Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-13173

SUFFOLK COUNTY

CHARLES KINGARA
Plaintiff-Appellant

v.

SECURE HOME HEALTH CARE INCORPORATED et al.
Defendants-Appellees

ON APPEAL FROM ORDERS OF SUFFOLK COUNTY SUPERIOR COURT

BRIEF FOR *AMICUS CURIAE*:
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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Dated: December 20, 2021

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education and professional standards, and to promote collegiality and civility among members of the Bar. To promote its objectives, the MassDLA participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. The MassDLA believes that this is such a case and that its perspective can assist the Court in resolving the important issues raised by this appeal.

DECLARATION PURSUANT TO MASS. R. A. P. 17(c)5

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)5, the *amicus curiae* hereby declares the following:

a. This brief was not authored in whole or in part by any party;

b. The preparation or submission of this brief was not funded by any party;

c. No other person or entity, other than the *amicus curiae*, contributed money intended to fund the preparation or submission of this brief;

d. The *amicus curiae* does not represent and has not represented any of the parties to the present appeal in another proceeding involving similar issues, nor was the *amicus curiae* a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF ISSUES

1. Whether the attorney for a deceased plaintiff in a putative class action has authority to act on the deceased plaintiff's behalf prior to class certification, and before any motion to certify a class has been filed, and without any motion by the deceased plaintiff's legal representative to substitute as a party to the putative class action.
2. If the attorney for a deceased plaintiff in a putative class action lacks such authority, whether a Superior Court judge has power to order, *sua sponte*, notice to the putative class members under Mass. R. Civ. P. 23(d).

STATEMENT OF THE CASE

The MassDLA, as *amicus curiae*, adopts the parties' statement of the case regarding the prior proceedings.

STATEMENT OF THE FACTS

The MassDLA, as *amicus curiae*, takes no view regarding the facts of the case on appeal, which do not appear to be in dispute, and devotes this brief to the questions posed in the Court's announcement

soliciting *amicus* briefs, under the factual circumstances described therein.

SUMMARY OF ARGUMENT

This brief is informed by the *amicus curiae*'s sensitivity to the potential disruption to the fair, orderly, and sequential disposition of class action cases that would follow adoption of any of the proposals advanced by the appellant's lawyers in this appeal. At bottom, they propose that, in the Commonwealth of Massachusetts, lawyers who file actions merely *pled* as putative class actions under Mass. R. Civ. P. 23 should be permitted to act on behalf of all members of the putative class before that class is certified. They further propose that even if attorneys lack the ability to act on behalf of anyone but the putative class representative prior to certification, trial courts are empowered, on their own motion and prior to certification, to issue notices to non-litigant *putative* class members for the purpose of inviting them to intervene in the action. These propositions collide with the very purpose of Rule 23's requirement that putative classes ultimately be "certified" by the court sometime prior to final adjudication of the merits. See pp. 18-23, infra.

Certification is the seminal event in the life of a putative class action. It is the moment when the "putative" moniker is dissolved, and the case becomes a true class action under the rule. It is the moment when the named plaintiff ceases *purporting* to represent all members of the class, and starts actually doing so upon formal appointment by a judge. The hallmark of certification carries the same weight for class counsel. Prior to certification, attorneys who represent named-plaintiffs in cases *pled* as class actions have no other clients but those very named-plaintiffs. *After* certification, they assume an attorney-client relationship with every member of the class. Additional protections which accrue upon certification include a prohibition on the settlement or dismissal of the case without court approval, to protect the rights and interests of absent members.

Once a class is certified, Rule 23(d) permits trial courts to issue notice to absent members of the class to advise them of "the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action[.]" The trial court's power to issue notices to class members is "designed to afford protection to absent members of

the class[,]" not *putative* class members. See infra, pp. 30-32.

In this appeal, the appellant's attorneys have asked the court to sanction, for the first time, the use of Rule 23's notice provision (sua sponte, or upon motion of putative class counsel) to issue a pre-certification clarion call to non-litigants to solicit their intervention in the case. Whether the text of Rule 23, our precedents, or the interests of justice permit such a use of the notice provision is an issue of first impression in the Commonwealth, but courts and commentators interpreting the concomitant federal class action rule agree that the earliest juncture that a court can or should invoke its Rule 23 notice powers is upon or subsequent to certification, or, in rare cases, to report that certification has been denied. See Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 410 & n. 61 (2002), citing 7B WRIGHT & MILLER, §§ 1786 and 1788 (collecting cases); *Manual for Complex Litigation (Second)*, § 30.21 (1985). *Cf.* Erica W. Rutner, Corey K. Brady, *Heads Plaintiffs Win, Tails Defendants Lose: The Asymmetrical Reality of Serial Class Action Relitigation*, 38 REV. LITIG. 69, 89 (2018)

(advocating for revision of Fed. R. Civ. P. 23 to permit notices to putative class members prior to certification). See infra, pp. 32-44.

The MassDLA respectfully submits that the overwhelming body of authority——from the text of Rule 23, to the Advisory Committee Notes thereto, our state precedents interpreting the rule, and the overwhelming body of cases interpreting Fed. R. Civ. P. 23——require the court to decline class counsel's invitation in this appeal to blur the presently bright-line distinction now provided by formal class certification and reverse the trial court's decision allowing class counsel's plaintiff-less motion for notice to issue to non-litigants inviting them to intervene in the action. As reasons therefore, the *amicus curiae* states that: (1) counsel in a putative class action cannot not act on behalf of absent class members until the class is certified, and cannot act on behalf of a deceased named-plaintiff until a proper party has been substituted in the decedent's place, and (2) Rule 23 does not permit invocation of its notice provisions until the class has been certified.

ARGUMENT

The answers to both questions posed in this appeal are provided by the text of Rule 23, which sets forth several prerequisites for maintaining a class action which, until they are established to the satisfaction of the trial court, otherwise prevent a *putative* class representative from maintaining the action "on behalf of all" other members of the putative class, i.e., as an actual (as opposed to a mere putative) class action. Mass. R. Civ. P. 23(a) (permitting member(s) of a class to sue as representative(s) on behalf of all members "*only if*" they first satisfy the enumerated prerequisites) (emphasis added). The process for determining whether an action can be maintained as a class action under Rule 23 is well developed by the precedents of our appellate courts, and is universally known as class "certification." The questions now before the court concern the powers of attorneys and our courts to request and/or issue notices under Rule 23 to *potential* plaintiffs eligible to replace a named plaintiff who has died prior to class certification.

As to the first question, whereas an attorney does not *represent* a class under Rule 23 until that

class is certified (and the court has also appointed him or her as class counsel), the attorney represents only the named-plaintiff(s) prior to certification. If the sole named representative of a putative class dies prior to certification, the deceased representative's attorney lacks any power to substitute herself as the class representative to request relief or take any other action in the case. Unless and until a new named plaintiff (whether or not that person is the legal representative of the deceased plaintiff's estate or someone else) steps forward to act as the class representative, the attorney has no client, and has no standing to move for the issuance of notices under Rule 23.

As to the second question concerning the trial court's power to issue notices *sua sponte*, again the issue is determined by the case's certification status——that is, whether the class has yet been certified. Rule 23(d) empowers courts to order notices to absent persons "at any stage of an action under this rule[.]" Prior to certification, a putative class action is not "an action under" Rule 23 because maintaining an action under Rule 23 requires

representatives to *first* establish the prerequisites enumerated in subsections (a) and (b) of the rule.

For these reasons, and as more fully explained below, the trial court's decision to issue pre-certification notices to non-litigants should be reversed.

I. PUTATIVE CLASS COUNSEL LACKS STANDING AND AUTHORITY TO SEEK RELEIF UNDER RULE 23 IF THE SOLE NAMED PLAINTIFF DIES PRIOR TO CLASS CERTIFICATION.

A. Rule 23 requires court certification to maintain a case as a class action.

Massachusetts Rule of Civil Procedure 23 sets out prerequisites that putative class representatives must establish to the satisfaction of the trial court in order to maintain a case as a class action, and then prescribes several powers and procedures at the court's disposal to resolve class actions that have first met those prerequisites. The rule's subsections on the prerequisites for certification provide, in relevant part:

> **(a) Prerequisites to Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23 was written "in the light of" Federal Rule of Civil Procedure 23, and thus shares many similarities with it, as well as some differences; therefore, in circumstances where Massachusetts decisional authority interpreting Rule 23 is found wanting, this court has repeatedly drawn from a vast body of case law governing class actions in the federal system. Chambers v. RDI Logistics, Inc., 476 Mass. 95, 111 (2016), quoting Longval v. Commissioner of Correction, 448 Mass. 412, 417 n. 9 (2007) ("case law construing the Federal rule is analogous and extremely useful"). See also Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337 (2008); Weld v. Glaxo Wellcome Inc., 434 Mass. 81 (2001); Spence v. Reeder, 382 Mass. 398 (1981); Brophy v. School Committee of Worcester, 6 Mass. App. Ct. 731 (1978) (in each of these cases, the court relied on Fed. R. Civ. P. 23 to construe the parameters of

Massachusetts Rule 23). This is a crucial consideration in this appeal, since courts in the federal system have almost universally rejected the reading of the class action rule proposed by the appellant's attorneys.

In comparing the federal class action rule with the one adopted in this Commonwealth, this court has noted that Rule 23, unlike its federal counterpart, does not explicitly provide for filing motions for class certification. Baldassari v. Pub. Fin. Tr., 369 Mass. 33, 39 (1975) (comparing Rule 23 with Fed. R. Civ. P. 23(c)(1)). However, it has also said that "such motions are often necessary and desirable for the efficient handling of class actions." Id. In recent times, Massachusetts courts have universally followed federal class action procedure whereby class certification is considered on a motion by the plaintiff(s), with the caveat that plaintiffs are generally afforded more time to file for certification in Massachusetts state courts than under the federal rule. Foster v. Comm'r of Correction, 484 Mass. 698, 714 (2020), citing Weld, 434 Mass. at 87 n.8 and Carpenter v. Suffolk Franklin Sav. Bank, 370 Mass. 314, 317–318 (1976). *Cf.* Massachusetts Gen. Hosp. v.

Rate Setting Comm'n, 371 Mass. 705, 713 (1977) and Baldassari, 369 Mass. at 39 (no abuse of discretion to postpone discovery and make early ruling on class certification).

However, whether the issue of certification comes before the trial court on a motion by the plaintiff, or upon the court's own prerogative, Rule 23 provides that if a case is to proceed as a true class action, and not just a putative one, the plaintiff must first "provide the court information sufficient to enable the court to form a reasonable judgment" that the prerequisites listed in subsections (a) and (b) of the rule are satisfied. Layes v. RHP Properties, Inc., 95 Mass. App. Ct. 804, 822 (2019), citing Kwaak v. Pfizer, Inc., 71 Mass. App. Ct. 293, 297 (2008); Sch. Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 423 Mass. 7, 14 n.12 (1996); Henry v. Bozzuto Mgmt. Co., 98 Mass. App. Ct. 690, 695 (2020); Brophy, 6 Mass. App. Ct. at 735.

So, while the Massachusetts rule (unlike its federal counterpart) does not provide any express language concerning, for example, the timing of certification, the contents of a certification order, or the ability of courts to alter or amend

certification orders, it *does* contemplate the same formal seminal event of court certification required under the federal rule. See Mass. R. Civ. P. 23(e)(2) (permitting orders, judgments, or settlements of class actions "***certified*** under this rule" to provide for disbursement of residual funds) (emphasis added). Put differently, while the Massachusetts rule does not explicitly provide trial judges parameters for issuing "certification *orders*," the courts of Massachusetts have long read into Rule 23 the same requirement that a putative class be "certified" as exists in the federal system. Gammella v. P.F. Chang's China Bistro, Inc., 482 Mass. 1, 8 (2019) ("To achieve class certification, [R]ule 23(a) requires plaintiffs to show that … [listing certification prerequisites]"); id. at 9 ("[W]e hold that [R]ule 23 provides the correct framework for analyzing a certification claim brought under the Wage Act or the minimum fair wage law."); Foster, 484 Mass. at 712; Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 601 (1985) (citing to federal precedents "construing parallel provision of Fed. R. Civ. P. 23" in setting forth plaintiff's burden "[i]n seeking class certification"); Sniffin v. Prudential Ins. Co. of Am., 11 Mass. App. Ct. 714, 724 (1981)

("[I]n order to determine whether an action may be maintained as a class action, the court must carefully apply the criteria set forth in rule 23 … to the facts of the case.").

Belaboring the requirement for formal certification is appropriate given that it is dispositive of the questions raised in this appeal. This is so because the powers that class counsel wish for themselves and the trial court in this case do not vest unless and until the court certifies the class. There is no dispute in this case that no class had yet been certified when class counsel requested that notices issue to non-litigants inviting them to participate in the case.

B. Putative class counsel does not represent putative class members and cannot act on their behalf unless and until the class is certified.

The appellant now before the court (who is deceased), unable to cite any authority granting his counsel powers to take action in the case following his death, is asking the court to divine that authority from the premise that attorneys representing litigants who purport to represent similarly situated individuals owe certain duties and obligations to all

members of a putative class. It is undisputed that even prior to certification, the named class representative, putative class counsel, and the court all have responsibilities to protect and guard the interests of all members of a putative class. Spence v. Reeder, 382 Mass. 398, 409 (1981) (collecting cases). However, that the appellant and his counsel have certain obligations to putative class members does not give counsel the power to act on behalf of a class that has yet to be certified, or to take any action in the case without a client to represent.

A duty to issue (or seek the issue of) notice that the sole representative of a putative class has passed away is not among the various duties that a putative class counsel owes to members of the putative class, whom the attorney can only *purport* to represent prior to certification. The appellant cites no authority identifying a duty to give such notice. To be sure, as the appellant notes in the Blue Brief, class counsel does have a duty to "ensure that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interests," Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) (cited at Blue Br.,

p. 10), but the prospect of a final judgment does not affect the interests of anyone but the named litigants unless and until the putative class is certified. **None** of the cases cited by the appellant stand for the proposition that class counsel's pre-certification duties to putative members bestows upon the attorney the power to take action in court on behalf of the putative class in the absence of a named class representative.[1]

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[1] See Blue Br., pp. 9-11. For example, Schick v. Berg, provides that prior to certification, putative class counsel have a duty to notify putative class members of actions they will take which are adverse to their interests, so they have an opportunity to object. 2004 WL 856298, at *6 (S.D.N.Y. Apr. 20, 2004), aff'd, 430 F.3d 112 (2d Cir. 2005). Requesting the court issue notices soliciting new class representatives following the death of the sole named plaintiff is not an action adverse to the interests of the putative class.

In re Williams-Sonoma, Inc. (cited at Blue Br., pp. 10-11) stands for an important related premise—— that using discovery to find a client to be the named plaintiff before a class action is certified is inappropriate. 947 F.3d 535, 542 (9th Cir. 2020). The appellant cites the ***dissenting*** opinion for commentary quoted from NEWBERG ON CLASS ACTIONS that class counsel may "wish to advise potential plaintiffs of their rights and encourage their involvement in a class suit." 947 F.3d at 542 (Paez, J., dissenting), citing 3 NEWBERG ON CLASS ACTIONS, § 9:6 (5th ed.). That class counsel may wish to personally contact known members of the putative class to encourage them to participate in the action is not controversial, so long as the communications do not run afoul of restraints against solicitation. The court will search Newberg's excellent class action treatise in vain for citation

to any authority imposing upon class counsel a duty to notify putative class members of a representative's death, or any authority bestowing powers upon class counsel to act on behalf of putative class members other than their client once that client has died. In fact, the treatise supports the position of the *amicus curiae*. See 3 NEWBERG ON CLASS ACTIONS § 9:6, n.1 ("Because there is no 'class' prior to certification by a court, there can, in a technical sense, be no 'class counsel' prior to certification.").

The appellant also cites two federal district court cases as examples of the minority position that finds there is a fully-formed attorney-client relationship between class counsel and putative class members. Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) (putative class members "properly characterized as parties to the action," and preventing defense counsel from contacting putative class members) and Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981) ("class counsel must treat [putative class members] as clients," and approving issue of notices to putative class members only to remedy inappropriate contact by defense counsel). Aside from the fact that the vast majority of courts reject this position, these cases did not go so far as to hold that counsel for a putative class could act on behalf of the class with no named representative in the suit.

Finally, the Blue Brief provides a (perhaps misleadingly) truncated excerpt from Gutierrez v. Johnson & Johnson observing that "[c]ommon sense dictates that … putative members be informed of the existence of the law suit, [] the identity of [plaintiffs'] attorneys, ... the fact that it is a class action, and that they may be a part of the class." 2003 WL 26477887, *3 (D.N.J. 2003). This passage did not endorse the premise that class counsel has powers to act on behalf of putative class members in a case without a named representative. Rather, a federal Special Master merely issued rulings on the contours of language to be included in an advisory notice *from the defendant* to putative class members in the plaintiff's as-yet uncertified class, before interviewing them in preparation for its defense in the suit. Id. at *1. The case involved neither a

The U.S. Supreme Court has expressly declined to decide what duties a purported class representative has to members of a putative class, in what has been called the twilight zone of pre-certification. Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 340 n.12 (1980); In re Fine Paper Litigation State of Wash., 632 F.2d 1081, 1086-87 (3d Cir. 1980) ("The filing of a class action complaint marks the beginning of what might be termed a twilight zone that terminates with the certification order. In a sense, the complaint may be considered akin to an offer by the named plaintiff to act as a representative for the members of the class, which offer may be accepted by the court in a certification order. Until that order is filed, the members of the class are not bound by any judgment and the responsibilities of the person who has offered to be a class representative attain a level somewhat below that of the usual fiduciary.").

Where courts agree regarding this twilight zone concerns the nature of the legal relationship between putative class counsel and putative class members, to

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deceased named representative nor proposed pre-certification notices from the court to putative class members.

wit, there is none. While named-plaintiffs/purported class representatives are clients of class counsel prior to certification of the class, absent putative class members have no attorney-client relationship with class counsel prior to certification and the expiration of any opt-out period. Fulco v. Cont'l Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1992); Shibetti v. Z Rest., Diner & Lounge, Inc., 2021 WL 1738315, *5 (E.D.N.Y. 2021); In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation, 835 F.3d 1195, 1203 (10th Cir. 2016); Velez v. Novartis Pharm. Corp., 2010 WL 339098, *2 (S.D.N.Y. 2010); Vallone v. CNA Financial Corp., 2002 WL 1726524, *1 (N.D. Ill. 2002); In re Wells Fargo Wage and Hour Employment Practice Litigation, 2014 WL 1882642, *5 (S.D. Tex. 2014) (a "client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired"); Hammond v. City of Junction City, Kansas, 167 F. Supp. 2d 1271, 1286 (D. Kan. 2001) ("It is fairly well-settled that prior to class certification, no attorney-client relationship exists between class counsel and the putative class

members."); ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 07-445 (Apr. 11, 2007) ("A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired."); Restatement (Third) of the Law Governing Lawyers, § 99 (2000) ("prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients").

In the circumstances presented by this appeal, the attorney for a deceased plaintiff in a putative class action does not have authority to act on behalf of putative class members prior to certification because the attorney does not *represent* putative class members until the class is certified.[2]

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[2]Moreover, that class counsel may take certain actions against the interests of her named-plaintiff client (see cases cited at Blue Br., pp. 13-14) does not authorize the attorney to take any actions when there is no named plaintiff whatsoever (see discussion at pp. 30-32, infra). The appellant believes that because a class counsel can in certain circumstances act against the wishes of the named-plaintiff if it advances the legitimate interests of the putative class, "then surely counsel has some limited authority to apprise the court of a named plaintiff's death and ask that court to exercise its broad authority to issue notice to putative class members in order to protect them from prejudice." Blue Br., p. 15. The

C. Putative class counsel has no authority to act on behalf of a deceased class representative until a qualifying individual is substituted in the representative's place, or a new representative seeks to intervene.

Attorneys formerly representing a now deceased named-plaintiff in a putative class action do not have authority to act on the deceased plaintiff's behalf prior to class certification any more than they have authority to act on behalf of un-named putative class members with whom they have no attorney-client relationship. The death of a sole named-plaintiff prior to certification is the death of class counsel's only client. And a deceased plaintiff is not a plaintiff. Accordingly, attorneys formerly representing a deceased named-plaintiff cannot stand in the shoes of their former client as the party in interest; they have no standing to do so. "There is no

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only authority provided for this argument is the general premise that "the notice provisions of Rule 23 are meant to protect the due process rights of absent class members." Blue Br., p. 15, citing Juris v. Inamed Corp., 685 F.3d 1294, 1317 (11th Cir. 2012). The *amicus curiae* takes no issue with the quoted premise. The Reporter's Notes (1973) to Mass. R. Civ. 23 also provide that the notice provisions "are designed to afford protection to absent members of the class." This only reemphasizes the argument of the *amicus curiae*. Rule 23 protects "absent members of the class." There are no class members——absent or present——until a class has been certified.

plaintiff with standing if there is no plaintiff." In re: 2016 Primary Election, 836 F.3d 584, 587 (6th Cir. 2016) ("A system that permits relief to be granted in connection with a plaintiff-less complaint is as close as we will ever come to permitting 'ghosts that slay,'" citing Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1008 (1924)). When the sole representative of a putative class dies, the authority of the representative's attorney automatically terminates upon his death. Cohen v. State St. Bank & Tr. Co., 73 Mass. App. Ct. 1106, *1 (2008), quoting Federal Ins. Co. v. Ronan, 407 Mass. 921, 923 n. 6 (1990) ("on the death of [a] client there is no legal representative before the court and counsel's authority was automatically terminated by his death.... No effective action can be taken until a legal representative is made a party.") (bracketing omitted); see also Astro v. State, No. 27106, 2008 WL 4425590, at *1 (Haw. Ct. App. 2008) (dismissing appeal upon death of appellant and in the absence of a motion for substitution of party). The only way that putative class counsel may take further action in such circumstances is if they assume representation of an individual eligible to substitute the deceased

plaintiff under Mass. R. Civ. P. 25 (who either files a Suggestion of Death on the record within a reasonable period of time, or moves for substitution within twelve months of the decedent's death), or assumes representation of another individual who falls under the definition of the putative class and that individual is permitted to intervene in the case. Motta v. Schmidt Mfg. Corp., 41 Mass. App. Ct. 785, 789 (1996).

In the absence of standing or power to act on behalf of either the deceased appellant-plaintiff or any other member of the putative class, class counsel's motion for notices to be issued to non-litigants was a legal nullity, and the trial court's endorsement of the motion should therefore be reversed.

II. THE TRIAL COURT DOES NOT HAVE THE POWER TO ISSUE NOTICES TO POTENTIAL PLAINTIFFS AND MAY ONLY ISSUE NOTICES TO CLASS MEMBERS ONCE THE CLASS IS CERTIFIED

Lacking any power to file motions in the case upon the death of the sole named-plaintiff, counsel for the appellant petitions this court to adopt a new rule inviting trial judges to issue notices to non-parties, soliciting interest in replacing the deceased

named-plaintiff as class representative. Adopting such a rule would be in direct contravention of Rule 23 because the powers granted therein to trial courts to issue notices do not vest unless and until the named-plaintiff has met the prerequisites of subsections (a) and (b) of the rule——that is, until the class has been certified.

Rule 23's notice provision, subsection (d), provides as follows:

> **(d) Orders to Insure Adequate Representation.** The court at any stage of *an action under this rule* may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. [...]

(emphasis added). The *amicus curiae* does not contest the appellant's observation that the powers described in subsection (d) are ones that may be exercised *sua sponte*, as distinguished from powers granted under other rules that may be exercised only "[u]pon motion of a party." See e.g., Blue Br., pp. 18-19, quoting Mass. R. Civ. P. 12(f), 15(b), 15(d), and 52(b). However, the appellant erroneously posits that the

court may exercise its notice powers at any time "from the filing of the complaint to the entry of final judgment—whether before or after class certification." Blue Br., p. 20. The appellant's position rests upon an incredibly broad interpretation of the opening clause of the subsection. The appellant maintains that the rule's language stating that the powers granted in subsection (d) may be invoked "at any stage of an action under [Rule 23]," should be read to mean as early as the day the complaint is filed, so long as it is *pled* under Rule 23. This interpretation misreads the quoted opening clause.

The phrase "at any stage of an action under [Rule 23]" in the opening clause of subsection (d) does not mean at any stage in an action that was *pled* as a class action. Recall that subsection (a) states that a representative may sue "on behalf of all ***only if***" the representative can show numerosity, commonality, typicality, and adequacy. Mass R. Civ. P. 23(a) (emphasis added). Recall further that under subsection (b) the representative can only maintain a case as a class action "***if***" he satisfies the prerequisites listed in subsection (a) "***and*** the court finds" predominancy and superiority. Mass. R. Civ. P. 23(b)

(emphasis added). Therefore, unless and until a court has certified the plaintiff's satisfaction of the subsection (a) and (b) prerequisites, the case is not "an action under [Rule 23]."

Interpretations of the concomitant federal rule refute the appellant's position that certification is not a prerequisite for a court's invocation of its class action notice powers. The United States Supreme Court observed that only "[o]nce it is determined that the action may be maintained as a class action … [is] the court [] mandated to direct to members of the class 'the best notice practicable under the circumstances....'" American Pipe & Const. Co. v. Utah, 414 U.S. 538, 547–548 (1974), quoting Fed. R. Civ. P. 23(c). One year after American Pipe, the U.S. Court of Appeals for the Ninth Circuit took up the very argument advanced by the appellant in this case. In Pan Am. World Airways, Inc. v. U.S. Dist. Ct. for Cent. Dist. of California, a district court judge had ordered the defendant to produce a list of passengers killed in an airline crash and the available addresses of their next of kin, and notified the parties he intended to use the list to notify potential plaintiffs of the putative class action arising out of

the crash. 523 F.2d 1073, 1075 (9th Cir. 1975). At issue in the appeal was the court's power to issue notices before the class of airline decedents had been certified. The Ninth Circuit began by rejecting the class representative's primary argument that the putative class members were constitutionally entitled to notice of pending actions in which they may join. The court rightly noted that unless and until the class was certified, putative class members would not be bound by the outcome of the case, and so could not be adversely affected by it. As such, no constitutional interest required issuing notice to potential plaintiffs. Id. at 1077. Regarding the class representative's alternative argument——that the district court possessed discretion to issue notices *sua sponte*——the majority in Pan Am. scoured several sources cited by the class representative for authority to issue notices to non-litigants of the pending action, and systematically analyzed the absence of any authority in Rules 16, 19, 21, 42, and 83, the Manual for Complex Litigation, and federal common law concerning the "equitable powers" of federal courts. Id. at 1077-1081. When it reached Rule 23, the court observed and held:

> The district court did not find, and the respondents have not shown, that the action below meets the specific prerequisites of a class action. Respondents contend nevertheless that it falls within the notice provisions of Rule 23 because a case may be treated as a class action before it is found to be one. However, none of the cited cases supports the notice sought in this case. In addition, although an Advisory Committee Note approves of discretionary notice to potential class members prior to the district court's determination whether the action should proceed as a class action, the notice proposed here serves no such limited purpose. Nor does the proposed notice provide only for notice of compromise or dismissal. The admitted purpose of the notice in this case is to bring the claims of unnamed members of the plaintiff class before the court. Notice for this purpose usually has been thought to issue only after certification of a class action. Otherwise, by notice and joinder of unnamed members of a possible plaintiff class, a district court could circumvent Rule 23 by creating a mass of joined claims that resembles a class action but fails to satisfy the requirements of the rule. For that reason, notice for the purpose of bringing the claims of unnamed members of the plaintiff class before the court may not issue before a class action has been certified.

Id. at 1078–79 (internal citations omitted). Decisions since Pan Am. have been consistent in viewing certification as the event that triggers a court's Rule 23 notice powers. Bentkowski v. Marfuerza Compania Maritima, S. A., 70 F.R.D. 401, 405 (E.D. Pa. 1976); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977); Tam v. Fed. Mgmt. Co., 2016 WL 7664718, at *4 (Mass. Super. Dec. 1, 2016) ("it seems only logical that the statute of limitations issue

should be resolved before a class is certified and notice is sent to putative class members").

Courts have also held that divining some power to issue notices to non-litigants prior to certification, in addition to trespassing the bounds of Rule 23, is also a dangerous idea because it would constitute an expansion of the judiciary's present power to adjudicate only "cases and controversies" presently before it. In addressing the sole dissenting opinion in Pan Am., Justice Wallace observed that:

> [The dissenting opinion] primarily argues ... that authority to notify prospective plaintiffs rests upon a residual power of the district court that has yet to be limited by rule or statute. But [it] fails to specify the source of this residual power. Traditionally in our judicial system, courts are powerless to act until litigants bring claims before them. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 326, 361 (1824) (Marshall, C. J.) (dictum). The issuance of notice to potential plaintiffs offends this principle in two ways: first, it permits a court to act upon a claim before it becomes the subject of a lawsuit; and second, it permits a court to acquire jurisdiction by encouraging lawsuits. So sharp a deviation from the traditional role of the judiciary requires justification. Resort to a residual power of unspecified origin is insufficient.

523 F.2d at 1077 n.3. The Ninth Circuit, by its reference to concerns about "circumventing" Rule 23 through pre-certification notice to non-litigants,

hinted at what future courts would say more expressly: that issuing notices prior to certification "is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court." Marian Bank v. Elec. Payment Servs., Inc., 1999 WL 151872, at *2 (D. Del. 1999), quoting Elias v. National Car Rental Sys. Inc., 59 F.R.D. 276, 277 (D. Minn. 1973). Marian Bank expounded on the Ninth Circuit's concern at length. In that case, as here, class counsel was left without a representative and asked the court to issue notices to putative class members announcing "the need and opportunity for an intervenor to represent the class[.]" 1999 WL 151872 at *1. Whereas the class representative in the present appeal died, the class representative in Marian Bank had been deemed an inadequate representative by the judge. Id. The court there found that the language of Fed. R. Civ. P. 23 explicitly contemplates the issuance of notices to intervene only after a court has certified a class action, and denied class counsel's motion to issue notices where no class had yet been certified. Id. at *2. The court declined to carve out any exceptions to afford itself the power to issue notices prior to certification, reasoning that honoring the boundaries

of Rule 23 "prevents courts from inciting litigation where none yet exists." Id. at *2-*3 ("The court has no obligation to awaken potential litigants from their lethargy.").

The vast majority of cases interpreting Fed. R. Civ. P. 23 agree that "discretionary notice is for the purpose of assuring fair conduct of an action or protecting class members —— it is not for undesirable solicitation of claims." Lewis v. Bloomsburg Mills, Inc., 21 Fed. R. Serv. 2d 748, *2 (D.S.C. 1976). "In fact," as those same courts note, "class member communications initiated by counsel without court supervision which have improper connotations are considered a breach of professional ethics. Further, solicitous communication with persons who are not even class members for the purpose of representation is a sufficient basis for denial of class action status with respect to those persons improperly solicited." Id. (internal citations omitted). See also Flanigan v. Am. Fin. Sys. of Georgia, Inc., 72 F.R.D. 563, 563 (M.D. Ga. 1976); Balschmiter v. TD Auto Fin. LLC, 2015 WL 2451853, at *7 (E.D. Wis. 2015) ("[T]he Court is not convinced that the plaintiff's request to send notice is a function of the plaintiff's altruism——or

that of Plaintiff's counsel——and not a ruse to either: (1) identify new clients and thereby recoup money Plaintiff's counsel has expended in attempt to certify the class; or (2) use the notice as leverage to force the defendant to settle.").[3]

Counsel for the deceased appellant claim to possess the identical altruistic motives suspected by courts in these cases. They invite this court to read

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[3] The appellant in this case cites dicta in Balschmiter for the proposition that Rule 23(d) "may provide an avenue to order (or permit) discretionary notice to putative class members in certain scenarios[,]" see Reply Br., p. 9, but did not alert this court to the authoring judge's skepticism of that very premise. The judge in Balschmiter ***denied*** the plaintiff's request for notices to issue to putative class members advising them of the status of the action and asking them to come forward to vindicate their rights and advise that the statute of limitations was running out on their claims. In the full quote omitted from the appellant's Reply Brief, the judge noted:

> Rule 23(d) may provide an avenue to order (or permit) discretionary notice to putative class members in certain scenarios[6] ....
>
> [FN6]: Although the Court questions whether even this is true, given that Rule 23(d) presumes that the Court is "conducting an action" under Rule 23——*i.e.* the matter is properly a class action——and thus there are "class members" that require protection. *See* Fed. R. Civ. P. 23(d). Where class certification has been denied, as here, only the named plaintiff's claims remain; thus, there is no class, no action under Rule 23, and thus Rule 23(d) would have no application.

Balschmiter, supra, at *7.

into Rule 23 some discretion for trial courts to issue notices to non-litigants prior to class certification in the situation presented by this appeal because, they claim, not doing so would risk "substantial prejudice" to putative class members. Reply Br., pp. 9-16. The appellant correctly notes that while the statute of limitations for putative class actions under Fed. R. Civ. P. 23 is tolled during the pendency of the action, allowing unnamed class members to join the action individually or file individual claims if the class fails, "follow-on" class actions filed past expiration of the statute of limitations will be dismissed as untimely. China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1804 (2018). The appellant fails to explain how non-litigants would be prejudiced by a textual reading of Rule 23 prohibiting notices to non-litigants prior to certification. Without notice of the appellant's death, these putative class members maintain the exact same status they held before the appellant died. That is, the statute of limitations continued to run on their claims, they had no notice of the appellant's case, and they were not yet bound by the appellant's decisions and prosecution of the case. Under these circumstances, the nonlitigant

members of the appellant's putative class are not prejudiced by strict adherence to Rule 23 where they were not relying on the decedent's suit to vindicate their rights. Balschmiter, supra, at *7; Robinson v. First Nat. City Bank, 482 F. Supp. 92, 101 (S.D.N.Y. 1979); Daisy Mountain Fire Dist. v. Microsoft Corp., 547 F.Supp.2d 475, 485–86 (D. Md. 2008) (collecting cases); Griffith v. Javitch, Block & Rathbone, LLP, 241 F.R.D. 600, 601–03 (S.D. Ohio 2007); 6A FED. PROC., L. ED. § 12:370. That the members of the appellant's putative class have no notice of this action does not appear to be in dispute. Blue Br., p. 23. Under Rule 23, trial courts are simply not obligated to notify non-litigants of their rights and is precluded from soliciting claims from same (see above discussion at pp. 38-40, supra). As the *amicus curiae* has gone to great lengths to demonstrate in this brief, courts have neither the power nor the duty to issue notices to prevent non-litigants from "permit[ting] the statute of limitation to run on their claims." Blue Br., p. 23, citing Sanft v. Winnebago Indus., Inc., 216 F.R.D. 453, 456 (N.D. Iowa 2003) (ordering notice following denial of class certification). See

Balschmiter, supra, at *6-8, citing Marian Bank, supra, at *3.

CONCLUSION

For the foregoing reasons, the MassDLA respectfully requests that the court reverse the decision of the trial court to issue notice to non-litigants soliciting intervention in the putative class action and remand the case for further adjudication consistent with the court's opinion.

Respectfully submitted,

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Dated: December 20, 2021

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 point, ten and one-half (10½) characters per inch, and contains 36 total non-excluded pages prepared with Microsoft Word 2013.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I hereby certify, under the penalties of perjury, that on December 20, 2021, I have made service of the Amicus Brief via the Massachusetts Tyler Host electronic filing system upon the parties to this appeal.

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