IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OTO ANALYTICS, INC. d/b/a WOMPLY, Plaintiff, v. CAPITAL PLUS FINANCIAL, LLC, CROSSROADS SYSTEMS, INC., ERIC DONNELLY, BA FIN ORION, LLC d/b/a BLUEACORN, and BARRY CALHOUN, Defendants.	§ § § § § § § § § § § §	Civil Action No. 3:21-cv-2636-B

PLAINTIFF'S SECOND OPPOSED MOTION (1) FOR RECONSIDERATION OF THE COURT'S ORDER DISMISSING THE BLUEACORN DEFENDANTS FOR LACK OF PERSONAL JURISDICTION UNDER THE CURRENT COMPLAINT, (2) FOR LEAVE TO REPLEAD ITS CLAIMS AGAINST BLUEACORN, OR (3) TO DIRECT ENTRY OF FINAL, APPEALABLE JUDGMENT AS TO BLUEACORN

Alexander L. Cheney (admitted *pro hac vice*)
Willkie Farr & Gallagher LLP
One Front Street
San Francisco, CA 94111
(415) 858-7400
acheney@willkie.com

Mark T. Stancil (admitted *pro hac vice*)
Joshua S. Levy (admitted *pro hac vice*)
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000
mstancil@willkie.com
jlevy@willkie.com

Nina Cortell
Texas Bar No. 04844500
Jason P. Bloom
Texas Bar No. 24045511
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
(214) 651-5000
jason.bloom@haynesboone.com
nina.cortell@haynesboone.com

Attorneys for Plaintiff Oto Analytics, Inc. d/b/a Womply

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PRELIMINARY STATEMENT

Pursuant to the Court's May 11, 2022 Order ("May 11 Order"; ECF No. 82) and July 6, 2022 Order (ECF No. 101), Plaintiff Womply respectfully submits this second motion for reconsideration of the Court's April 11, 2022 Order ("Order"; ECF No. 68) dismissing Blueacorn for lack of personal jurisdiction.[1] Given the current procedural posture of this case, in response to the Court's decision on the remaining Defendants' motion to dismiss, Womply proposes three forms of relief: the Court (1) reconsider and set aside its Order based on the current First Amended Complaint ("Complaint" or "Am. Compl."; ECF No. 20) and permit Womply's claims against Blueacorn to proceed; (2) set aside its Order and reconsider personal jurisdiction based on the proposed Second Amended Complaint ("SAC"), which is appended as Exhibit A hereto with a redline against the Complaint appended as Exhibit B hereto;[2] or (3) enter a partial, appealable judgment with respect to Blueacorn under Federal Rule of Civil Procedure 54(b).

(1) Reconsideration of the Order is appropriate based on the Complaint because the Court's dismissal reflects three legal errors—two related to Womply's contract claims and one related to Womply's tort claims.

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[1] As noted in prior motions practice, "Womply" refers to Plaintiff Oto Analytics, Inc. d/b/a Womply (n/k/a Oto Analytics, LLC), and "Blueacorn" refers to Defendants BA Fin Orion d/b/a Blueacorn and Barry Calhoun. Unless otherwise noted, capitalized terms shall carry the same meanings in Womply's memorandum in opposition to Blueacorn's motion to dismiss (ECF No. 45).

[2] Because Defendants have designated certain information "Confidential Information" or "Confidential Attorney Eyes Only Information" under the April 21, 2022 Protective Order (ECF No. 75), the SAC in Exhibit A, and accompanying references to the SAC in this Motion, contain redactions. To enable the Court and Defendants to view the redacted information, Womply is submitting an accompanying Sealed Appendix containing unredacted versions of the SAC and this Motion. Should the Court grant Womply leave to amend its claims as to Blueacorn, Womply respectfully requests that the Court direct the Clerk to publicly file the redacted SAC in Exhibit A in accordance with Local Civil Rule 15.1.

First, the Court's decision dismissing Womply's contract claims rests on a misinterpretation of law. In concluding that those claims did not arise from Blueacorn's minimum contacts with Texas, the Court held "that a party must sign *and* perform in the forum state for personal jurisdiction to exist." (Order at 16 (emphasis in original).) The Supreme Court, however, "long ago rejected the notion that personal jurisdiction might turn on mechanical tests or on conceptualistic theories of the place of contracting or performance." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478–79 (1985) (cleaned up). Accordingly, the Fifth Circuit and numerous District Courts within this Circuit have *upheld* personal jurisdiction where a contract was signed elsewhere but certain activities under the contract were performed in the forum state. (*See infra* Section I.A.1 (collecting cases).) None of the cases cited in the Court's opinion holds otherwise. Nor has Blueacorn identified any cases holding otherwise.

Second, although the Court acknowledged "that Womply and Blueacorn's agreements had a 'substantial connection with Texas' because of the large number of applications and the actual monetary value of these contracts" (Order at 17 (quoting *Burger King*, 471 U.S. at 479)), the Court improperly overlooked numerous allegations in Womply's Complaint to draw the inference against Womply that these were "one-way contacts" that "did not solidly connect Blueacorn to Texas." (*Id.*) As a result, and by way of example, the Court overlooked the allegation that Blueacorn stood to earn many millions of dollars from Texas-based Capital Plus by acting as Capital Plus's agent with the federal government. Blueacorn's relationship with Capital Plus in Texas was as *bilateral* as it gets: As Capital Plus's formal Lender Service Provider, Blueacorn *sent* thousands of loans to Capital Plus in Texas and *received* nearly half of its revenue from Texas-based Capital Plus.

Third, as to Womply's tort claims, although the Court recognized that Blueacorn's misconduct had "effects" in Texas (*id.* at 15), it failed to properly credit those effects. The effects here were extensive, such as causing Texas-based Capital Plus to collect fees on tens of thousands of loan transactions, which fees are (contrary to Blueacorn's misrepresentations to Womply) apparently beyond the reach of Blueacorn. Respectfully, this case bears no resemblance to *Danziger & De Llano v. Morgan Verkamp L.L.C.*, 24 F.4th 491 (5th Cir. 2022), and, in any event, that case did not purport to reverse the longstanding rule that tortious conduct causing significant, anticipated effects in the forum state is sufficient to establish personal jurisdiction. Here, Blueacorn's tortious conduct caused tens of millions of dollars in fees from tens of thousands of transactions to flow into the pockets of a Texas business—no court has ever suggested such consequences would not support personal jurisdiction.

(2) Alternatively, Womply respectfully requests leave to include in its Second Amended Complaint additional allegations to address the Order's stated concerns regarding personal jurisdiction, and to return Blueacorn and Calhoun as defendants in this action. In its May 11 Order granting in part and denying in part Capital Plus's motion to dismiss, the Court granted Womply "one chance to amend its pleadings" to file a "second amended complaint," because "[t]he court should freely give leave to amend when justice so requires." (May 11 Order at 28–29 (quoting Fed. R. Civ. P. 15(a)(2)) (cleaned up).) The Court should likewise give Womply the opportunity to replead its claims against Blueacorn and further allege Blueacorn's substantial contacts with Texas—including Blueacorn's substantial PPP-related work directed towards Texas as Capital Plus's Lender Service Provider; payment of fees from Texas; emails and chats demonstrating Blueacorn's deep commercial relationship with Texas-based Capital Plus (*e.g.*, communications in which Blueacorn declared to Womply "*we = Cap Plus"); and marketing materials directed to

PPP loan applicants in Texas. Moreover, many of the allegations Womply added in response to the Court's May 11 Order necessarily implicate Blueacorn's contacts with Texas. The Court could render its ultimate decision on whether the Blueacorn Defendants should remain parties after reviewing this more fulsome backdrop. Womply respectfully submits that interests of efficiency would be served by such a course of action.

(3) Finally, absent any other relief requested above, the Court should enter an appealable partial judgment as to Blueacorn under Rule 54(b). Such orders are common when some (but not all) defendants are dismissed for lack of personal jurisdiction. Allowing Womply to take an immediate appeal would facilitate expeditious resolution of this important threshold issue.

ARGUMENT

I. THE COURT SHOULD RECONSIDER ITS ORDER DISMISSING BLUEACORN FOR LACK OF PERSONAL JURISDICTION BASED ON THE COMPLAINT.

The Court can "reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)); *see* Fed. R. Civ. P. 54(b) ("any order or other decision . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). Reconsideration is not limited to correcting "manifest error" but instead "rests within the discretion of the court," which "is broad." *Aubrey v. D Mag. Partners, L.P.*, 2020 WL 619839, at *2 (N.D. Tex. Feb. 10, 2020) (Boyle, J.) (cleaned up). Womply respectfully requests that reconsideration of the Order is appropriate under any standard because the Complaint more than adequately alleges facts necessary to support personal jurisdiction over Blueacorn on both Womply's contract and tort claims.

A. The Complaint Alleges That Womply's Contract Claims Against Blueacorn Have A Substantial Connection to Texas.

The Court correctly held that (i) "Blueacorn entered an agreement centered in Texas"; (ii) "[t]he negotiations centered around drawing Womply into an agreement to facilitate the origination of loans through Capital Plus in Texas"; (iii) "Blueacorn facilitated and individually transmitted 86,521 PPP loans from Womply to Capital Plus in Texas" as a result of these agreements; (iv) "[i]n effect Blueacorn directed these loan applications to Texas"; and (v) Blueacorn therefore "ha[s] enough minimum contacts with Texas to warrant personal jurisdiction." (Order at 12.) The Court nonetheless concluded that Womply's "breach-of-contract claims do not allow the Court to exert personal jurisdiction over the Blueacorn Defendants." (*Id.* at 16.) Respectfully, the Court's analysis contains two errors.

1. <u>There Is No Requirement That A Party Must Sign *And* Perform A Contract In The Forum State.</u>

The Court held that "[t]he Fifth Circuit has repeatedly made clear that a party must sign *and* perform in the forum state for personal jurisdiction to exist." (Order at 16 (emphasis in original; citing cases).) That is incorrect; to the contrary, "[t]he [Supreme] Court long ago rejected the notion that personal jurisdiction might turn on mechanical tests or on conceptualistic theories of the place of contracting or performance." *Burger King*, 471 U.S. at 478–79 (cleaned up) (collecting cases). A requirement that a contract must be signed and performed in a forum state would be a paradigmatic example of such a "mechanical test" focused on "the place of contracting or performance."

None of the cases cited in the Order holds otherwise. *International Energy Ventures Management, L.L.C. v. United Energy Group., Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016), did not purport to require that a contract be both signed and performed in a forum state. For starters, the Court there considered an "*unwritten* agreement"; if signing a contract in the forum state were

necessary for personal jurisdiction, the Court would have ended its analysis there, rather than conducting a broader "inquiry" into "'the relationship among the defendant, the forum, and the litigation.'" *Id.* at 212 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)).[3] The Fifth Circuit referred to the place of signing and place of performance only when reciting a list of items, including a failure to "conduct business in the state," whose *combined* absence would not suffice to establish personal jurisdiction:

> [T]here are not sufficient contacts with a forum state "when the defendant does not have a physical presence in the state; *it did not conduct business in the state*; ***and*** the contract underlying the business transaction at issue in the lawsuit was not signed in the state and did not call for performance in the state."

Id. (emphasis and double emphasis added) (quoting *Monkton*, 768 F.3d at 433).[4] The Fifth Circuit did not (and had no occasion to) suggest that personal jurisdiction over a contract claim *requires* both signing a contract in the forum and performance in the forum.

Indeed, the Fifth's Circuit's reliance on *Walden* further disproves any such categorical rule. *Walden* reaffirmed *Burger King* and confirmed that personal jurisdiction may be asserted "over defendants who have purposefully 'reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State." 571 U.S. at 285 (quoting *Burger King*, 471 U.S. at 479–80). That is

[3] The Order noted that *International Energy Ventures* quoted *Monkton Insurance Services Ltd. v. Ritter*, 768 F.3d 429, 430, 432 (5th Cir. 2014), but the quoted passage from *Monkton* includes the entire block-quoted text.

[4] As the full quotation from *Monkton* makes clear, that case did not hold that personal jurisdiction requires both signing and performance of a contract in the forum state. *Monkton* held only that there was no personal jurisdiction over a Cayman Islands bank arising from alleged breaches of an account agreement the bank had with a Cayman Islands company, where the owner of the Cayman Islands company resided in Texas and received certain account-related communications and transfers—directed by others, not by the bank—in Texas. *See* 768 F.3d at 433–34. Those facts bear no resemblance to this case, where Blueacorn sent literally tens of thousands of loan applications to Capital Plus in Texas.

precisely the case here: Blueacorn's contractual relationships with Womply resulted in literally tens of thousands of contacts with Texas. As the Court's opinion elsewhere recognized, "[e]very application that Blueacorn sent to Capital Plus created a new contact with Texas, regardless of whether Blueacorn made contact with Womply in the State." (Order at 12.) In the language of *International Energy Ventures*, Blueacorn indisputably "conduct[ed] business" in Texas—to the tune of hundreds of millions of dollars in loans and tens of millions of dollars in fees. 818 F.3d at 212.

The Court also cited *Sangha v. Navig8 ShipManagement Private Ltd.*, 882 F.3d 96, 103 (5th Cir. 2018) (Order at 16), but that case did not establish a "sign and perform" requirement. *Sangha* merely repeated the above-quoted passage from *International Energy Ventures*,[5] and likewise relied on *Walden*. Moreover, *Sangha* involved a *tort* claim for tortious interference with contract, not a breach of contract claim. The only reference in *Sangha* to the location of the contract's formation was in a footnote observing that it was signed in Florida and did not "specifically refer to the Port of Houston" or require that the plaintiff's "work would be confined to the Gulf of Mexico." 882 F.3d at 103 n.2. Even if such an observation were relevant here, that case bears no resemblance to contracts allowing Blueacorn to deliver 86,521 loan applications to Capital Plus in Texas, which in turn allowed Capital Plus to preclude Womply from obtaining more than $76 million in fees it is owed. (Order at 2–4.)

Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 273 (5th Cir. 2006) (Order at 16) is likewise inapposite. That case concerned tort claims for "defective design, failure to warn, negligence, and negligence *per se*," not a breach of contract action. *Id.* at 274. It did not purport to

[5] *Sangha* also reproduced the passage from *Monkton* that is quoted in *International Energy Ventures* and block-quoted above. *See Sangha*, 882 F.3d at 103.

establish a rule for personal jurisdiction over a breach-of-contract action. The Court addressed contract issues only in responding to the plaintiff's attempt to use the "stream-of-commerce theory" to hold the helicopter's *owner* (defendant HAI) liable for his injuries. The plaintiff suffered those injuries when using the helicopter on behalf of his employer, which had leased the helicopter from HAI. *Id.* In rejecting that argument, the Court noted that "HAI did not have a physical presence in Mississippi. *It did not conduct business in the state*. Its contract with Air 2 [plaintiff's employer] was not signed in Mississippi, nor did the contract call for performance in the state." *Id.* at 272 (emphasis added). Thus, not only do the facts of *Seiferth* differ significantly from those at issue here, the Fifth Circuit there merely reiterated the same uncontroversial observation as in *International Energy Ventures* and *Sangha*: The complete absence of any connection by the defendant with the forum state—including "doing business" in the forum state—forecloses personal jurisdiction. Here, by contrast, the Complaint alleges in detail that Blueacorn did *substantial* business in Texas, to Womply's great detriment.

The Court also cited the Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021), for the proposition that "'[t]he plaintiff must show that the defendant . . . entered a contractual relationship centered'" in the forum state. (Order at 16 (quoting 141 S. Ct. at 1025) (cleaned up).) That statement, however, does not purport to establish a rule that a contract must be signed and performed in a forum state. Nor does that decision—which involved product liability tort claims, not contract claims—otherwise support such a requirement. Indeed, the "contractual relationships" implicating Blueacorn here were undoubtedly "centered" in Texas: As alleged in the Complaint, Blueacorn contracted with Womply to take tens of thousands of loan applications from Womply, send them to Capital Plus in Texas, receive fees from Texas-based Capital Plus, and send payment to Womply. (Am. Compl. ¶¶ 12,

59, 61–67, 154, 167.) "[P]ut just a bit differently," as the Supreme Court explained in *Ford Motor Co.*, there was surely "'an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" 141 S. Ct. at 1025 (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017)) (cleaned up).

Far from requiring "signing and performance," the Fifth Circuit has long held that, when considering personal jurisdiction based on a contract, "the place or time of 'execution,' 'consummation' or 'delivery' ***is irrelevant***—*performance*, contemplated or accomplished, is the touchstone." *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492 n.11 (5th Cir. 1974) (quoting *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847, 852 n.14 (5th Cir. 1966)) (emphasis added), *abrogated on other grounds by Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982), *as stated in Burstein v. State Bar of Cal.*, 693 F.2d 511, 518 n.12 (5th Cir. 1982). For example, in *Dubea v. Simpson*, 2009 WL 528258, at *4–5 (E.D. Tex. Mar. 2, 2009), the court considered whether it had personal jurisdiction based on a contract that "was in large part negotiated in Louisiana, and was drafted and executed . . . in Louisiana," but included "just one act of performance" that occurred "in Texas." Relying on *Cousteau*, the court held that act was sufficient to establish "a prima facie case for jurisdiction" in Texas, which required only that "'some performance is to occur there.'" *Id.* (quoting 495 F.2d at 492 n.11). Here, the contracts did not result in "just one act of performance" in Texas but undisputedly resulted in tens of thousands of loans and payments in Texas.

Courts in this Circuit routinely hold that personal jurisdiction lies over contract claims where, as here, the contract included performance in Texas but was signed elsewhere. *See, e.g.*, *Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd.,* 993 F.2d 1201, 1205 (5th Cir. 1993) (affirming

personal jurisdiction of Texas court over Maryland entities where contracts were signed in Maryland but certain conduct "was performed in Texas"); *Texas Capital Bank, N.A. v. Garden World of Holiday, Inc.*, 2009 WL 2824700, at *3–5 (E.D. Tex. Aug. 27, 2009) (denying motion to dismiss for lack of personal jurisdiction where "the contracts were signed in Florida"); *Am. Airlines, Inc. v. Rogerson ATS*, 952 F. Supp. 377, 379–82 (N.D. Tex. 1996) (denying motion to dismiss for lack of personal jurisdiction where the agreement "was signed . . . in Tulsa, Oklahoma"). Tellingly, Blueacorn does not defend the Court's analysis, and is unable to identify any authority requiring that a contract must be signed in the forum state for personal jurisdiction to lie. (ECF No. 96.)

2. The Court Overlooked Substantial Allegations Demonstrating Blueacorn's Substantial Bilateral Contacts With Texas.

The Court acknowledged that "it would appear that Womply and Blueacorn's agreements had a '*substantial* connection with Texas' because of the large number of applications and the actual monetary value of these contracts" that were referred to and funded by Capital Plus in Texas. (Order at 17 (emphasis in original).) This is sufficient to "establish[] a *prima facie* case" for personal jurisdiction, which is all that is required at the pleading stage. (Order at 5 (citing *Seiferth*, 472 F.3d at 270; *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 219–20 (5th Cir. 2012)).)

The Court concluded, however, that these contacts were substantial only "[i]n the abstract," and "were not 'substantial' in that the contacts did not solidly connect Blueacorn to Texas," because the Court assumed that Blueacorn had only "one-way contacts" that "flowed purely from Blueacorn to Texas." (Order at 17.) Respectfully, the Court's assumption rests on an inference drawn *against* Womply; at the pleading stage, Womply is entitled to a reasonable inference that

Blueacorn, as Capital Plus's Lender Service Provider, had bilateral contacts with Capital Plus in Texas. (*Id.* at 5.)

In any event, Womply's Complaint and additional evidence adequately demonstrated that Blueacorn's contacts with Texas were a two-way street. Those allegations included that:

- Blueacorn was created to refer and service "PPP loans" for "two [] lender counterparties," one of which is Texas-based Capital Plus (Am. Compl. ¶¶ 9, 46; APP'X 4–5, 8–9, 22–31, 44–51);[6]

- Blueacorn is Capital Plus's "Lender Service Provider"—and is therefore authorized to "carr[y] out lender functions in originating, disbursing, servicing, or liquidating" loans, 13 C.F.R. § 103.1(d)—which requires communications to and from Capital Plus in Texas (Am. Compl. ¶¶ 5, 46, 98; APP'X 8–9);

- Blueacorn sent "billion[s] in funding" of PPP loans to Capital Plus in Texas, and received "more than $500 million in fees" from Capital Plus in Texas (Am. Compl. ¶¶ 5, 9, 47, 50–54; APP'X 10–75);

- Blueacorn and Capital Plus collaborated to negotiate the Agreements with Womply, including by sending "diligence items" and participating in joint telephone calls (Am. Compl. ¶ 58; APP'X 84–93, 111–28, 199–200, 212–14);

- Blueacorn communicated with Womply on behalf of Capital Plus—including by sending Womply "Capital Plus promissory note[s]" and coordinating with Womply about "customer service inquiries" to Capital Plus—which required communications to and from Capital Plus in Texas (Am. Compl. ¶¶ 58, 169; APP'X 94–96, 166–86, 201, 219–21); and

- Blueacorn admitted that Capital Plus "undisputedly owes Blueacorn fees in connection with those [Womply-referred] loans" (ECF No. 31 at 1).

Thus, Blueacorn's contacts with Texas "flowed into and out of the forum state." (Order at 17 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).) And Blueacorn "deliberately reached out beyond [its] home state" and "entered into a carefully structured" relationship with Capital Plus with "continuing and wide-reaching contacts" with Texas. (*Id.* at 16–17 (quoting

[6] All references to "APP'X" refer to the appendix accompanying Womply's opposition to Blueacorn's motion to dismiss (ECF No. 46-1).

Burger King, 471 U.S. at 479–80).) Those allegations must be accepted as true, and are more than sufficient to support personal jurisdiction. The Court distinguished *McGee* based on its assumption that "the contacts flowed purely from Blueacorn to Texas." (*Id.* at 17.) Because that assumption is wrong, *McGee*'s "substantial connection" standard for personal jurisdiction is satisfied. Indeed, under *Burger King* and *McGee*, "even a single act can support jurisdiction." *Burger King*, 471 U.S. at 475 n.18 (citing *McGee*, 355 U.S. at 223). Here, there are numerous detailed allegations that Blueacorn's contacts with Texas under the contracts were pervasive.

The Supreme Court's decision in *Walden v. Fiore*, 571 U.S. 277 (2014), further supports the Court's exercise of personal jurisdiction over Blueacorn. In *Walden*, the Supreme Court reaffirmed that "it is the defendant's conduct that must form the necessary connection with the forum State" to establish personal jurisdiction, and "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties." 571 U.S. at 285–86 (collecting cases). That is precisely the case here, where, as a result of Blueacorn's performance of its contracts with Womply, "Blueacorn facilitated and individually transmitted 86,521 PPP loans from Womply to Capital Plus in Texas," effectively "direct[ing] these loan applications to Texas." (Order at 12 (citing *Walden*, 571 U.S. at 290).)

B. The Complaint Alleges That Womply's Tort Claims Against Blueacorn Have A Substantial Connection To Texas.

The Court correctly held that "all the claims arise from the same forum contacts," and "when multiple claims arise from the same contacts, specific jurisdiction does not need to be established for each claim." (Order at 13 (quoting *Sedillo ex rel. Filo & Fran Sedillo Revocable Tr. v. Team Techs., Inc.*, 2020 WL 6870711, at *3 (N.D. Tex. Nov. 23, 2020)).) Accordingly, the Court has personal jurisdiction over Blueacorn with respect to Womply's contract and tort claims for the reasons discussed above.

The Court nonetheless analyzed "Womply's tort claims" separately, holding correctly that it must examine "the 'effects' of the defendant's conduct when analyzing specific personal jurisdiction." (*Id.* at 14–15 (quoting *Calder v. Jones*, 465 U.S. 783, 788–89 (1984)).) The Court recognized that the Complaint alleged: (i) "that Blueacorn's CEO induced Womply's CEO to enter into the Agreements, where Womply provided services to Capital Plus in Texas"; (ii) that "[a]fter entering into the agreements, Womply referred 86,521 PPP loans to Blueacorn and then referred all of those loans to Capital Plus in Texas"; and (iii) "[p]ursuant to the agreements, Capital Plus funded 86,521 PPP loans worth over $950 million and received $186,882,948 in Lender Processing Fees for Womply-referred loans." (*Id.* at 4, 11 (cleaned up).) Those facts are more than sufficient to make a *prima facie* showing that Blueacorn's misconduct had jurisdictionally significant effects in Texas.

The Court's Order, however, imposed an additional requirement that *Womply* must "suffer[] the alleged injuries" in Texas, or that Blueacorn's misconduct must "occur[] in Texas" or be "directed toward Texas." (*Id.* at 15 (cleaned up).) Respectfully, that is wrong. Neither the Supreme Court nor the Fifth Circuit requires the harm to be felt in, have occurred in, or be directed to the forum state to establish personal jurisdiction. All that is required is that the alleged misconduct have the "'foreseeable' effect of 'causing business activity in the forum state.'" *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 382 (5th Cir. 2003) (quoting *Miss. Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982)) (reversing dismissal for lack of personal jurisdiction); *see Calder*, 465 U.S. at 788–89 ("Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California."); *Def. Distributed v. Grewal*, 971 F.3d 485, 490–97 (5th Cir. 2020) (finding personal jurisdiction because "[t]he foreseeable effects of a tort" "includ[ed] Texas residents") (quoting *Wien Air Alaska, Inc.*

v. Brandt, 195 F.3d 208, 211 (5th Cir. 1999)). Womply alleged that Blueacorn's conduct had the foreseeable effect of causing Capital Plus's business activity in Texas. Moreover, the Fifth Circuit has long recognized that "[e]ven an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct." *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 628 (5th Cir. 1999). That is precisely what the Complaint alleges here. Wherever Blueacorn's tortious conduct may have occurred, the consequences of those actions had the effect of impermissibly enriching a Texas-based business by tens of millions of dollars at Womply's expense.

The Court's reliance on *Danziger & De Llano, L.L.P. v. Morgan Verkamp, L.L.C.*, 24 F.4th 491 (5th Cir. 2022), is misplaced. There, "'[t]he only act or omission . . . plausibly connected to Texas' was an unsolicited reply to an email by the defendant." (Order at 14 (quoting *Danziger*, 24 F.4th at 497).) Here, by contrast, Blueacorn coordinated its fraudulent conduct with Texas-based Capital Plus, resulting in tens of thousands of transactions generating more than $950 million of loans and more than $187 million in government fees flowing to Texas, which "*meaningfully* connect[s] [Blueacorn] to Texas." *Danziger*, at 498 (emphasis in original). Indeed, the Court held that the Complaint "adequately pleaded" a "conspiracy between Blueacorn, Calhoun, and the Capital Plus Defendants to commit unlawful and tortious acts against Womply that resulted in $76 million in damages." (May 11 Order at 28 (citing Am. Compl. ¶¶ 187–90).) Blueacorn's conspiracy with Capital Plus, which is undisputedly alleged to have engaged in misconduct in Texas, further supports the Court's exercise of personal jurisdiction.[7]

[7] Courts are divided over whether this conspiracy, standing alone, is sufficient to allege personal jurisdiction, and Womply reserves the right to raise this issue on appeal. *Compare, e.g.*, *Unspam Techs, Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013) (recognizing "conspiracy theory of

In sum, the allegations in Womply's Complaint are more than sufficient to survive a motion to dismiss.

II. ALTERNATIVELY, THE COURT SHOULD SET ASIDE ITS ORDER AND PERMIT WOMPLY TO REPLEAD ITS CLAIMS AGAINST BLUEACORN IN ITS SECOND AMENDED COMPLAINT.

In its May 11, 2022 Order granting in part and denying in part Capital Plus's motion to dismiss, the Court held that because "this is the Court's first opportunity to assess the sufficiency of Womply's allegations, the Court deems it appropriate to provide it one chance to amend its pleadings in light of the deficiencies noted in this Court." (May 11 Order at 28 (citing Fed. R. Civ. P. 15(a)(2)).) Should the Court deny reconsideration on the basis of the currently pending First Amended Complaint, Womply respectfully requests leave to include in its Second Amended Complaint allegations addressing the Court's concerns regarding personal jurisdiction. Because the Court has already granted leave to amend, including jurisdictional allegations against Blueacorn will promote judicial economy and is particularly appropriate here because the Court dismissed Womply's claims against Blueacorn "without prejudice." (Order at 1, 18); *see Stewart v. Atherio, Inc.*, 2018 WL 2047997, at *2 (N.D. Tex. May 2, 2018) (Boyle, J.) ("Unless there exists a substantial reason for denying leave to amend, the district court should permit the filing of a proposed amendment.") (internal quotation marks omitted) (granting leave to amend).

In the SAC, Womply specifically addresses the Court's concerns that Blueacorn did not have "a substantial connection with Texas," Blueacorn's contacts with Texas ran "one-way," and Blueacorn's conduct did not "meaningfully connect" it to Texas. (Order at 14–17.) For example,

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jurisdiction"), *and J & M Assocs., Inc. v. Romero*, 488 F. App'x 373, 375 (11th Cir. 2012) (same) (citing *Ex Parte Reindel*, 963 So.2d 614, 622–24 (Ala. 2007)), *with Nat'l Indus. Sand Assoc. v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (rejecting "[c]onspiracy as an independent basis for jurisdiction").

the SAC alleges, based in part on new evidence obtained through discovery in this action, that Blueacorn was established to operate as a Lender Service Provider to just two PPP loan lenders, one of which is Texas-based Capital Plus. (SAC ¶¶ 9, 24(a), 82.) Specifically, [redacted] (*Id.* ¶¶ 24(b), 24(h), 84–86, 92.) [redacted] (*Id.* ¶¶ 24(d)–(f), 88–89.) [redacted] (*Id.* ¶¶ 9, 90, 93.) In fact, the SAC alleges, based in part on analysis of Capital Plus's parent corporation's financial disclosures, that Texas-based Capital Plus paid $606.4 million in fees to the loan servicer provider Blueacorn related to Capital Plus's participation in the PPP loan program. (*Id.* ¶¶ 9, 24(l), 110.)

The SAC further details that Blueacorn and Capital Plus negotiated the Agreements with Womply together, including specific allegations that Blueacorn's CEO communicated directly with Capital Plus about the proposed Agreements; that Blueacorn and Capital Plus had joint "diligence items" and calls with Womply about the proposed Agreements; and that Blueacorn and

Womply coordinated to provide Capital Plus with access to Womply's Technology Platform. (*Id.* ¶¶ 24(n), 121–22, 126, 128, 131–32, 141.) The SAC also describes specific emails and chats showing how Blueacorn coordinated closely with Capital Plus to implement the Agreements by reviewing, processing, and funding the Womply-referred loans using the Womply Technology Platform. (*Id.* ¶¶ 24(o), 143–151) For example, Blueacorn told Womply that "*we = Cap Plus." (*Id.* ¶ 148) And Blueacorn continues to work with Capital Plus regarding forgiveness of the Womply-referred PPP loans. (*Id.* ¶¶ 84, 90, 108.)

The SAC further alleges that Blueacorn marketed its services in Texas, provided services to PPP loan applicants in Texas, and facilitated PPP loans to borrowers in Texas that were approved by the SBA and funded by a lender. (*Id.* ¶¶ 24(m), 100–102.) The SAC identifies specific Blueacorn advertisements that appeared in Texas and specific applicants in Texas who applied for PPP loans through Blueacorn during the relevant time period for this action. (*Id.* ¶¶ 101–102.) As the Supreme Court recently confirmed, "specific jurisdiction attaches" where, as here, a company "actively seeks to serve the market" in the forum State, including by "advertising, selling, and servicing" products in that State. *Ford*, 141 S. Ct. at 1022, 1026–27.

III. IN THE ALTERNATIVE, THE COURT SHOULD DIRECT ENTRY OF FINAL JUDGMENT AS TO BLUEACORN UNDER FED. R. CIV. P. 54(b).

Should the Court decline to reconsider or set aside its Order or decline to permit Womply to replead its claims against Blueacorn, Womply respectfully requests that the Court "direct entry of a final judgment" as to Blueacorn. Fed. R. Civ. P. 54(b) ("[T]he court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties . . . ."). Rule 54(b) certification will enable Womply to take an immediate appeal, which will promote efficiency "because the issue of personal jurisdiction is plainly separable from the remaining claims against the other defendants." *Animale Grp., Inc. v. Sunny's Perfume, Inc.*, 2007 WL 2010476, at *2 (S.D. Tex.

July 5, 2007) (cleaned up) (granting Rule 54(b) certification). As a result, without Rule 54(b) certification, Womply will otherwise be forced "to choose between deferring its claims against [Blueacorn] to be resolved at a much later date, either in this Court or in some other district, or withdrawing its appeal, acquiescing in this Court's decision on personal jurisdiction, and proceeding simultaneously in two courts." *Id.*

Rule 54(b) certification will not disrupt this action and will prevent substantial delay and inefficiency. Although this case is currently scheduled for trial on May 1, 2023 (ECF No. 35), that schedule is unlikely to hold. The Court's initial schedule has already been extended several times, including at Blueacorn's request. (ECF Nos. 55–56, 91–92, 94–95.) Both Blueacorn and Capital Plus have stonewalled Womply's discovery requests, which will also require extending the schedule to ensure that Womply is able to obtain necessary discovery. (*See* ECF No. 63 at 3–5; ECF No. 73 at 4–6.) In fact, counsel for Womply and Capital Plus are conferring about a proposed revised schedule. Accordingly, Rule 54(b) certification will provide just and speedy relief. Fed. R. Civ. P. 1.

Courts in this Circuit often enter "a final appealable order" under Rule 54(b) when dismissing claims against certain parties "for lack of personal jurisdiction." *Avdeef v. Google, Inc.*, 678 F. App'x 239, 239 (5th Cir. 2017); *see, e.g.*, *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 453 (5th Cir. 2005) ("Cooper Tire's claims against Turner and his firm were dismissed for lack of personal jurisdiction, the dismissal being certified under Federal Rule of Civil Procedure 54(b) as a partial final judgment."); *Hoffman v. L&M Arts*, 774 F. Supp. 2d 826, 849 (N.D. Tex. 2011) ("By Rule 54(b) final judgment filed today, Hoffman's action against Meyer is dismissed

without prejudice for lack of personal jurisdiction.").[8] As one court noted, "[o]ne would be hard-pressed to find a decision in which a court denied Rule 54(b) certification after dismissing a party for lack of personal jurisdiction." *Animale*, 2007 WL 2010476, at *1.[9]

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Womply respectfully requests that the Court (i) reconsider and set aside its Order based on the current Complaint; (ii) alternatively, set aside its Order and reconsider personal jurisdiction over Blueacorn based on the SAC; or (iii) in the alternative, direct entry of final, appealable judgment as to Blueacorn under Rule 54(b). Should the Court deny Womply leave to replead its claims against Blueacorn, Womply will file its SAC against Capital Plus.

[8] *See also Anderson v. T&D Machine Handling Inc.*, 85 F.3d 625 (5th Cir. 1996) ("[T]he district court granted T&D's motion and entered final judgment dismissing the claims against SBH for lack of personal jurisdiction.") (citing Fed. R. Civ. P. 54(b)); *Shippitsa Ltd. v. Slack*, 2019 WL 277613, at *1 (N.D. Tex. Jan. 22, 2019) (dismissing claims against certain defendants "for lack of personal jurisdiction" and "enter[ing] final judgment under Rule 54(b)"); *Freedom Path, Inc. v. Lerner*, 2015 WL 770254, at *14 (N.D. Tex. Feb. 24, 2015) (same); *Franklin v. N.*, 2012 WL 12878159, at *2 n.2 (N.D. Tex. July 6, 2012) (same).

[9] Alternatively, Womply requests that the Court certify its Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because (i) personal jurisdiction "involves a controlling question of law," (ii) there is "substantial ground for difference of opinion" for the reasons set forth above, and (iii) "immediate appeal from the order may materially advance the ultimate termination of the litigation" by avoiding the need for Womply to re-file this action in a different court.

Dated: July 11, 2022

Respectfully submitted,

By: /s/ *Jason P. Bloom*
Nina Cortell
Texas Bar No. 04844500
Jason P. Bloom
Texas Bar No. 24045511
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
(214) 651-5000
jason.bloom@haynesboone.com
nina.cortell@haynesboone.com

Attorneys for Plaintiff Oto Analytics, Inc. d/b/a Womply

Of Counsel:

Willkie Farr & Gallagher LLP

Alexander L. Cheney (admitted *pro hac vice*)
One Front Street
San Francisco, CA 94111
(415) 858-7400
acheney@willkie.com

Mark T. Stancil (admitted *pro hac vice*)
Joshua S. Levy (admitted *pro hac vice*)
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000
mstancil@willkie.com
jlevy@willkie.com

CERTIFICATE OF CONFERENCE

On May 10, 2022, I conferred with Michael Levy and Christopher Egleson, counsel for Blueacorn, by email regarding the relief requested herein. Counsel for Blueacorn stated that they are opposed to Womply's motion for reconsideration and for leave to amend the complaint, and would take a position regarding Rule 54(b) certification after reviewing this motion. On June 20, 2022, Blueacorn filed its opposition to the entirety of Womply's motion. (ECF No. 96.)

/s/ Joshua S. Levy
Joshua S. Levy

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served on the following counsel of record, this 11th day of July 2022, by using the electronic case filing system of the United States District Court for the Northern District of Texas:

Penny P. Reid, preid@sidley.com
Claire Homsher, chomsher@sidley.com
Michael A. Levy, mlevy@sidley.com
Christopher M. Egleson, cegleson@sidley.com
Katelin Everson, keverson@sidley.com
Terrell W. Oxford, toxford@susmangodfrey.com
Harry P. Susman, hsusman@susmangodfrey.com
Megan Elise Griffith, mgriffith@susmangodfrey.com

/s/ *Jason P. Bloom*
Jason P. Bloom