IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

Eric Greathouse, Ernesto Covarrubias, Tiffany Sumrall, and Barbara Myles, individually and on behalf of all others similarly situated, Plaintiffs, v. **Capital Plus Financial, LLC** and **Crossroads Systems, Inc.**, Defendants.	§ § § § § § § § § § § §	Case No. 4:21–cv–1243–BRW

Defendants Capital Plus Financial, LLC's and Crossroads Systems, Inc.'s Reply Brief in Support of Their Motion to Dismiss Plaintiffs' Amended Class Action Complaint

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INTRODUCTION

Unable to point the Court to any relevant connection between Defendants and Arkansas, Plaintiffs rely on contacts that are insufficient and case law that is inapposite. Plaintiffs account for Defendants' alleged activities in Arkansas in a scattershot manner, relying most heavily on public information from the SBA's website about CPF's potential borrowers who live in Arkansas and CPF's alleged communications with the SBA's Little Rock Loan Service Center ("LSC"). On similar facts, courts have rejected these contacts as insufficient to give rise to personal jurisdiction because these contacts do not show Defendants purposefully availed themselves in the forum. Nor do these contacts tend to show the type of minimum contacts that give rise to personal jurisdiction under the precedent in the Eighth Circuit.

By contrast, Defendants' Motion to Dismiss and supporting declaration set forth the undisputed facts that demonstrate a lack of personal jurisdiction over Defendants. The Giga Declaration establishes: CPF is a lender that primarily serves underprivileged and minority borrowers in major metropolitan areas in Texas (ECF 24, Ex. A ¶ 5); CPF and Crossroads do not have any offices, employees, or operations in Arkansas (*id.* ¶¶ 6-7); CPF's PPP lending activities were principally coordinated by Blueacorn, an Arizona company (*id.* ¶ 9.); and CPF's loan underwriting and administration are coordinated through CPF's offices in Texas. (*id.* ¶¶ 10-11). The Giga Declaration also establishes that CPF did not engage in any national advertising campaigns, and instead, acquired its borrowers through referrals from Blueacorn after it processed borrowers' loan applications. *Id.* ¶ 9. In sum, none of Defendants' lending activities took place in Arkansas.

Plaintiffs cannot establish personal jurisdiction in Arkansas; nor can they demonstrate that they are entitled to jurisdictional discovery under the Eighth Circuit standard. For the reasons in

Defendants' Motion to Dismiss (ECF 44) and this Reply, Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' Amended Complaint.

ARGUMENT

I. Plaintiffs Have Failed to Show Personal Jurisdiction is Proper in Arkansas.

Dismissal of the Amended Complaint under Federal Rule of Civil Procedure 12(b)(2) is proper for the reasons presented below.

A. Plaintiffs Make Numerous Factual Misrepresentations Regarding Defendants' Alleged Contacts with Arkansas.

To make Defendants' contacts appear more robust, Plaintiffs misrepresent the facts to attempt to show Defendants purposefully availed themselves of Arkansas. This effort fails.

First, Plaintiffs allege that "the terms of [the loan documents] provided that loan proceeds were to be deposited by CPF into a bank account in the State of Arkansas." Opp. at 28. The loan documents, however, do not provide that Mr. Greathouse's loan is to support an Arkansas business or to be deposited with an Arkansas bank. *See* Am. Compl., Ex. A. at 12-13. Mr. Greathouse's W-9, which he submitted to support his loan application, lists his address in Russellville, Arkansas. *Id.* at 12. Mr. Greathouse's bank certification provides that his bank is "Evolve Bank & Trust." *Id.* at 13. There is no address affiliated with Evolve Bank & Trust provided in the Loan Documents. There is also nothing in the terms of the loan that states that payment is to either an Arkansas residence or business. *Id.* Mr. Greathouse's Declaration, on which Plaintiffs also rely, does not provide any evidence for the position that Defendants acknowledged and intended to send funds to Arkansas to support an Arkansas business. *See* ECF 49, Ex. A. ¶¶ 2, 3, 10, 11. On this point, Mr. Greathouse's Declaration provides only that he lived in Arkansas and intended to use the funds to support his business. *Id.*

Plaintiffs have not introduced any evidence that CPF knew that the funds were to be directed or used in Arkansas, and the record is devoid of such evidence. In fact, Plaintiffs concede that Mr. Greathouse even sent correspondence to CPF in which he confirmed his understanding that CPF is a Texas company, and his desire to borrow from CPF was because of his past residence in Texas. ECF 24, Ex. B., 2-3 ("I want my loan as agreed, you're a local company to me, I used to work in [Texas towns of] Bedford and Euless…I would be a great asset to your company if funded, because there are groups forming on face book [sic] with multiple lawyers looking to sue BlueAcorn and Capital Plus…"). Even if Defendants knew that Mr. Greathouse intended to use loan funds to support an Arkansas business, which they did not, mere knowledge that Plaintiff resided in Arkansas and intended to use loan funds in Arkansas is insufficient to confer personal jurisdiction over Defendants in Arkansas. *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (finding that contacts must arise out of those that "defendant *himself* creates with the forum [s]tate") (emphasis in original) (internal quotations omitted). In sum, merely lending to a borrower, which is all Plaintiffs have alleged in this case, is "not sufficient in and of itself to establish personal jurisdiction over the defendant in the plaintiff's forum state." *Fastpath, Inc. v. Arbela Tech. Corp.*, 760 F. 3d, 816, 821 (8th Cir. 2014) (finding that a contract is not sufficient to establish personal jurisdiction).

Second, Plaintiffs contend that "Defendants admit they, or at least CPF, directed communications, advertisements and documents into Arkansas after the loan was approved by the SBA" and that "there were borrower-facing advertising and communications directed to Arkansas." Opp. at 29. These allegations are false. Plaintiffs' citation to the Giga Declaration is out of context, which when read in full, explains that Mr. Greathouse "would not have known his application was referred to CPF until it was processed by Blueacorn and approved by the SBA" and only then would CPF have engaged in any "communications, advertisements, or [sent]

documents" to Mr. Greathouse. ECF 24, Ex. A ¶ 12. Defendants maintain that they "do[] not engage in any independent advertising regarding PPP lending." *Id.* ¶ 9. In short, Defendants would have contacted Mr. Greathouse only after he had applied for a loan with the SBA and his loan application had been processed by Blueacorn and given to CPF. *See id.* Nothing in the Giga Declaration is an admission otherwise. *See generally* ECF 24, Ex. A.

Finally, Plaintiffs misrepresent the relationship between Defendants and LSC. First, the PPP program is codified in Section 7a of the Small Business Act. *See* 15 U.S.C. § 636(a)(36). This fact is particularly important in light of Plaintiffs' admission that, for 7a loans, LSC's role is limited to managing the loan after disbursement of the funds. Opp. at 35. Plaintiffs contend that LSC "assisted with the administration of PPP loans" and "received many emails from lenders regarding PPP loans" and suggest that a lender would have to routinely communicate with LSC to service a loan. *Id.* Even if this were true, it would apply only to funded loans, and has no bearing for establishing jurisdiction as LSC would not have been involved with any of Plaintiffs' unfunded loans because they have not yet been disbursed and therefore did not require servicing. Plaintiffs erroneously contend that the function of LSC is "unclear." Opp. at 35 n.6. This contention ignores the clear evidence from the SBA's website that states LSC only services loans after disbursement of funds. *See* ECF 45 at 37-38. Accordingly, there are no routine contacts with LSC for any Plaintiffs in the putative class who allege, as the Amended Complaint does, that their loans have not been funded.

Even if contact with LSC existed, which it did not, Plaintiffs have misconstrued the government contacts exception. The exception is importantly rooted in the principle that the judiciary should not interfere with the smooth functioning of government. *See Inv. Co. Inst. v. United States*, 550 F. Supp. 1213, 1217 (D.D.C. 1982). Courts applying the government contact doctrine have consistently applied it to businesses using government service offices for private

commercial activities. *See id.* Moreover, even if CPF were somehow using government services at LSC to assist in processing and administering government-backed loans, that is precisely the type of "government petition" described in the string of case law cited by Plaintiffs as not giving rise to jurisdiction. *See, e.g.*, *Lamb Turbine Designs, Inc.*, 41 F. Supp. 2d 1362, 1365 (N.D. Ga. 1999), *aff'd*, 240 F.3d 1316 (11th Cir. 2001) (finding that a defendant's FAA application was not the type of contact in which defendant could reasonably foresee being hailed into the forum).

Plaintiffs' intent to use Defendants' contacts with LSC as a jurisdictional hook would substantially and impermissibly expand the scope of personal jurisdiction. Plaintiffs allege that LSC services the loans for half of the country. Am. Compl. ¶ 33. Permitting personal jurisdiction based on a lender's mandatory contact with LSC for government-backed loans once disbursed would subject all Section 7a lenders, no matter where they are located, to either personal jurisdiction in Arkansas or California—an inconceivable result that this Court should not allow. *See Inv. Co. Inst.*, 550 F. Supp. at 1217.

Plaintiffs' allegations regarding Defendants' contacts with Arkansas amount to little more than a string of misrepresentations. Accordingly, Plaintiffs have not demonstrated that Defendants have the minimum contacts with Arkansas to subject them to personal jurisdiction.

B. Plaintiffs Erroneously Rely on *Ford*.

Plaintiffs' reliance on the Supreme Court's decision in *Ford* is misplaced. *See* Opp. § I. In *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, the Court affirmed the long-standing principle that specific personal jurisdiction exists only in cases in which plaintiffs' claims "arise out of or relate to the defendant's contacts within the forum." 141 S. Ct. 1017, 1025 (2021). *Ford* does not stand for the proposition that "'entering a contractual relationship centered [in the forum]' is indeed sufficient to confer jurisdiction." Opp. at 26.

Ford involved the relationship between defendant's contacts with the forum and plaintiff's claims. *See Ford*, 141 S. Ct. at 1022-23. The defendant, Ford, a nationwide auto manufacturer, had many connections with the forum, including on the ground brick-and-mortar dealerships, physical repair locations, and nationwide advertising. *Id.* An injury from an automobile accident gave rise to plaintiff's claims. *Id.* The Court held that because Ford's contacts "related to" plaintiff's claims, personal jurisdiction was proper. *Id.* at 1024. Unlike in our case, Ford had far-reaching and numerous contacts with the forum. *Id.* *Ford* did not grapple with how many and what types of contacts are jurisdictionally sufficient to confer personal jurisdiction. *Id.* at 1028. The Court made clear that its *Ford* decision does not mean "anything goes" and does not relieve Plaintiffs of their burden to show defendant has minimum contacts with a forum. *Id.* at 1026.

In this case, the record is clear that Defendants did not deliberately reach into Arkansas. Defendants did not have any operational presence in Arkansas, did not advertise in Arkansas, did not conduct their underwriting activities in Arkansas, and have no brick-and-mortar locations in Arkansas. ECF 24, Ex. A ¶¶ 6–7. Defendants did not hire, contract, or otherwise engage any intermediary to conduct CPF's business in Arkansas. *See id.* Plaintiffs' allegations fail to show that Defendants deliberately targeted Arkansas to fall in line with the Court's ruling in *Ford*, thereby making this precedent inapplicable.

C. Plaintiffs' Reliance on *Oto Analytics* Is Misplaced.

Plaintiffs' reliance on the decision in *Oto Analytics* is similarly misplaced. Plaintiffs cite to a recent order on defendant's motion to dismiss in *Oto Analytics* for the argument that a court may exercise personal jurisdiction on CPF through the acts of an agent in the forum. Opp. at 15-16. First, in ruling on defendant's motion to dismiss, the *Oto Analytics* court found that plaintiff Womply, not Blueacorn, was an "agent" only as defined by the SBA for the purpose of collecting agent fees. Opp. at 15 ("Womply was an 'agent'"); *see Oto Analytics, Inc. v. Cap. Plus Fin., LLC*,

2022 WL 1488441, at *5 (N.D. Tex., May 11, 2022). The court did not conclude that Womply was an agent for purposes of determining personal jurisdiction. *See id.* Plaintiffs' citation is erroneous and irrelevant.

The court also did not hold that there was imputed personal jurisdiction on CPF through Blueacorn's presence in the forum. *See id.* But even if that were the ruling, which it was not, Plaintiffs' Amended Complaint does not allege that Blueacorn had sufficient minimum contacts or purposely availed itself in Arkansas sufficient to confer personal jurisdiction over Blueacorn in Arkansas. *See generally* Am. Compl. Accordingly, Plaintiffs' argument that an agent's contacts can be imputed to its principal is another dead-end.

Plaintiffs also attempt to use the *Oto Analytics* decision to suggest that the loan applications alone were "sufficient minimum contacts" to confer personal jurisdiction over Defendants in Arkansas. Opp. at 16. To the contrary, at most the *Oto Analytics* court's decision supports a finding of sufficient minimum contacts between Blueacorn and Texas because the court found every loan application Blueacorn sent to CPF created a contact with Texas due to the fact that "all loan origination [was conducted by CPF] from Texas"—a conclusion which does not aid Plaintiffs in this case. *Oto Analytics, Inc. v. Cap. Plus Fin., LLC*, 2022 WL 1082368, at *6 (N.D. Tex. Apr. 11, 2022). The *Oto Analytics* decision only reinforces Defendants' argument that personal jurisdiction is inappropriate in Arkansas for a Texas company that conducts its business in Texas.

D. Plaintiffs' Interpretation of *Bristol-Myers* is Incorrect.

Correctly applied to the instant case, *Bristol-Myers* results in a dismissal of the non-Arkansas Plaintiffs. "In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy." *Vallone v. VJS Sols. Grp.*, LLC, 9 F.4th 861, 865 (8th Cir. 2021) (quoting *Bristol-Myers Squibb v. Superior Ct. of Cal., San Francisco Cnty.*, 137 S. Ct. 1773, 1781 (2017)). This fundamental premise serves as an important

distinction that renders Plaintiffs' cited case law inapplicable. Plaintiffs' argument that *Bristol Myers* does not apply to class actions attempts to rely on a string of cases in which courts declined to extend *Bristol Myers* to unnamed class members in a putative class. *See In re Folgers Coffee*, 2021 WL 7004991, at *5 (W.D. Mo. Dec. 28, 2021); *Krumm v. Kittrich Corp.*, 2019 WL 687609, *5 (E.D. Mo. Dec. 17, 2019); *Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1332 (D. Minn. 2018).

While Plaintiffs are correct that courts have declined to extend *Bristol-Myers* to class actions involving unnamed plaintiffs, this fact is entirely irrelevant. The reasoning of those cases addresses the process of class certification and concludes that it has numerous safeguards to avoid any due process violations because it ensures unnamed plaintiffs have a single unified claim to be brought into the class. *See Krumm*, 2019 WL 6876059, at *5. None of these cases, however, stand for the proposition that a named plaintiff can escape the requirement of establishing personal jurisdiction. The mere fact that another named Plaintiff was allegedly injured in Arkansas does not rescue non-resident Plaintiffs' claims by obviating their need to establish specific jurisdiction over their claims. *Bristol-Myers Squibb,* 137 S. Ct. at 1781.

II. Plaintiffs Failed to Demonstrate that They Are Entitled to Jurisdictional Discovery.

Plaintiffs' argument for jurisdictional discovery is similarly unavailing and demonstrates a clear attempt to obtain premature, nationwide class discovery. Under Eighth Circuit precedent, to obtain discovery, Plaintiffs must show "certain facts necessary to resolving the jurisdictional inquiry are either unknown or disputed." *See Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 598 (8th Cir. 2011). Jurisdictional discovery is an extraordinary remedy

and "[w]hen a plaintiff offers only speculation or conclusory assertions about contacts with a forum state," a court is within its discretion to deny the request. *Id.*

Plaintiffs allege Defendants have numerous contacts with Arkansas, including many funded borrowers in the state, Mr. Greathouse's residence in Arkansas, and communications with LSC. There can be no dispute about these contacts, because even if true they are insufficient as a matter of law to establish personal jurisdiction over Defendants.

Plaintiffs concede that the number of loans CPF funded in Arkansas is not in dispute because Plaintiffs cite to publicly available loan information from SBA's website, which provides the number of CPF funded loans in Arkansas. Opp. at 18. It is only when Plaintiffs attempt to meet the Eighth Circuit test for jurisdictional discovery that they allege CPF's contacts with Arkansas are disputed and unknown. Opp. at 43-44. Plaintiffs also pose a series of hypothetical questions about Defendants' potential actions in the forum, all of which are red herrings for purposes of establishing jurisdiction because Defendants have stated the totality of their relevant activities in Arkansas. Opp. at 44. The record is clear on Defendants' activities: CPF's communications, underwriting activities, and operations did not take place in Arkansas and any fees received on these loans were not received in Arkansas. ECF 24, Ex. A ¶¶ 6-9. Broad discovery on what communications CPF had with borrowers and what underwriting activities CPF performed would not affect the personal jurisdiction inquiry because it would not disprove what is already known—that CPF does not operate in Arkansas. Any additional discovery would not and cannot connect the named Plaintiffs' causes of action to Defendants' conduct in the forum.

Moreover, Plaintiffs contend because they produced documentary evidence, they should be entitled to jurisdictional discovery under the Eighth Circuit test. First, Plaintiffs have introduced only documentary evidence that Defendants have funded Arkansas loans. That

information is publicly available from SBA's website and undisputed. Accordingly, the introduction of this evidence does not meet the standard for jurisdictional discovery.

Second, all cases on which Plaintiffs rely for this proposition are easily distinguishable. In *Steinbuch v. Cutler*, a stream-of-commerce case, the court permitted jurisdictional discovery in a case in which the defendant was a novelist and the documentary evidence produced with the Complaint was evidence that his book was available at every bookstore in the forum. 518 F.3d 580, 587 (8th Cir. 2008). Likewise, in *Valley View LLC v. Prod. Co-op. Oil Mill,* the court granted jurisdictional discovery in a case in which defendant's own website touted that it conducted business in the forum. 2015 WL 853277, at *2 (E.D. Ark. 2015). Finally, in *Wesson v. Lamb AB*, the court denied jurisdictional discovery for the very reason the Court should deny the request in our case—Plaintiffs have given no detail regarding what "specific information they seek" and how it would support personal jurisdiction. *See* 2018 WL 11320712, at *8 (W.D Ark. 2018).

Unlike the defendants in these stream-of-commerce cases, Defendants have not set up physical brick-and-mortar locations in Arkansas, do not market their services in Arkansas, and do not use Arkansas intermediaries to sell their products. ECF 24, Ex. A. ¶¶ 6-10. Any attempt to obtain additional discovery beyond already known, undisputed, and publicly available information is precisely the type of "speculation" and fishing expedition that courts in this Circuit have routinely rejected. *See Viasystems, Inc.*, 646 F.3d at 598.

CONCLUSION

For the foregoing reasons, and those presented in its initial briefing on its Motion to Dismiss, Defendants respectfully request that the Court issue an order dismissing the Amended Complaint for lack of personal jurisdiction, as well as the additional grounds presented in the Motion, and grant such other and further relief to which they may be justly entitled.

Respectfully submitted on June 1, 2022.

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