.* at 1789 n.4 (Sotomayor, J., dissenting).

Taking heed of the Supreme Court's admonition that the primary concern of the analysis is the burden on the defendant, other district courts applied these principles of specific jurisdiction to federal class actions. It appears that those courts agree that *Bristol-Myers* generally applies to bar nationwide class actions in federal court where the defendant allegedly *injured the named plaintiff outside the forum.* What they seem to disagree on, however, is whether that precedent controls beyond that: in cases where the defendant allegedly injured the named plaintiff inside the forum, enabling that individual to represent the absent claims of the nonresident and unnamed putative class members who the defendant injured outside the forum. Compare *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 872 (N.D. Ill. 2017) (reconsidering part of a motion to dismiss for lack of personal jurisdiction after Bristol-Myers, applying it to a named plaintiff in a putative class action, and granting it as to that

named plaintiff who (1) did not reside in the forum state, (2) nor did the defendant allegedly injure him there, (3) nor did the defendant have any contacts with the forum in connection with that named plaintiff's claims, because the mere fact that his claims were similar, or even identical, to the resident plaintiff's claims did not permit the court to assert specific jurisdiction over the nonresident's claims), *and Al Haj v. Pfizer Inc.*, No. 17 C 6730, 2018 WL 1784126, at *6 (N.D. Ill. Apr. 13, 2018) (similar), *with Al Haj v. Pfizer Inc.*, No. 17 C 6730, 2018 WL 3707561, at *2 (N.D. Ill. Aug. 3, 2018) (denying the defendant's renewed motion to strike the complaint's nationwide class claims because (1) the named plaintiff resided in the forum state and (2) the defendant allegedly injured him there, so the court could assert specific jurisdiction over his claims, and it needed not do so over the absent class members' claims that lacked the requisite nexus to the forum because those individuals were not parties for the purposes of assessing personal jurisdiction over the defendant, only the named plaintiff was).

Turning to the matter before the Court, first, because the Telephone Consumer Protection Act does not authorize nationwide service of process, this Court looks to Illinois law and the Due Process Clause of the Fourteenth Amendment for the applicable limits on its exercise of personal jurisdiction. *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). That being so, this Court does not have general jurisdiction over IQVIA because it is a Delaware corporation and its principal place of business is in Pennsylvania. (Dkt. 15.)

Second, *Bristol-Myers* applies here, at least in the sense that this is a class action in federal court, so there must be a named plaintiff allegedly injured inside the forum state, Illinois. Mussat is an Illinois corporation with its principal place of business also in Illinois and Mussat alleged that it received the two junk faxes from IQVIA in Illinois. *Id.* The question, then, for this Court is whether it must have specific jurisdiction over IQVIA as to each of the absent class members' claims that Mussat seeks to represent. *Bristol-Myers* holds that due process requires the defendant be subject to specific jurisdiction not only as to the named plaintiff's claims, but also as to the absent class members' claims.

B. Absent Class Members' Claims

For this Court to exercise specific jurisdiction, "the *suit* must arise out of or relate to the defendant's contacts with the *forum*." *Bristol-Myers*, 137 S. Ct. at 1780 (internal quotation marks and brackets omitted) (emphasis in original). Indeed, "the mere fact" that Mussat received two faxes in Illinois "does not allow" for an exercise of "specific jurisdiction over the nonresidents' claims" with respect to faxes received outside of Illinois because those absent class members' claims do not relate to IQVIA's contacts with Illinois. *Id.* at 1781 (brackets omitted). It follows, then, that exercising specific jurisdiction over IQVIA with respect to the nonresidents' claims would violate IQVIA's due process rights. Therefore, the Court must strike the class definition to the extent it asserts claims of nonresidents. This ruling should "streamline discovery and simplify the disputed issues." *See, e.g., America's Health &*

Resource center Ltd. v. Alcon Laboratories, Inc., 16 C 04539, at *8 (N.D. Ill. June 15, 2018) (order granting motion to strike).

Mussat argues against this result, claiming that it is contrary to Supreme Court precedent, namely *Califano v. Yamasaki*, 442 U.S. 682, 709 (1979), and *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811–12 (1985). Yet, Califano did not address the propriety of specific jurisdiction over absent class members' claims. *See* 442 U.S. at 684. Even so, the Court did, in fact, assume several times for the purposes of deciding that case that jurisdiction was a prerequisite to the statutory, class certification, and remedial requirements at issue there. *See id.* at 701, 702 (stating that where "the district court has jurisdiction over the claim of each individual member of the class," "where the district court has jurisdiction over the claims of the members of the class," and "if jurisdiction lies over the claims of the members of the class ..."). Otherwise, Califano is inapposite, and for the same reasons, so is *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (reviewing the scope of a nationwide injunction).

As for *Shutts*, the Court considered an exercise of personal jurisdiction over *plaintiffs*, not defendants. *See* 472 U.S. at 811–12. As it happens, the Court spent a good portion of its opinion distinguishing between absent class action plaintiffs and absent defendants, reasoning that states place fewer burdens upon plaintiffs than they do on defendants, and as such, the according due process protections differ between the two. *See id.* at 808–12 (explaining that the "burdens placed by a State upon an absent class-action plaintiff are not of the same order or

magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment against it," and because "States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.") (emphasis in original). In *Shutts*, as here, "the class-action defendant itself has a great interest in ensuring that the absent plaintiff's claims are properly before the forum." *Id.* at 809.

If anything, *Shutts* counsels against Mussat's position in this case. The Supreme Court recognized as much in *Bristol-Myers* when it expressly distinguished Stutts. See 137 S. Ct. at 1783 (clarifying that because "*Shutts* concerned the due process rights of [nonresident] plaintiffs ... it has no bearing on the question presented."). Unlike this case, the Court concluded that the defendant in *Shutts* "did not assert that [the State] improperly exercised personal jurisdiction over it, and the Court did not address that issue." *Id.* Here, however, IQVIA claims that this Court's exercise of personal jurisdiction over it would violate its due process rights, not the due process rights of the nonresident class members.

Following the Supreme Court's lead in *Bristol-Myers* and applying its core reasoning here, due process, as an "instrument of interstate federalism," requires a connection between the forum and the specific claims at issue. 137 S. Ct. at 1780–81. This recognition bars nationwide class actions in fora

where the defendant is not subject to general jurisdiction. Whether it be an individual, mass, or class action, the defendant's rights should remain constant. *See, e.g.*, *Practice Mgmt. Support Servs., Inc.*, 301 F. Supp. 3d at 861 (deciding that under "the Rules Enabling Act, a defendant's due process interest should be the same in the class context" as all others).

Shady Grove Orthopedic Assocs., PA v. Allstate Ins. Co., 559 U.S. 393 (2010) does not change this. There, the Court merely held that Rule 23 preempted conflicting state laws. *Id.* at 399. Here, however, there is no conflicting state law at issue. Moreover, the Constitution and state law guide the personal jurisdiction analysis, which affects only the forum where this suit may be brought. That consequence does not run afoul of the Rules Enabling Act. Conversely, faithfully interpreting the Act here ensures the consistent and uniform application of defendants' due process rights in class actions under Rule 23, as compared to the maintenance of individual or mass actions. This construction ensures that Rule 23—a rule of procedure subject to the Act's limitations—does not violate the Act by extending the personal jurisdiction of the federal courts to "abridge, enlarge or modify" a "substantive right." 28 U.S.C. § 2072(b).

III. Venue

As a final matter, Mussat asks this Court to transfer the case to the United States District Court for the District of Delaware or the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. § 1406. (Dkt. 51.) But

venue is appropriate in the Northern District of Illinois, *see* 28 U.S.C. § 1391(b)(2)–(3), so that statute cannot support transferring this case. *See In re LimitNone, LLC*, 551 F.3d 572, 575–76 (7th Cir. 2008). Because venue is proper here, § 1404(a), rather than § 1406(a), provides the authority for a potential transfer. *See id.* (citing 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.")). In its discretion, the Court declines to transfer the case. Mussat remains free to voluntarily dismiss this case and refile it in a court where IQVIA is subject to that court's general jurisdiction.

CONCLUSION

Because there is no connection between Illinois and the absent class members' claims, the Court grants IQVIA's motion to strike Mussat's class definition to the extent that Mussat seeks to assert those claims on behalf of nonresidents that did not allegedly receive faxes in Illinois.

APPENDIX C

UNITED STATES COURT OF APPEALS,
FOR THE SEVENTH CIRCUIT

No. 19-1204

FLORENCE MUSSAT, M.D., S.C., on behalf of itself and the all others similarly situated,
Plaintiff-Appellant,

v.

IQVIA INC., *et al*,
Defendants-Appellees.

May 14, 2020

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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No. 17 C 8841

Virginia M. Kendall, *Judge*.

O R D E R

Defendants-appellees filed a petition for rehearing and rehearing *en banc* on April 8, 2020. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

[1] Judge Joel M. Flaum did not participate in the consideration of this matter.