CASE NO. 18-7162

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHOLE FOODS MARKET GROUP, INC.

Appellant,

v.

MICHAEL MOLOCK, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 16-CV-02483 (APM)

BRIEF OF APPELLANT WHOLE FOODS MARKET GROUP, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(1) **Certificate.** The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 28 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

(A) **Parties**

Defendant-Appellant:

Whole Foods Market Group, Inc.

Plaintiffs-Appellees:

Michael Molock,

Randal Kuczor

Jon Pace

Jose Fuentes

Christopher Milner

(B) **Rulings Under Review.** The ruling at issue before this Court is the interlocutory Memorandum Opinion and Order, dated March 15, 2018, signed by the Honorable Judge Amit P. Mehta of the United States District Court for the District of Columbia in *Molock, et al. v. Whole Foods Market, Inc., et al.*, Case No. 16-cv-02483-APM [Dkt. 34]. A copy of the Memorandum Opinion and Order appears as Appendix A to Appellant's Brief. This Memorandum Opinion and Order may also be found in *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114 (D.D.C. 2018).

(C) **Related Cases.** This case has never been under review before this Court or any other Court. A related case—*Victor Vasquez, et al. v. Whole Foods Mkt. Grp., Inc.*, Case No. 17-CV-00112-APM—is currently pending in the United

States District Court of District of Columbia before the Honorable Judge Amit P. Mehta.

Dated: January 28, 2018

/s/ Gregory J. Casas
Gregory J. Casas
Attorney of Record for
Defendant-Appellant

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Whole Foods Market Group, Inc. ("WFMG") certifies that WFMG is a wholly owned subsidiary of Whole Foods Market, Inc. ("WFMI"), which is an indirect subsidiary of Amazon.com, Inc., a publicly traded company.

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GLOSSARY

Abbreviation	Actual Term	Summary/Background
Answer	Defendants' Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint	WFMG's answer to Appellees' Second Amended Class Action Complaint, filed on April 30, 2018 [attached as Appendix E]
Bristol-Myers or *BMS*	*Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, __ U.S. __, 137 S. Ct. 1773 (2017)	United States Supreme Court's June 19, 2017 opinion, the application of which is central to this appeal.
Complaint	Second Amended Class Action Complaint and Jury Demand	Appellees' live complaint, filed on June 22, 2017 [attached as Appendix D]
Daimler	*Daimler AG v. Bauman*, 571 U.S. 117 (2014)	United States Supreme Court's 2014 opinion that clarified the limits of general personal jurisdiction.
Former Plaintiffs	Former Plaintiffs Sarah Strickland and Carl Bowens	Named plaintiffs who were dismissed for want of personal jurisdiction.
Gainsharing	The Gainsharing™ Program	Whole Foods' profit-sharing and productivity incentive program for eligible Team Members.
Individual Plaintiffs or Appellees	Appellees/Plaintiffs Michael Molock, Randal Kuczor, Christopher Milner, Jose Fuentes, and Jon Pace	Current and former employees of WFMG. All but Pace claim to have worked at a Whole Foods store in the Washington, D.C. metropolitan area. Pace is a DC resident.

Abbreviation	Actual Term	Summary/Background
Memorandum Opinion or Mem. Op.	*Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114 (D.D.C. 2018)	District Court's March 15, 2018 Memorandum Opinion and Order granting in part and denying in part Defendants' Motion to Dismiss [attached as Appendix A]
Parties	WFMG and the Individual Plaintiffs, collectively	The only named parties to this appeal, and the current parties in the District Court.
Store Team Leader	Store manager for specific Whole Foods store	Whole Foods' term for highest-ranking manager at specific store.
Team Members	Whole Foods' employees	Whole Foods' term for current or former employees, regardless of position.
Vasquez or the *Vasquez* Case	*Victor Vasquez, et al. v. Whole Foods Mkt. Grp., Inc.*, Case No. 17-CV-00112-APM (D.D.C.)	Related case that concerns the termination of 9 former WFMG store managers for alleged manipulation of Gainsharing.
WFMI	Former Defendant Whole Foods Market, Inc.	Holding company that is the sole owner of Whole Foods operating entities, including WFMG.
Whole Foods, WFMG, or Appellant	Appellant/Defendant Whole Foods Market Group, Inc.	Operating entity that owns and operates Whole Foods stores in 26 states and the District of Columbia.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this permissive, interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5.

On June 11, 2018, the District Court issued both an Order and Memorandum Opinion in support thereof, granting Appellant's Motion to Certify for Interlocutory Appeal, stating that the District Court's order on Appellant's Motion to Dismiss (1) involves a controlling question of law (2) as to which there is a substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The District Court's July 11 Memorandum Opinion and Order—which are attached as Appendix B and C, respectively—comply with the requirements of 28 U.S.C. 1292(b). (JA 34–43).

Appellant timely filed its Petition for Leave to Appeal Interlocutory Order in this Court on June 21, 2018. *Whole Foods Mkt. Grp., Inc. v. Molock, et al.,* USCA Case 18-8006, Doc. 1737282 (D.C. Cir.). This Court granted Appellant's petition on November 11. *Whole Foods Mkt. Grp., Inc. v. Molock, et al.,* USCA Case 18-8006, Doc. 1754709 (D.C. Cir. Nov. 11, 2018) (JA 272). Appellant timely paid the district clerk all required fees. *See* FED. R. CIV. P. 5(d)(1). Thus, this interlocutory appeal is fully perfected and satisfies all requirements of 28 U.S.C. 1292(b) and Federal Rule of Appellate Procedure 5.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Whole Foods Market Group, Inc. believes that oral argument would greatly benefit the Court and the Parties in this case. This interlocutory appeal involves a novel issue of Constitutional Due Process that is confronting dozens of federal district courts but has not yet been addressed by any other federal circuit court. Given that the resolution of this issue is both complex and will likely have a broad impact throughout the federal court system, oral argument is both advantageous and appropriate.[1]

ISSUE PRESENTED

When a class action is brought in federal court under diversity jurisdiction against a nonresident corporation, does the court have jurisdiction to determine claims brought on behalf of unnamed putative class members who could never individually satisfy the requirements for personal jurisdiction?

[1] As of the date of this filing, this case is the only active appeal in any federal circuit that is likely to address the application of *Bristol-Myers* to class actions. A Rule 23(f) appeal from an order granting class certification is currently pending in the Ninth Circuit, but that appeal has been stayed pending approval of class settlement in the district court. *See Transamerica Life Ins. Co. v. Feller*, Case No. 18-55408 (Ninth Circuit interlocutory appeal from *Feller v. Transamerica Fin. Advisors, Inc.*, 305 F. Supp. 3d 1342 (M.D. Cal. 2018)).

STATUTES AND REGULATIONS

FED. R. CIV. P. 4(k)

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D.C. CODE 13-423

U.S. CONST., amend. V

U.S. CONST., amend. XIV

28 U.S.C. § 2072 (the "Rules Enabling Act")

28 U.S.C. § 1331 (federal question jurisdiction)

28 U.S.C. § 1332(d) (diversity jurisdiction for class actions)

STATEMENT OF THE CASE

This appeal is from an interlocutory order on Whole Foods' motion to dismiss for lack of personal jurisdiction. Because the District Court ruled on the motion without an evidentiary hearing, the District Court could consider the pleadings, "bolstered by such affidavits and other written materials" relied upon by the parties. *Mwani v. bin Laden*, 417 F.3d 1, 7 (D.C. Cir. 2005). Therefore, Whole Foods bases its statement of facts on the pleadings and other materials filed by the parties in connection with Whole Foods' motion to dismiss.

A. CASE OVERVIEW

This case concerns the alleged underpayment of Gainsharing "bonuses" to Whole Foods' current and former Team Members across the country. Complaint ¶ 1 (JA 44). Gainsharing was Whole Foods' incentive-based bonus program, whereby Whole Foods would pay periodic bonuses to eligible Team Members when the Team Members' department was under its projected cost-of-labor budget. The "bonus" consisted of a portion of the profits that the department may have realized due to its cost savings in beating its allocated labor budget. The calculation of these bonuses depended on many factors, such as labor costs, actual revenue of a given department, and an eligible Team Member's pro-rata share of all hours worked in a given department during the fiscal period at issue. Complaint ¶¶ 15–17 (JA 47–JA 49).

In December 2016, Whole Foods terminated nine Store Team Leaders (i.e., store managers) in the Washington, D.C. metropolitan area. Complaint ¶ 26 (JA 52). Whole Foods determined that these managers improperly "shifted" Team Member hours from underperforming departments to overperforming departments in order to make it appear that all departments were meeting their projected cost-of-labor budgets.[2] It is undisputed that the unauthorized transfer of labor hours to other departments where Team Members did not work violated the Gainsharing program's written policies.

On December 13, 2016, the Associated Press published a story stating that Whole Foods had terminated "nine store managers in the mid-Atlantic region for manipulating a bonus program for their benefit." Complaint ¶ 26 (JA 52); Matthew Barakat, *Whole Foods fires 9 store managers over bonus manipulation*, ASSOCIATED PRESS, Dec. 13, 2016 (JA 131). The Washington Post published an article two days later, in which a Whole Foods spokesman was reported as saying the manipulation of the Gainsharing program was under investigation, but that it appeared to be

[2] When a department was underperforming—meaning its cost of labor was exceeding its projected percentage of the department's revenue, and therefore operating at a loss—these terminated Store Team Leaders allegedly transferred hours for certain Team Members from the underperforming department to a department that was beating its labor budget and operating at a profit, although the transferred Team Member did not actually work for that department. *See* Complaint ¶¶ 18–19 (JA 49–JA 50).

isolated to "a relatively small number of its 457 stores." Complaint ¶ 29 (JA 53); Justin Wm. Moyer, *Whole Foods fires managers in Md., Va. and D.C. for manipulating bonus system*, WASH. POST, Dec. 15, 2016 (JA 210–JA 211).

On January 17, 2017, the nine terminated store managers filed a lawsuit against Whole Foods, claiming that they were wrongfully terminated because the above-described improper shifting of labor hours was in fact a "nationwide practice." *See* Complaint ¶¶ 30–31 (citing allegations in *Vasquez* case) (JA 53–JA 54). Based solely on the news articles and the allegations contained in the terminated store managers' lawsuit, the Individual Plaintiffs filed the underlying putative nationwide class action. *See* Complaint ¶¶ 30, n.2 (incorporating by reference the pleadings in *Vasquez* Case) (JA 53).

The Individual Plaintiffs allege that Whole Foods engaged in a nationwide "corporate practice known as 'shifting labor costs,'" which the Individual Plaintiffs claim was intended to reduce Gainsharing bonuses. Complaint ¶ 1 (JA 1). The Individual Plaintiffs, all of whom are current or former Whole Foods' Team Members, brought only state-law causes of action for breach of an oral contract, unjust enrichment, and common-law fraud. Complaint ¶¶ 107–17, 163–70 (JA 71–JA 72, JA 80–JA 84). The Individual Plaintiffs assert these claims on behalf of

themselves and a putative nationwide class of all current and former Whole Foods Team Members. *Id.* [3]

The Gainsharing bonuses that the Individual Plaintiffs claim they were denied are paid to Team Members in their paychecks and are subject to individual state laws. Whether labor hours were improperly shifted can only be determined on a store-by-store basis. *See* July 11, 2018 Mem. Op. p. 7 (JA 40) (outlining scope of store-specific discovery that Individual Plaintiffs are seeking to establish class injury).

B. JURISDICTIONAL FACTS

WFMG is an operating entity that owns and operates Whole Foods stores in 26 states and the District of Columbia. *See* Decl. of P. Yost, ¶ 5 (JA 133). Employees who work at Whole Foods' grocery stores within these states are employees of WFMG, which is incorporated in Delaware and has its principal place of business in Austin, Texas. Complaint ¶¶ 12–13 (JA 46–JA 47); Decl. of P. Yost ¶ 3 (JA 133). The Whole Foods stores in other states are owned and operated by other operating entities, none of which have any connections to the District of Columbia. *See* Decl. of P. Yost ¶ 5 (JA 133); July 11, 2018 Mem. Op. p. 7 (JA 40)

[3] Individual Plaintiffs also seek to represent unique, state-specific subclasses of current or former Team Members for various alleged violations of Maryland's and the District of Columbia's wage collection statutes. Complaint ¶¶ 118–62 (JA 73–JA 80).

(noting that the Individual Plaintiffs' counsel has expressed his intention to seek discovery of stores that are not operated by WFMG).

WFMG is a wholly owned subsidiary of WFMI, a holding company that owns all shares of Whole Foods' operating entities in the United States. Decl. of P. Yost ¶ 4 (JA 133). WFMI is incorporated in Texas, with its principal place of business in Austin, Texas. Decl. of P. Yost ¶ 2 (JA 132). WFMI does not own any stores in the District of Columbia or any other state. Decl. of P. Yost ¶¶ 4, 6–9 (JA 133).

Individual Plaintiffs Michael Molock and Randal Kuczor are residents of the District of Columbia. Complaint ¶¶ 5–6 (JA 45). Molock is a current Whole Foods Team Member. Complaint ¶ 32 (JA 54). Kuczor left the company in 2015. Complaint ¶ 34 (JA 54). Both Molock and Kuczor are the only two Individual Plaintiffs who allege they have continuously worked at a Whole Foods store in the District of Columbia during their entire employment.

Individual Plaintiffs Jose Fuentes, Christopher Milner, and Jon Pace are residents of Maryland, Georgia, and the District of Columbia, respectively. Complaint ¶¶ 8–10 (JA 46). Fuentes and Milner previously worked at Whole Foods stores in Washington D.C., but also worked at stores in Maryland, Virginia, North Carolina, and Georgia. Complaint ¶¶ 59, 70 (JA 59, JA 61–JA 62). Pace has only worked at a Whole Foods store in Virginia. Complaint ¶ 85 (JA 65). To the extent

any of these Individual Plaintiffs were improperly deprived of their Gainsharing bonuses, such deprivation occurred in the States in which they worked, because any manipulation of hours occurred at their assigned stores. *See* Compl. ¶ 20 (JA 50) (alleging that improper labor shifting "was effectuated by the Payroll/Benefits Specialist located in each Whole Foods store.").

The Complaint also asserted claims on behalf of the Former Plaintiffs, Sarah Strickland and Carl Bowens. *See* Complaint ¶¶ 50–58, 92–99 (JA 57–JA 59, JA 66–JA 68). The District Court dismissed both Former Plaintiffs for lack of personal jurisdiction because neither Strickland nor Bowens ever lived or worked in Washington, D.C. Mem. Op. pp. 10–13 (JA 10–JA 13).

The Individual Plaintiffs seek to represent both current and former Team Members in at least the other 26 states in which WFMG operates, although the overwhelming majority of those unnamed putative class members have never worked in the District of Columbia.

C. PROCEDURAL HISTORY

Whole Foods filed its motion to dismiss, seeking, in part, to dismiss the parties and claims over which the District Court lacked personal jurisdiction.[4] First, Whole

[4] WFMI moved to dismiss itself entirely from this case because it is not subject to either general or specific jurisdiction in the District of Columbia. WFMG also moved to dismiss the Individual Plaintiffs' claims for lack of standing and for various failures to state claims upon which relief could be granted. *See* Mem. Op.

Foods moved to dismiss all Individual Plaintiffs' and Former Plaintiffs' claims, to the extent those claims arose from employment outside of Washington D.C., because any injury stemming from such employment was not connected to the forum. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (noting that because employees did not allege "any injury from work in or related to" the forum, specific jurisdiction could not exist). This included (1) moving to entirely dismiss Former Plaintiffs because neither of them lived nor worked in the District and (2) limiting the Court's exercise of specific jurisdiction over Individual Plaintiffs Fuentes and Milner to only "those specific dates of employment" when they worked in the District. *See* Mem. Op. pp. 9–13 (JA 9–JA 13). Second, Whole Foods moved to dismiss claims asserted on behalf of nonresident putative-class members because there were no facts to support personal jurisdiction as to those nonresidents' claims. Mem. Op. pp. 11–12 (JA 11–JA 12).

The District Court granted Whole Foods' motion to dismiss in part. The District Court held that *Bristol-Myers* applies to federal courts sitting in diversity and applies to named plaintiffs in a class action, and dismissed the Former Plaintiffs

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pp. 18–32 (JA 18–JA 32). The District Court dismissed WFMI for lack of personal jurisdiction; dismissed the Oklahoma subclass based on its dismissal of Strickland as a named plaintiff; but denied the remaining, alternative bases to dismiss the Individual Plaintiffs' claims. Mem. Op. pp. 14–32 (JA 14–JA 32).

for lack of personal jurisdiction. Mem. Op. pp. 9–13 (JA 9–JA 13). The District Court rejected Whole Foods' contention that specific jurisdiction for the Individual Plaintiffs was limited to only the time periods when they worked at a Whole Foods store in the District of Columbia. Mem. Op. pp. 11–12, 11 n.3 (JA 11–JA 12).

Finally, the District Court denied Whole Foods' motion to dismiss the nonresident putative class members based on lack of personal jurisdiction. Mem. Op. pp. 13–14 (JA 13–JA 14). The District Court emphasized the distinction between the mass tort at issue in *Bristol-Myers* and a class action under Federal Rule of Civil Procedure 23, noting the additional "due process safeguards" provided by class actions. Thus, the District Court concluded that "*Bristol-Myers* does not require a court to assess personal jurisdiction with regard to all nonresident putative class members." Mem. Op. p. 14 (JA 14).

SUMMARY OF ARGUMENT

Bristol-Myers held that every plaintiff must establish personal jurisdiction and rejected the argument that a nonresident plaintiff can avoid personal-jurisdiction scrutiny by tying their suit to claims of a similarly situated resident plaintiff. Based on that reasoning, a court cannot exercise specific personal jurisdiction over a defendant for state-law claims brought on behalf of unnamed putative class members which have no connection to the forum. When, as here, a nonresident defendant can only be subject to specific jurisdiction in a particular forum, forcing that defendant to defend against claims brought by a class of individuals whose causes of action arose in other jurisdictions violates interstate federalism and the defendant's due process rights under the Fifth Amendment.

Under *Bristol-Myers*, a group of multistate plaintiffs seeking to sue a corporate defendant for state-law causes of action has two choices: (i) the plaintiffs may bring a single suit for all plaintiffs nationwide in a forum where the defendant is subject to general jurisdiction; or (ii) plaintiffs can bring separate, state-specific suits for all plaintiffs harmed in a specific forum. These two options should apply with equal force to class actions. Limiting a nationwide class action involving only state-law causes of action to forums in which a defendant is subject to either general jurisdiction or specific jurisdiction for all claims comports with the concepts set forth

in *Bristol-Myers*, *Daimler*, and a trend of Supreme Court precedent that has narrowed the scope of personal jurisdiction.

Because Whole Foods is not subject to general jurisdiction in the District of Columbia, the Individual Plaintiffs' class should be limited to only those class members whose claims are connected to the District. Given that putative class members, whether named or unnamed, who never worked for Whole Foods in the District of Columbia cannot assert that their alleged loss arose in this forum, those nonresident class members' claims should be dismissed for lack of personal jurisdiction. Plaintiffs cannot escape the constitutional demands of personal jurisdiction by donning the procedural cloak of a class action.

ARGUMENT

I. *BRISTOL-MYERS* ESTABLISHED THAT DUE PROCESS REQUIRES EACH PLAINTIFF TO SATISFY PERSONAL JURISDICTION—A REQUIREMENT THAT SHOULD APPLY WITH EQUAL FORCE TO CLASS ACTIONS.

This appeal concerns the relatively straightforward application of the constitutional rule that was set forth in the recent *Bristol-Myers* decision. *See generally Bristol-Myers Squibb Co. v. Superior Court of Cal.*, ___ U.S. ___, 137 S. Ct. 1773 (2017). In *Bristol-Myers*, the Supreme Court's central ruling is clear. Due process requires that a court must have personal jurisdiction over every plaintiff's claim. 137 S. Ct. at 1781.

Bristol-Myers involved a group of over 600 plaintiffs consisting of both California and non-California residents that sued Bristol-Myers in a mass action brought in California state court. *Id.* Bristol-Myers conceded that it was subject to specific jurisdiction for the California residents' claims, but moved to dismiss the non-California plaintiffs because their actions arose in other states. *Id.* The California Supreme Court affirmed the trial court's denial of Bristol-Myers' motion, holding that because Bristol-Myers was subject to specific jurisdiction for the California plaintiffs' claims, it did not violate traditional notions of fair play and substantial justice to require Bristol-Myers to defend itself against all nationwide

plaintiffs in that forum. *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 889–90 (Cal. 2016).

On review, the Supreme Court overturned that decision, holding that allowing non-California residents to bring claims against Bristol-Myers that arose outside of California violated Bristol-Myers's due-process rights under the Fourteenth Amendment. *Bristol-Myers*, 137 S. Ct. at 1782. After discussing the distinction between general and specific, the Court emphasized that specific jurisdiction requires that "the *suit* must arise out of or relate to the defendant's contacts with the *forum*." *Id.* at 1780 (internal quotations omitted). "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 the third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents." *Id.* at 1781 (quoting *Walden v. Fiore*, 571 U.S. at 227, 286 (2014)). Thus, *Bristol-Myers* expressly rejected the state court's reasoning that the constitutional underpinnings of personal jurisdiction are less strict when a defendant is already subject to personal jurisdiction for some, but not all, of the individual plaintiff's claims. *Id.* at 1781.

Moreover, *Bristol-Myers* reached this conclusion despite acknowledging that there were practical considerations that otherwise favored allowing the case to proceed as a single, nationwide suit. As the Court explained:

> [E]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . .; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 1780–81.

This central holding in *Bristol-Myers* demonstrates why this Court should hold that personal jurisdiction must independently exist for each plaintiff's claims, regardless of whether the claim is tied to a similarly situated class member. Whether they are named or unnamed, the nonresident class members in this case sit in the same posture as the non-Californian plaintiffs in *Bristol-Myers*. Standing alone, the named and unnamed nonresident class members' claims lack any jurisdictional nexus with this forum. *See BNSF Ry.*, 137 S. Ct. at 1558 (noting that because employees did not allege "any injury from work in or related to" the forum, specific jurisdiction could not exist).

For this reason, the District Court properly dismissed Bowens and Strickland because their claims arose out of actions allegedly occurring in only Maryland and Oklahoma. The remaining Individual Plaintiffs (except for Pace) all worked within

the District of Columbia at some point during the relevant time period. The District Court allowed claims arising in Maryland to also proceed to discovery at this time. The court also has retained the claims of the unnamed putative class members from all States in which WFMG operates, even though those alleged injuries arose from actions that did not occur within the District of Columbia. This ruling violates Whole Foods' due process rights, as analyzed and applied in *Bristol-Myers*.

While *Bristol-Myers* conclusively resolved this issue for mass actions, the fact that this is a class action should not change the underling analysis. *Bristol-Myers* has obvious parallels to a putative nationwide class action in federal court, and its rationale applies with equal force to class actions. "Nothing in *Bristol-Myers* suggests that its basic holding is inapplicable to class actions." *Chavez v. Church & Dwight Co., Inc.*, No. 17 C 1948, 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018) (slip op.).[5] *Bristol-Myers* discusses a general principle of Due Process—in cases involving specific jurisdiction, there must be a connection between the forum and each plaintiff's claims. Based on *Bristol-Myers*'s reasoning, a court should apply its rationale to putative nationwide class actions brought in a forum where the court

[5] Whole Foods acknowledges that the analysis of district courts from other federal circuits are not binding on this Court and are, at best, persuasive authority. However, given that no federal circuit court has had the opportunity to analyze whether *Bristol-Myers* applies to federal class actions, Whole Foods believes that the persuasive analysis of district courts that have addressed this issue may be valuable to the Court.

does not have general jurisdiction over the defendant. *See e.g., DeBernardis v. NBTY, Inc.*, No. 17-C-6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (slip op.); *see also Practice Mgmt. Support Servs., Inc. v. Cirque de Soleil, Inc.*, 301 F. Supp. 3d 840, 861–62 (N.D. Ill. 2018).[6]

In this case, the only connection that the nonresident plaintiffs' claims have to this forum is that other class members with similar injuries were injured in the District of Columbia. The Supreme Court has clearly stated that this connection to other plaintiffs cannot salvage a nonresident's lack of contacts with the forum. *Bristol-Myers*, 137 S. Ct. at 1781. Therefore, the requirements of personal jurisdiction divest the District Court of its power to render a valid judgment over the nonresident plaintiffs' claims. *See id.* at 1779.

II. ***BRISTOL-MYERS*** SHOULD GOVERN IN NATIONWIDE CLASS ACTIONS BROUGHT IN THE FEDERAL COURTS.

A. ***BMS*** Applies To Class Actions Brought In Federal Courts.

The primary issue left open by *Bristol-Myers* is whether its analysis would be the same in federal court: "we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 1784. However, to the extent that the Supreme Court has not addressed

[6] Again, due to the lack of any Circuit Court authority on this point, WFMG refers to District Court cases as examples of how the WFMG's argument would apply in practice.

whether the same personal-jurisdiction analysis applies to federal courts, this Court and other Circuits have done so.

1. When sitting in diversity, the limits on a district court's personal jurisdiction is the same as those of a state court

In *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54 (D.C. Cir. 2017), this Court rejected the argument the Fifth Amendment's "personal-jurisdiction restrictions are less protective of defendants than those imposed by the Fourteenth Amendment."[7] As this Court explained, "[n]o court has ever held that the Fifth Amendment permits personal jurisdiction without the same 'minimum contacts' with the United States as the Fourteenth Amendment requires." *Livnat*, 851 F.3d at 54. *Livnat*, however, was a federal-question case in which the only issue was whether the defendant had sufficient contacts with the "United States as a whole," such that the Court "expressed no view" on whether the defendant also needed sufficient contacts with the District of Columbia. *Id.* at 55 n.6.

In diversity cases, however, this Court has held that "the federal district court's personal jurisdiction over the defendant is coextensive with that of a District of Columbia court." *Helmer v. Doletskaya*, 393 F.3d 201, 205 (D.C. Cir. 2004). The

[7] This is consistent with other precedent in which the Supreme Court has found that due process under the Fifth Amendment is coextensive with due process under the Fourteenth Amendment. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (noting that equal protection claims are analyzed the same under the Fifth and Fourteenth Amendments).

reason this is particularly true in diversity cases is that a federal court is not exercising any inherent authority of the United States, but rather is stepping into the place of a state court whose reach would otherwise be limited by the same interstate federalism concerns that were at play in *Bristol-Myers*. As the Fifth Circuit explained, a "federal court sitting in diversity may exercise personal jurisdiction over a nonresident defendant (1) as allowed under the state's long arm statute; and (2) to the extent permitted by the Due Process Clause of the Fourteenth Amendment." *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 398 (5th Cir. 2009). This is consistent with rulings from the Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits,[8] as well as this Court's previous rulings. *Helmer*, 393 F.3d at 205. The United States Supreme Court has acknowledged this "ordinary" practice of "follow[ing] state law in determining the bounds" of a federal court's jurisdiction. *Daimler AG v. Bauman*,

[8] *Spiegel v. Schulmann*, 604 F.3d 72, 76 (2d Cir. 2010) ("A district court's personal jurisdiction is determined by the law of the state in which the court is located."); *Koch v. Pechota*, 744 Fed. Appx. 105, 109–10 (3d Cir. 2018) (same); *Tamburo v. Dworkin*, 601 F.3d 693, 700 (7th Cir. 2010) ("Where no federal statute authorizes nationwide service of process," federal courts analyze defendants' minimum contacts with the forum state); *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015); *Sanchez v. White Cty. Med. Ctr.*, 730 Fed. Appx. 656, 658 (10th Cir. 2018) (noting federal courts "turn to the federal constitutional limitations imposed Oklahoma's exercise of specific jurisdiction."); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1312 (11th Cir. 2018) (applying same two-step inquiry as Fifth Circuit). Whole Foods has not found any opinion from a federal circuit court which has held that a federal district court, sitting in diversity, may exercise personal jurisdiction in a manner that is broader than or different from the State in which the federal court sits.

571 U.S. 117, 125 (2014). Thus, any argument that a district court, sitting in diversity, has broader personal jurisdiction than the state in which it sits "buckles under the weight of precedent." *See Livnat*, 851 F.3d at 54.

As set forth above, Plaintiffs brought this case pursuant to the District Court's diversity jurisdiction, 28 U.S.C. § 1332(d), not the District Court's federal question jurisdiction, 28 U.S.C. § 1331. Plaintiff's claims sound in (i) the alleged violations of District of Columbia's wage and hour laws; (ii) the District's common law; (iii) Virginia common law; (iv) Maryland wage and hour laws; and, (v) potentially, the disparate common-law of all 27 states in which WFMG operates. June 11, 2018 Mem. Op. p. 8 (JA 41) (noting that if this case is a nationwide class action, the district court will be "grappling with the laws" of every state where Whole Foods operates). The parties are entitled to expect that these causes of action will be adjudicated as if they had been brought in the District of Columbia Superior Court. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945).

Each state is its own sovereign, and due process issues necessarily arise to ensure that the federal court, as stand in for the state court, is properly exercising its powers over nonresidents. A federal court sitting in diversity thus can only adjudicate claims that the state court could adjudicate. Litigants could experience significant disharmony in rulings if a district court adjudicates a claim that the state

court could not, giving rise to potential violations of a defendant's due process rights. Though the Supreme Court in *Bristol-Myers* did not address this concern, this concern is supported by other precedent. *See Guaranty Trust Co. of N.Y.*, 326 U.S. at 109 (discussing why prosecuting a case in federal court "instead of a State court a block away, should not lead to a substantially different result."). As this Court observed, "[a]pplying consistent personal-jurisdiction standards under the Fifth and Fourteenth Amendments is also easier to administer" and will lead to simpler and more predictable rules. *Livnat*, 851 F.3d 55–56.

2. The rationale of *Bristol-Myers* should apply in class actions.

Personal jurisdiction is a facet of constitutional due process, whether arising under the Fifth or Fourteenth Amendment. Class actions, however, are a creature of Rule 23 of the Federal Rules of Civil Procedure. The Supreme Court has emphasized that Rule 23's requirements must be interpreted in keeping with Article III constraints and with the Rules Enabling Act, which instructs that "the Federal Rules of Civil Procedure shall not abridge, enlarge, or modify any substantive right." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)); *Practice Mgmt. Support Servs., Inc.*, 301 F. Supp. 3d at 861 (applying *Amchem* in reasoning that *Bristol-Myers* must apply in the class-action context). "[T]he Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns" that counsel

against "adventurous application" of Rule 23.[9] *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 845 (1999) (discussing why certifying a "mandatory class" would violate the "Seventh Amendment jury trial rights of absent class members").

Rule 82 makes this restriction abundantly clear: "These rules [of civil procedure] do not extend or limit the jurisdiction of the district courts . . . ." FED. R. CIV. P. 82; *see Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (noting that term "jurisdiction," in strictest since, refers to a court's personal jurisdiction and subject-matter jurisdiction). The Supreme Court has noted that Rule 82 further reinforces the principle that Rule 23 cannot expand a court's subject matter jurisdiction. *Amchem*, 521 U.S. at 613. Furthermore, Chief Justice Roberts recently reemphasized the principle that Rule 23 cannot enlarge a court's jurisdiction, noting

[9] Some courts have pointed to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), as support for the argument that unnamed, out-of-state plaintiffs can be considered part of a putative nationwide class even though their claims do not arise of the of the actions of the defendant in the forum. *See, e.g., Knotts v. Nissan N. Am., Inc.*, No. 17-cv-05049, 2018 WL 4922360, at *14 (D. Minn. Oct. 10, 2018). This is a misreading of *Shutts*. In that case, the Supreme Court addressed due process rights of nonresident plaintiffs who were included as class members. *Shutts*, 472 U.S. at 808–12. In *Bristol-Myers*, the Court distinguished and limited *Shutts* to its specific facts. *Bristol-Myers*, 137 S. Ct. at 1783. *Shutts*, therefore, has no bearing on the question before the Court. If anything, *Bristol-Myers*'s discussion of *Shutts* underscores the critical distinction between the due process rights of *plaintiffs*, which are protected by class-action procedures, and the due process rights of *defendants*, which are protected by personal jurisdiction of either general or specific jurisdiction. *Id.* at 1783–84. As *Bristol-Myers* implicitly held, the due-process protections for plaintiff do not alter the need for due-process protections for defendants.

that "Article III does not give federal courts power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (noting that constitutional requirement of injury-in-fact precludes courts from awarding any damages to class that may include uninjured plaintiffs).

Because Rule 23 does not supplant due process or expand a court's jurisdiction, a court must determine whether it has personal jurisdiction before Rule 23's constraints are applied. *See Amchem Prods.*, 521 U.S. at 613 (noting that courts only consider Rule 23's requirements if they are "logically antecedent" to the standing analysis). Otherwise, due process becomes subservient to the logistical analysis of Rule 23. *See id.* at 613 n.15 (if class certification is at all in doubt, "jurisdictional issues would loom larger" and require resolution). The elements of Rule 23 focus on protecting the rights of the class, to ensure that the named plaintiffs represent all putative class members, and also protect the defendant to ensure that it will not be subject to multiple suits by those who are not adequately represented. But the requirements of Rule 23 do not eliminate the requirement of personal jurisdiction over the defendant with regard to the claims brought by both the named plaintiffs and the putative class members.

3. The party/non-party distinction does not affect whether *Bristol-Myers* should apply.

Several district courts have ruled that the party/non-party distinction prevents the application of personal jurisdiction analysis on unnamed putative class members. *See, e.g.*, *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360, 1368–69 (N.D. Ga. 2018).[10] That analysis assumes too much and does not address possible due process concerns. In *Sanchez*, the court pointed out that courts routinely do not take unnamed putative class members into account for purposes of determining diversity of citizenship or written discovery. *Id.* at 1369. Neither of these exclusions impact the due process rights of a defendant. Accordingly, reliance on them is not persuasive.

First, diversity jurisdiction is almost entirely a creature of statute, and Congress is authorized under Article III to prescribe the exact limits of how much diversity is required to confer original jurisdiction to federal courts. *See Hertz Corp. v. Friend*, 559 U.S. 77, 84 (2010). Similarly, the scope and limits of discovery are governed by the Federal Rules of Civil Procedure themselves, as well as the inherent discretion of trial courts. *See, e.g.*, FED. R. CIV. P. 26(b)(1) (requiring discovery to be proportional to needs of case). Personal jurisdiction, by contrast, is primarily a question of constitutional due process, and thus solely within the courts' providence.

[10] *See supra* n.5.

Whether a court may exercise personal jurisdiction over unnamed putative class members impacts a defendants' due process rights, and therefore cannot be abridged by the Rules of Civil Procedure. *See Ortiz*, 527 U.S. at 845–46 (noting that Rule 23 cannot deprive absent class members of Seventh Amendment right to jury trial).

Courts have included unnamed putative class members for fundamentally significant purposes, such as the tolling of the statute of limitations, the binding effect of a judgment, and appealing an adverse judgment. *Sanchez*, 297 F. Supp. 3d at 1368 (citing *Am. Pipe & Contr. Co. v. Utah,* 414 U.S. 538, 540–60 (1974)); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 184 (1985); *Smith v. Bayer Corp*., 564 U.S. 299, 313 (2011)). Including unnamed putative class members for purposes of determining whether the court has specific personal jurisdiction over the defendant is akin to those decisions.

The distinction between cases in which unnamed putative class members are considered and those in which they are not is both significant and intuitive. When a rule can be applied uniformly to all unnamed class members because the rule is not dependent on an individual being a member of the class, the rule can and should be applied at the pleading stage, and even before class certification. *See, e.g.*, *China Agritech, Inc. v. Resh*, __ U.S. __, 138 S. Ct. 1800, 1806–07 (adopting uniform rule that filing a class action tolls limitations for successive unnamed class member's

individual claims, but does not toll limitations for unnamed plaintiffs to bring class actions).

Here, a bright-line rule regarding jurisdiction can apply to all unnamed, putative class members without having to decide the effect on an individual through discrete inquiry, or even to consider whether the unnamed class members could otherwise satisfy the requirements for class certification. *See Amchem Prods.*, 521 U.S. at 613 (noting that jurisdictional issues should be addressed before class-certification issues unless class-certification issues are "logically antecedent"). The rule is simple: if the unnamed putative class member could not bring an individual claim against a defendant in the forum due to lack of personal jurisdiction, then the court lacks specific jurisdiction over the claims of that person as a member of the putative class. Further, it is consistent with the interstate federalism concerns that underpin personal jurisdiction—*i.e.*, that personal jurisdiction *divests courts* of the ability to reach out beyond their borders to render judgments that are not related to the States in which they reside. *See Bristol-Myers*, 137 S. Ct. at 1781. These same federalism concerns should dictate that a federal district court, sitting in diversity, cannot reach beyond the borders of the District of Columbia to exercise jurisdiction of absent class members' claims that lack any connection to this forum. *See Helmer*, 393 F.3d at 205 (D.C. Cir. 2004).

4. Deciding whether the District Court has jurisdiction over unnamed putative class members at the pleading stage is more efficient.

Prior to class certification, an unnamed class member may be designated as a party for some purposes and not for others. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). "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.* (emphasis added). But this procedural context does not change the basic substantive rule that a court must ultimately have personal jurisdiction over a plaintiff's claim in order to render judgment on that claim. To await the class certification stage to determine if a court could ever have personal jurisdiction over putative class members is a misguided use of resources.

a. Addressing personal jurisdiction at the pleading stage will avoid wasteful discovery.

Waiting until class certification means that the Parties, including the defendants, will have spent significant time and resources in discovery regarding claims that ultimately might be denied as to individual class members. *See IMark Mktg. Servs., LLC v. Geosplat S.p.A.*, 753 F. Supp. 2d 141, 149 (D.D.C. 2010) (explaining why courts should evaluate personal jurisdiction before reaching any issue concerning merits of case). As the District Court noted, "[d]iscovery in this case, in its present form, promises to be drawn out, complex, and expensive." July

11, 2018 Mem. Op. p. 7 (JA 40). "The potential time and expense of obtaining such discovery" of Whole Foods grocery stores nationwide "is staggering." *Id.* For example, the Individual Plaintiffs could seek class-related discovery for unnamed putative class members who have only every worked at WFMG stores in Illinois, only to inevitably have those Illinois class members' claims dismissed at class certification.

This result flies in the face of *Daimler*, *Goodyear*, and the logic behind *Bristol-Myers*. *See Daimler*, 571 U.S. at 140; *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 923 (2011). If the Court allows plaintiffs to proceed, and allows plaintiffs to prosecute claims by Team Members from 27 states, the parties are left with the prospect of staggering quasi-nationwide discovery, involving millions of dollars in fees and thousands of professional hours spent conducting discovery over claims that will be dismissed at the class certification stage. WFMG has not expected, and in light of *Daimler* should not have expected, to be exposed to such burdensome and ultimately wasteful discovery in this district. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is . . . . that the defendant's conduct and connection with the forum State are such that he should reasonably

anticipate being hauled into court there."); *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1348 (D.C. Cir. 2000).

The more efficient method for proceeding is to determine jurisdiction at the pleading stage. This will ensure that the case can proceed, involving claims by only plaintiffs and putative class members that can establish specific personal jurisdiction over the defendant, which will result in the best use of the court's and the parties' resources. As the District Court noted, "if the court is wrong about *Bristol-Myers Squibb*, this case becomes simpler and discovery far more manageable." July 11, 2018 Mem. Op. p. 7 (JA 40).

b. Addressing personal jurisdiction at the pleadings stage will also be more efficient for the District Court.

In addition to preserving the resources of the Parties, addressing personal jurisdiction at the pleadings stage could also potentially Applying *Bristol-Myers* in this case, for example, would limit the putative class to only WFMG Team Members who worked at Whole Foods stores in the District of Columbia. Unnamed putative class members who never worked in the District of Columbia cannot establish specific personal jurisdiction over WFMG in this venue. This will limit the laws involved to just the laws of the District of Columbia and will limit the size of the class considerably. June 11, 2018 Mem. Op. p. 7–8 (JA 40–JA 41).

Should *Bristol-Myers* not apply at the pleading stage, but instead be delayed until class certification, the District Court here would face claims under 27 different states' laws, and will preside over a putative class, nearly all of whose members will never be able to establish specific personal jurisdiction over WFMG because those claims arise out of actions that did not occur within the District of Columbia. *Id.*

B. Applying Bristol-Myers To Federal Class Actions Is Consistent With The Supreme Court's Limitations On Personal Jurisdiction.

Bristol-Myers is the latest in a line of cases in which the Supreme Court has limited the scope of claims in the class action/mass action context in order to protect the Due Process rights of defendants.

Most recently before *Bristol-Myers*, in *Daimler*, 571 U.S. at 140, the Court limited the scope of general jurisdiction in order to bring the application of it more in line with traditional notions of fairness. In that case, Argentinian citizens sued Daimler AG in California for claims arising out of the automaker's alleged collaboration with state security forces in Argentina to kidnap plaintiffs or their close family members. *Id*. at 121. The automaker moved to dismiss, arguing that despite the presence of a subsidiary's dealerships in California and the fact that the subsidiary had been operating in California for decades, Daimler was not subject to general jurisdiction in California. *Id.* at 123–24. Therefore, Daimler could not be sued for alleged actions that occurred entirely outside of California. *Id.*

The Court noted that "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Id*. at 128 (alteration in original) (quoting *Goodyear*, 564 U.S. at 925). The Court detailed the history of the focus on specific jurisdiction and the limitations such jurisdiction placed on the claims that could be brought against a defendant in a forum. *Id*. at 129–33 (primarily discussing *Goodyear*, 564 U.S. 915; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437 (1952)). As noted by Justice Ginsburg, the Court has "increasingly trained on the relationship among the defendant, the forum, and the litigation." *Id*. at 132–33 (quoting *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

The Court then went on to analyze when a corporation can be considered to be "at home" in a district, and therefore subject to general jurisdiction. It held that general jurisdiction, except in the most exceptional circumstances, is limited to the company's state of incorporation and the state in which defendant has its principal place of business. *Id*. at 138–39. Absent general jurisdiction, a defendant could only be subject to specific jurisdiction, and a plaintiff's claim must be tied to the actions of the defendant in the forum. *Id*. at 126–27; *see Goodyear*, 564 U.S. at 923. Because Daimler was not incorporated in California and did not have its principal

place of business there, plaintiffs could not bring claims against it in California unless those claims arose from the defendant's business activities in California. *Daimler*, 571 U.S. at 139. Because they did not, the Court dismissed plaintiffs' claims. *Id.*

Daimler had a significant impact on personal jurisdiction, severely limiting the scope of general jurisdiction, and requiring courts to focus on the actions at issue in the case and where they occurred. *Daimler* forced parties alleging specific jurisdiction to have a plaintiff's claim linked to a defendant's actions in a particular forum.

Bristol-Myers continued this narrowing of personal jurisdiction. The Court has emphasized that:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Bristol-Myers, 137 S. Ct. at 1780–81 (quoting *World-Wide Volkswagen*, 444 U.S. at 293). The Court could not be clearer—a defendant subject only to specific jurisdiction can only be sued by a plaintiff who alleges injury arising under a specific action of a defendant in that forum. Accordingly, because the nonresident plaintiffs' claims did not arise out of Bristol-Myers's actions in California, they could not bring

their claims in California, despite any alleged efficiencies or lack of inconvenience. *Id.*

In light of *Bristol-Myers*, *Daimler*, *Goodyear*, *World-Wide Volkswagen*, and others, the next logical step in specific-jurisdiction jurisprudence must be to extend the reasoning of *Bristol-Myers* to class actions arising in diversity where the defendant is only subject to specific jurisdiction in the forum. Such application has already begun, in part. Courts readily apply *Bristol-Myers* to named class members, requiring that their claims arise out of the defendant's actions in the forum. *See, e.g., Feldman v. BRP U.S., Inc.*, No. 17-CIV-61150, 2018 U.S. Dist. LEXIS 53298, at *14 (S.D. Fla. Mar. 28, 2018) (dismissing named plaintiff); *Howe v. Samsung Elecs. Am., Inc.* No, 1:16cv386, 2018 WL 2212982, at *4 (N.D. Fl. Jan. 5, 2018) (slip. op.); *see also* Mem. Op. pp. 10–13 (JA 10–JA 13) (dismissing Former Plaintiffs for want of personal jurisdiction). The next step is to apply *Bristol-Myers* to the claims of unnamed putative class members, as is the case here. *See Chavez*, 2018 WL 2238191, at *10–11; *Practice Mgmt. Support Servs.*, 301 F. Supp. 3d at 860–62. Just like a named putative class member's claim must arise out of the defendant's actions in the forum, the unnamed putative class members' claims must also arise out of defendant's action—both due process and interstate federalism require it. *See Bristol-Myers*, 137 S. Ct. at 1780–81.

III. WHEN SITTING IN DIVERSITY, THE DISTRICT COURT IN THIS CASE IS LIMITED TO THE EXTENT OF THE DISTRICT OF COLUMBIA'S LONG-ARM JURISDICTION STATUTE

In addition to the constitutional limits imposed by the Fifth Amendment, the District Court's jurisdiction over a diversity case is further limited by District of Columbia's long-arm statute. As this Court explained, in "a diversity case, the court's personal jurisdiction over nonresident defendants depends upon state law, here the law of the District of Columbia." *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002). Therefore, any analysis regarding potential distinctions between personal jurisdiction under the Fifth Amendment and Fourteenth Amendment must be read in concert with precedent that personal jurisdiction is also limited by District's long-arm statute.

The District of Columbia's long arm jurisdiction statute has been interpreted to allow for the District of Columbia Superior Court to have jurisdiction over parties to the limits of the Fourteenth Amendment. *See FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1091–92 (D.C. Cir. 2008). A federal court, sitting in diversity over claims arising under DC law, is subject to the limitations of the District of Columbia's laws, and must follow that law in determining the boundaries of its jurisdiction over the parties before it. *Daimler*, 571 U.S. at 125. "This is because a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant 'who is subject to the jurisdiction of a court of

general jurisdiction in the state where the district court is located.'" *Walden v. Fiore*, 571 U.S. 277, 283 (quoting FED. R. CIV. P. 4(k)(1)(A)).

In this case, the Individual Plaintiffs have alleged that the District Court has personal jurisdiction over WFMG pursuant to D.C. CODE § 13-423(a)(1)–(3). Accordingly, the District Court may only exercise jurisdiction over WFMG to the extent, and only so far as allowed by, the District of Columbia's jurisdictional statute. According to D.C. CODE §13-423(a):

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent as to a claim for relief arising from the person's—
>
> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia; [or]
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> . . . .
>
> (b) When jurisdiction over a person is based solely on this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

D.C. CODE §13-423.

This subsection "has been interpreted to be coextensive with the Constitution's due process requirements." *GTE New Media Servs.*, 199 F.3d at 337 (internal citations omitted). "But subsection (a)(1) still contemplates a connection"

between the business that the defendant conducts in the District and "the claim in suit." *Forras v. Rauf*, 812 F.3d 1102, 1106 (D.C. Cir. 2016) (internal quotations omitted). "A corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" *Goodyear*, 564 U.S. at 927 (citing *Int'l Shoe Co. v. State of Wash.,* 326 U.S. 310, 318, (1945)). Accordingly, the Individual Plaintiffs' claims here must arise out of the business that WFMG transacted in the District and only in the District, to protect WFMG's due process rights under the Fifth Amendment. *Id.*; *see also Gorman*, 293 F.3d at 509–10 (noting that specific jurisdiction was unavailable because defendant's transactions in the District were unrelated to breach-of-contract claim).

IV. ***BRISTOL-MYERS*** PROVIDES CLEAR GUIDANCE FOR HOW MULTISTATE CLASS ACTIONS CAN PROCEED WITHOUT OFFENDING DUE PROCESS.

Plaintiffs in *Bristol-Myers* argued that the nonresident claims should proceed in California because the resident plaintiffs' case would inevitably take place in California, and therefore Bristol-Myers would suffer minimal inconvenience from defending similar claims in a single forum. The Supreme Court disregarded this argument. According to the Court, merely because some of the plaintiffs' claims arose out of Bristol-Myers' actions in California, that does not mean that any potential plaintiff from any other state could file suit in California simply because of

the efficiencies of proceeding in one action. *Bristol-Myers*, 137 S. Ct. at 1780–81. Because Bristol-Myers was only subject to specific jurisdiction in California, the Fourteenth Amendment, "acting as an instrument of interstate federalism" prevented Bristol-Myers from being sued in California for claims arising in other states. *Id.*

The Individual Plaintiffs make an argument similar to the argument made by the *Bristol-Myers* plaintiffs. According to the Individual Plaintiffs, because WFMG allegedly acted in a uniform manner across multiple states and injured Team Members in these states, all Team Members, including both named and unnamed putative class members, should be allowed to bring their claims against WFMG in the District of Columbia, even though the District Court might otherwise lack specific jurisdiction for nonresident class members' claims. According to the Individual Plaintiffs, simply because the District Court has jurisdiction over the remaining Individual Plaintiffs, the District Court should adjudicate the claims brought by unnamed putative class members from outside the forum, in part because of the efficiency that would result from proceeding in the District Court. *Bristol-Myers* dooms this argument at its core. To proceed as the Individual Plaintiffs suggest would eviscerate the notion of interstate federalism and would violate Whole Foods' due process rights. *See id.*

Instead, *Bristol-Myers* offers clear guidance for how to maintain the efficiency of adjudicating plaintiffs' claims from multiple states without offending due process. As noted in *Bristol-Myers*, dismissing nonresident class members based on lack of personal jurisdiction in California "does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over" Bristol-Myers. *Id.* at 1783. Alternatively, the Court stated that groups of plaintiffs who lived in the same state "could probably sue together in their home States." *Id.* Thus, merely requiring similarly situated plaintiffs from disparate states to file suit in accordance with personal jurisdiction did not deprive those plaintiffs of an efficient forum.

Similarly here, preventing the Individual Plaintiffs from bringing a multistate class action against WFMG in this forum does not eliminate the claims of nonresident, absent class members. The Former Plaintiffs have the opportunity to file their claims as class action in states in which they worked at a Whole Foods store, or Individual Plaintiffs can bring their claims in class actions in Texas or Delaware, where WFMG is admittedly subject to general jurisdiction. Decl. of P. Yost ¶ 3 (JA 133). Unnamed, absent class members can band together and file class actions in states in which they worked at a Whole Foods store. Even if the unnamed putative class members filed suit in the states where they worked, it is not a certainty

that the Individual Plaintiffs' counsel, or WFMG, would be subject to the burden of discovery in multiple courts. Either side has the ability to petition for the creation of an MDL proceeding, so that the individual suits can be consolidated for discovery and other pretrial matters. *See* 28 U.S.C. § 1407(a).

Thus, any parade of horribles that the Individual Plaintiffs' counsel may imagine will result from applying due process requirements to class actions are readily addressed by *Bristol-Myers* itself. At bottom, *Bristol-Myers* established that a defendant who is not at home in a given state should not be subjected to suit in that state by individuals from other states whose claims are connected to the forum. This is true regardless of whether the nationwide suit takes the form of a mass tort or class action. As one court aptly stated, a defendant's due process rights 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,* No. 16 Civ. 696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017);[11] *see also Amchem Prods.*, 521 U.S. at 612–13 (noting that Rule 23 does not extend federal court's jurisdiction).

[11] *See supra* n.5.

CONCLUSION

Expanding Plaintiffs' class to unnamed class members who were injured, if at all, outside of the District of Columbia violates the concepts of interstate federalism and due process. The reasoning and rationale set forth in *Bristol-Myers* evidences the Supreme Court's clarifying the boundaries of specific jurisdiction, requiring each plaintiff to narrowly tie his or her claims to specific actions of a defendant within a jurisdiction. While *Bristol-Myers* applied this concept in a mass action, the logical next step is to apply it in a class action. Accordingly, under *Bristol-Myers*, the Individual Plaintiffs' class in this case must be limited only to those Team Members who worked in the District of Columbia. The claims of all unnamed putative class members whose claims are unrelated to WFMG's operations in the District of Columbia should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document was produced on a computer using Microsoft Word 2010, and contains 8,765 words, as determined by the computer software's word-count function, excluding the sections of the documents in compliance with Rule 32(g)(1).

/s/ Gregory J. Casas
Gregory J. Casas

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2019, a true and correct copy of the foregoing Brief of Appellant was electronically filed with the Court pursuant to Federal Rule of Appellate Procedure 25(a)(2)(D) and 25(c), and that all counsel of record are being served through the Court's CM/ECF system.

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