B-14

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Kellie Juricek DEPUTY

CAUSE NO. DC-21-13097

OTO ANALYTICS, INC. D/B/A WOMPLY, *Plaintiff,* v. CAPITAL PLUS FINANCIAL, LLC., CROSSROADS SYSTEMS, INC., AND ERIC DONNELLY, *Defendants.*	§ § § § § § § § § § §	IN THE DISTRICT COURT OF DALLAS, COUNTY, TEXAS 95TH JUDICIAL DISTRICT

DEFENDANTS' ORIGINAL ANSWER,
MOTION TO TRANSFER VENUE, AND PLEA IN ABATEMENT

MOTION TO TRANSFER VENUE

Defendants Capital Plus Financial, LLC ("CPF"), Crossroads Systems, Inc. ("Crossroads"), and Eric Donnelly file this Motion to Transfer Venue under Texas Rule of Civil Procedure 86 and Texas Civil Practice & Remedies Code § 15.063(1) before Defendants' Original Answer or any other pleading in this matter (Tex. R. Civ. P. 86(1)). Defendants request that the Court transfer this case to Tarrant County, a county of proper venue, and in support thereof, respectfully state as follows:

Defendants specifically object to and deny that venue is proper in Dallas County as alleged by Plaintiff Oto Analytics, Inc. d/b/a Womply ("Womply") in its Original Petition when it initiated this action filed with this Court. In alleging that venue was proper in Dallas County, Womply stated only that venue was proper "because Defendant Capital Plus's principal office is located in Dallas County, Texas." Pl. Orig. Pet. ¶ 17.[1] This statement is not true and is belied by other

[1] Womply also alleges that "[t]his Court has subject matter jurisdiction over this lawsuit because a substantial part of the events giving rise to Womply's claims occurred in Dallas County, Texas." Pl. Orig. Pet. ¶ 12. This sentence does not support venue in Dallas County either: Womply does

allegations in the Original Petition. As Womply alleges, CPF's "principal place of business [is] in Bedford, Texas." *Id.* ¶ 9. Bedford is located in Tarrant County.

Venue is proper in Tarrant County because CPF's principal office in this state is in Tarrant County. TEX. CIV. PRAC. & REM. CODE § 15.002(3). Further, Crossroads' principal office is also in Tarrant County, and Donnelly is a natural person with his residence in Colorado. None of the Defendants have the requisite tie to maintain venue in Dallas County. *Id.* But venue could be maintainable in Tarrant County.

Prayer for Relief

For these reasons, Defendants move to transfer venue of this action to Tarrant County, Texas. Venue in Dallas County is impermissible. Venue in Tarrant County is permitted under TEX. CIV. PRAC. & REM. CODE § 15.002(3). Defendants respectfully request that the Court set this motion for a hearing, and that, after the hearing, the Court grant this motion, that this case be transferred to Tarrant County, that all costs be taxed against the Plaintiff Womply, that the Court direct the Clerk to make a transcript as required by Texas Rule of Civil Procedure 89, and for such other and further relief to which Defendants are entitled.

PLEA IN ABATEMENT SUBJECT TO DEFENDANT'S MOTION TO TRANSFER VENUE

Subject to Defendants' Motion to Transfer Venue and without waiving same, Defendants hereby file this Plea in Abatement and respectfully request that the Court abate these proceedings for two reasons:

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not elaborate on this conclusory statement, and its allegations appear to allow for the inference only that the alleged events took place at CPF's or Crossroads' offices. Therefore, if the principal offices were not in Dallas County, then nor was "a substantial part of the events giving rise to Womply's claims."

First, upon information and belief, Plaintiff Womply is a foreign corporation without a permit to do business in the State of Texas. "A foreign filing entity . . . may not maintain an action, suit, or proceeding in a court of this state . . . on a cause of action that arises out of the transaction of business in this state unless the foreign filing entity is registered in accordance with this chapter." Tex. Bus. Orgs. Code Ann. § 9.051. A plea in abatement is proper to challenge whether a foreign entity is registered with the Secretary of State and can maintain an action for affirmative relief. *See, e.g.*, *Jay-Lor Textiles, Inc. v. Pac. Compress Whs. Co.*, 547 S.W.2d 738, 740 (Tex. App.—Corpus Christi 1977, writ ref'd n.r.e.).

Second, upon information and belief, despite its acknowledgement that it operates using the d/b/a "Womply," Plaintiff has not filed an assumed-name certificate. A "person may not maintain in a court of this state an action or proceeding arising out of a contract or act in which an assumed name was used until an original, new, or renewed certificate has been filed as required by this chapter." Tex. Bus. & Com. Code Ann. § 71.201. A plea in abatement is proper to challenge the lack of an assumed-name certificate. *See, e.g.*, *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 55 (Tex. 2003).

Prayer for Relief

For these reasons, Defendants ask that the Court set this Plea in Abatement for a hearing and that, after the hearing, the Court grant the Plea in Abatement and order Plaintiff Womply to cure its pleading defects, and if Plaintiff does not, that the Court strike Plaintiff's petition.

DEFENDANTS' ORIGINAL ANSWER

Subject to the Court's ruling on Defendants' Motion to Transfer Venue and Plea in Abatement set forth above and without waiving same, Defendants file this answer to Plaintiff

Womply's Original Petition. In support of this answer, Defendants respectfully show the Court as follows:

GENERAL DENIAL

1. Under Texas Rule of Civil Procedure 92, Defendants generally deny each and every allegation made against them in Plaintiff Womply's Original Petition and demands strict proof thereof.

CONDITIONS PRECEDENT

2. Contrary to Womply's allegation in paragraph 90 of the Original Petition, the conditions precedent for its above claims have not occurred, been performed, or been waived.

AFFIRMATIVE DEFENSES

3. Subject to and without waiving any of the foregoing, under Texas Rule of Civil Procedure 94, Defendants assert that Plaintiff's suit is barred in whole or part by the following affirmative defenses.

4. Plaintiff's Fault. Defendants are not liable to Womply because Womply's own acts or omissions proximately caused or contributed to Womply's injury. Tortious interference with an existing contract is an intentional tort. *Southwestern Bell Tel. Co. v. John Carlo Tex., Inc.*, 813 S.W.2d 613, 619 (Tex. App.—Houston [14th Dist.] 1991), *rev'd on other grounds*, 843 S.W.2d 470 (Tex. 1992). Thus, Defendants can assert that Womply's own acts or omissions caused or contributed to Womply's injury.

5. Inability to Perform. Defendants are not liable to Womply because Blueacorn was unable to perform the contract—legally and practically—as contemplated by Womply and Blueacorn.

6. Estoppel. Defendants are not liable to Womply because Womply is estopped from pursuing the claim.

7. Illegal Contract. Defendants are not liable to Womply because the underlying contract is illegal. In this case, the illegal nature of the contract is apparent from Womply's pleadings. *See Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991). A contract is illegal if the parties undertake to do an act that is forbidden by law in the place where the act is to occur. *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 638–39 (Tex. App.—San Antonio 1993, writ denied); *see Adams v. McFadden*, 296 S.W.3d 743, 751 (Tex. App.—El Paso 2009, pet. granted, judgm't vacated w.r.m.); *Franklin v. Jackson*, 847 S.W.2d 306, 309 (Tex. App.—El Paso 1992, writ denied).

8. Public Policy. Defendants are not liable to Womply because the contract violates public policy. A contract with provisions that are against public policy cannot be enforced. *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 180 (Tex. App.—Dallas 1986, no writ).

9. Proportionate Responsibility. If Defendants are found liable for damages, Defendants intend to seek a reduction of damages under the proportionate-responsibility statute.

10. Knowledge of Falsity. Defendants are not liable to Womply because Womply had knowledge of the falsity of the alleged misrepresentations when Womply entered into the agreement with Blueacorn.

11. Qualified Good-Faith Refusal. Defendants are not liable to Womply because 'Defendants' qualified refusal to release the Technology Fees and Referral Fees to Blueacorn and/or Womply was reasonable and made in good faith.

12. Mutual Mistake. Defendants are not liable to Womply because the alleged contract underlying Womply's tortious interference claim suffers from mutual mistake of Womply and Blueacorn.

PRAYER FOR RELIEF

FOR THESE REASONS, Defendants respectfully pray that the Court:

1. Set for hearing Defendants' Motion to Transfer Venue, and upon hearing, grant Defendants' motion and transfer this case to Tarrant County, Texas.

2. Subject to the Court's ruling on Defendants' Motion to Transfer Venue, set for hearing Defendants' Plea in Abatement, and upon hearing, dismiss Womply's claims with prejudice or hold Womply's plea in abatement.

3. Find for the Defendants on their affirmative defenses.

4. Order that Plaintiff take nothing against Defendants in this suit.

5. Dismiss all claims against Defendants with prejudice.

6. Order that Defendants recover all costs and reasonable attorneys' fees incurred in defense of Plaintiff's claims.

7. Grant Defendants such other and further relief, general and special, at law or in equity, to which Defendants may be justly entitled.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

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CERTIFICATE OF SERVICE

I certify that on October 18, 2021 a true and correct copy of this document properly was served on counsel of record in accordance with the TRCP via electronic efiling and email.

/s/ Harry P. Susman
Harry P. Susman

Automated Certificate of eService

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Status as of 10/18/2021 2:53 PM CST

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