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, *et al.*, Defendants.	Civil Action No. 3:21-cv-2636-B

[SEALED] BLUEACORN DEFENDANTS' OPPOSITION TO PLAINTIFF WOMPLY'S SECOND MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

Page

INTRODUCTION 1

LEGAL STANDARD FOR RECONSIDERATION 3

ARGUMENT 3

I. The Court Has Not Exhibited "Complete Disregard of the Controlling Law," and Should Not Grant Reconsideration. 3

A. Womply Does Not Even Contend that it Meets the Applicable "Manifest Error" Standard, and Unfairly Complains About this Court's Reading of Cases Womply Declined to Address in its Original Briefing. 3

B. The Court Committed No "Manifest Error" in Holding that Blueacorn's Relationship with Third-Party Capital Plus Cannot Create Specific Jurisdiction for Womply's Claims for Breach of the Womply-Blueacorn Contracts. 5

C. The Court Correctly Held that it Lacked Specific Personal Jurisdiction over Womply's Tort Claims, Which Did Not Arise out of Blueacorn's Contacts with Texas. 10

II. The Court Should Deny Womply the Opportunity to Replead Its Claims Against Blueacorn. 13

III. The Court Should Deny Womply's Request for an Entry of Partial Final Judgment 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Aubrey v. D Magazine Partners, LP,
2020 WL 619839 (N.D. Tex. Feb. 10, 2020).....3, 6, 13

Bader v. Atl. Intl., Ltd.,
986 F.2d 912 (5th Cir. 1993) 17

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985)..... *passim*

Calder v. Jones,
465 U.S. 783 (1984).....11, 13

In re Cao,
619 F.3d 410 (5th Cir. 2010) 4

Cent. Freight Lines Inc. v. APA Transp. Corp.,
322 F.3d 376 (5th Cir. 2003) 12

Cinel v. Connick,
15 F.3d 1338 (5th Cir. 1994) 4

Danziger & De Llano L.L.P. v. Morgan Verkamp, L.L.C.,
24 F.4th 491 (5th Cir. 2022) 12

Defense Distributed v. Grewal,
971 F.3d 485 (5th Cir. 2020) 12

Delta Brands Inc. v. Danieli Corp.,
99 F. App'x 1 (5th Cir. May 5, 2004).....13

Fernandez-Montes v. Allied Pilots Ass'n,
987 F.2d 278 (5th Cir. 1993) 16

Ford Motor Co. v. Mont. Eight Jud. Dist. Ct.,
141 S. Ct. 1017 (2021).....15

Freudensprung v. Offshore Tech. Servs.,
379 F.3d 327 (5th Cir. 2004) 10

GlobeRanger Corp. v. Software AG,
2013 WL 1499357 (N.D. Tex. April 12, 2013) 13

Goldstein v. MCI WorldCom,
340 F.3d 238 (5th Cir. 2003) 16

Gundle Lining Constr. Corp. v. Adams Cnty. Asphalt, Inc.,
85 F.3d 201 (5th Cir. 1996) 13

Guy v. Crown Equip. Corp.,
394 F.3d 320 (5th Cir. 2004) 3

In re Hallwood Energy, L.P.,
2013 WL 524418 (N.D. Tex. Feb. 11, 2013).....21

Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima,
776 F.2d 1277 (5th Cir. 1985) 18

Int'l Energy Ventures Mgmt., L.L.C. v. Unites Energy Grp., Ltd.,
818 F.3d 193 (5th Cir. 2016) 5

Jebaco Inc. v. Harrah's Operating Co. Inc.,
587 F.3d 314 (5th Cir. 2009) 14

M3Girl Designs, LLC v. Blue Brownies, LLC,
2011 WL 13129681 (N.D. Tex. May 9, 2011) 14

McFadin v. Gerber,
587 F.3d 753 (5th Cir. 2009) 10, 12

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957).....8, 9

Miele v. Blockbuster Inc.,
2005 WL 176170 (N.D. Tex. Jan. 26, 2005) 16

Mullen v. JPMorgan Chase Bank N.A.,
2017 WL 7520608 (N.D. Tex. May 26, 2017),
aff'd, 726 F. App'x 246 (5th Cir. 2018).....3, 9

Nieman v. City of Dallas,
2016 WL 470235 (N.D. Tex. Feb. 8, 2016).....18

Nieman v. Milam,
2017 WL 11638394 (N.D. Tex. Nov. 20, 2017),
adopted by WL 11638382 (N.D. Tex. Nov. 21, 2017) 17, 18

Pemberton v. State Farm Mut. Auto. Ins. Co.,
996 F.2d 789 (5th Cir. 1993) 21

Prod. Promotions, Inc. v. Cousteau,
495 F.2d 483 (5th Cir. 1974) 5

PYCA Indus. v. Harrison Cnty. Waste Water Mgmt. Dist.,
81 F.3d 1412 (5th Cir. 1996) 17

Stabilis Fund II LLC v. Compass Bank,
2018 WL 3768343 (N.D. Tex. Aug. 9, 2018).....3, 4

Stem v. Gomez,
813 F.3d 205 (5th Cir. 2016) 14

Stroman Realty v. Wercinski,
513 F.3d 476 (5th Cir. 2008) 12

Varela v. Gonzales,
773 F.3d 704 (5th Cir. 2014) 14

Walden v. Fiore,
571 U.S. 277 (2014)..... *passim*

Statutes

28 U.S.C. § 1291.....20

28 U.S.C. § 1292(b) 21

Other Authorities

Fed. R. Civ. P. 12(b) 14, 16, 19

Fed. R. Civ. P. 54(b) 3, 4, 17, 20

INTRODUCTION

As the Court is aware, this action was commenced in state court against Texas-based defendant Capital Plus. After Capital Plus removed to this Court, Plaintiff Womply decided to add a Wyoming company, Blueacorn, and an individual who does not reside in Texas, Barry Calhoun, as additional defendants (the "Blueacorn Defendants"). That afterthought addition of those defendants to this Texas case was ill-founded, however, because those Defendants are not at home in Texas and cannot be sued there on these claims. The newly added Defendants moved to dismiss for lack of personal jurisdiction. In the alternative, they moved to dismiss in favor of arbitration, since Womply expressly agreed in the contracts it is suing over that it would resolve any disputes through arbitration in California (Womply's home) using California law to interpret the contracts. The Court granted the motion to dismiss for lack of personal jurisdiction, without needing to enforce the arbitration agreement.

The Court's balanced, 18-page Memorandum Opinion and Order ("Order") correctly laid out and applied the tests for general and personal jurisdiction. It concluded that general personal jurisdiction was lacking because the dismissed Defendants do not reside in and are not essentially at home in Texas. With respect to specific jurisdiction, the Court observed that "each cause of action" must arise "out of" or have "resulted from each defendant's minimum contacts" with Texas. Order at 13. Womply's tort claims did not meet that test, because "none of the conduct occurred in Texas, nor was it directed toward Texas," and Womply did not "suffer any 'effects' from the Blueacorn Defendants' actions in Texas." *Id.* at 15. And its contract claims did not meet that test because the contracts at issue were "not signed in [Texas] and did not call for performance in [Texas]," *id.* at 16, and "the agreements between Womply and Blueacorn" did not otherwise have a "'substantial connection' with Texas," *id.* at 18.

Womply waited five weeks after the Court's decision and then filed a motion for reconsideration claiming that this Court's Order misconstrued the law.[1] But even while accusing this Court of getting the black-letter law wrong, Womply itself does not acknowledge the black-letter "manifest error" standard that governs this motion, does not assert that this Court's analysis constitutes "manifest error," and does not identify any error in this Court's analysis at all, let alone the "manifest" error that this Court has held is required. Womply's request for the extraordinary relief of reconsideration should be denied.

Womply alternatively asks for leave to re-plead—initially without even attaching a proposed complaint, as required by local rules. At the direction of the Court, Womply has now attached a proposed complaint, but, as presaged by Womply's earlier description of what it sought permission to add, Womply fails to add anything material to the allegations that the Court already considered when it rejected Womply's deficient assertion of personal jurisdiction and ordered the case dismissed.

Finally, in a second alternative, Womply asks that the Court allow it to commence a piecemeal appeal against the Blueacorn Defendants now rather than waiting a mere nine months for this case to go to trial on May 1, 2023, after which it will be able to take an ordinary-course appeal from an ordinary-course final judgment. But Womply identifies no prejudice to itself from the short wait, while failing to reckon with the disruption that such a piecemeal, interlocutory appeal will cause for these proceedings. Accordingly, this final alternative request for relief should also be denied.

[1] On July 7, this Court issued an "ORDER Denying [Womply's] Motion for Reconsideration," Dkt. Entry 101, while giving Womply permission to "file an amended motion for leave" to replead that complied with the local rules by attaching Womply's proposed amended complaint. Order at 2. Nothing in the order gave Womply permission to file a second, successive motion for reconsideration, and reconsideration may be denied on that ground standing alone.

LEGAL STANDARD FOR RECONSIDERATION

"Reconsideration" under Rule 54(b) "is an extraordinary remedy that should be used sparingly." *Aubrey v. D Magazine Partners, LP*, 2020 WL 619839, at *2 (N.D. Tex. Feb. 10, 2020) (Boyle, J.) (internal quotation marks omitted). Rule 54(b) reconsideration motions "are only appropriate for the narrow purpose to correct manifest errors of law or fact or to present newly discovered evidence." *Stabilis Fund II LLC v. Compass Bank*, 2018 WL 3768343, at *2 (N.D. Tex. Aug. 9, 2018) (Boyle, J.) (internal quotation marks omitted). They "are not the proper vehicle for rehashing old arguments or advancing theories of the case that could have been presented earlier." *Aubrey*, 2020 WL 619839, at *2 (internal quotation marks omitted); *see also Stabilis*, 2018 WL 3768343, at *2 (same); *Mullen v. JPMorgan Chase Bank N.A.*, 2017 WL 7520608, at *2 (N.D. Tex. May 26, 2017) (Boyle, J.) (same), *aff'd*, 726 F. App'x 246 (5th Cir. 2018). Likewise, a party may not use a Rule 54(b) reconsideration motion "to raise an argument for the first time without justification." *Mullen*, 2017 WL 7520608, at *2 (internal quotation marks omitted).

ARGUMENT

I. The Court Has Not Exhibited "Complete Disregard of the Controlling Law," and Should Not Grant Reconsideration.

A. Womply Does Not Even Contend that it Meets the Applicable "Manifest Error" Standard, and Unfairly Complains About this Court's Reading of Cases Womply Declined to Address in its Original Briefing.

As noted, to warrant reconsideration, a party must show that the Court committed "manifest errors of law or fact." *Stabilis Fund*, 2018 WL 3768343, at *2. "Manifest error" means an error that "is plain and indisputable, and that amounts to a complete disregard of the controlling law." *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004). Womply only cursorily asserts that such error exists and does not contend anywhere that the Court decided the motion to dismiss with "complete disregard of the controlling law." Because Womply has made no serious

effort to satisfy the governing standard, Womply's motion should be denied on its face. *Stabilis Fund*, 2018 WL 3768343, at *2 (Rule 54(b) motion denied in the absence of a "manifest error").

Beyond that, Womply's nitpicking of the Court's decision should be rejected at the threshold specifically with respect to the contract causes of action, because on that prong of the motion Womply gave only passing attention to the controlling law in its own opening brief. Womply's legal analysis on the contract claims in its opposition to the motion to dismiss consisted of a single conclusory sentence citing a single case—the Supreme Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Womply Mem. in Opp. at 13. Relying on that one case, Womply asserted summarily that the contract between Womply and Blueacorn had the kind of "substantial connection" that was found to ground personal jurisdiction in *Burger King*. But its brief did not recite the facts of *Burger King* that were dispositive in that case or explain how it thought the facts in *this* case might be similar to the facts of *Burger King*.

Having failed to explain the logic of its argument in its own underlying brief, Womply should not be heard to criticize the work this Court was forced to do in trying to infer what Womply meant by its cryptic citation to *Burger King*. The role of the Court is "not to create arguments for adjudication" but only to "adjudicate the arguments with which [it is] presented," *In re Cao*, 619 F.3d 410, 435 (5th Cir. 2010), and a "party who inadequately briefs an issue is considered to have abandoned the claim," *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994). A party should not be heard to argue that the Court acted in "complete disregard of the controlling law" when that party itself has failed to put forth its own view of what law controls and why. Womply's motion for reconsideration should be denied for that reason as well.

B. The Court Committed No "Manifest Error" in Holding that Blueacorn's Relationship with Third-Party Capital Plus Cannot Create Specific Jurisdiction for Womply's Claims for Breach of the Womply-Blueacorn Contracts.

Even if the Court reaches Womply's legal analysis, Womply does not and cannot show that this Court "complete[ly] disregard[ed] the controlling law" (or committed any error at all) in dismissing for lack of personal jurisdiction.

1. The Court was first of all correct to conclude that Womply's contract claims cannot support personal jurisdiction "because '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.'" Order at 16 (quoting *Int'l Energy Ventures Mgmt., L.L.C. v. Unites Energy Grp., Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016) (emphasis added by the Court)). Womply does not challenge the Court's reliance on *International Energy Ventures*, and both of these factual holdings are undisputedly correct: there is no allegation that these contracts between a Wyoming company and a California company were signed in Texas; and nothing in the contracts "call[s] for" performance in Texas. *See* Blueacorn's Reply in Support of its Motion to Dismiss ("Reply"), at 3.

On this reconsideration motion, Womply spends the lion's share of its brief addressing whether specific jurisdiction requires that a "contract be *both* signed and performed in a forum state," insisting that either may be sufficient. Mot. at 5 (emphasis added).[2] But while Womply

[2] Womply tries to fudge the issue, but as the Fifth Circuit has repeatedly held, and as the Court correctly recognized, what matters is whether the contract "*call[s] for* performance in the state." Order at 16 (quoting *Int'l Energy Ventures Mgmt.*, 818 F.3d at 212) (emphasis added). The reference in *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492 n.11 (5th Cir. 1974)) to where contract performance is "accomplished" (Mot. at 9) relates to what were then the "*statutory* requirements for jurisdiction," which the Fifth Circuit distinguished from the constitutional analysis. That *dicta* was anyway irrelevant because what satisfied Due Process in that case was that the contract not only "was made in Texas" but also "required some performance in Texas," *id.* at 497 (*contra* Mot. at 9). That is unlike the Womply-Blueacorn contracts here, which were not signed in Texas and did not require performance in Texas. And in any event there is by now no dispute that Blueacorn took no action in Texas: the Court held that "Blueacorn conducted all business operations outside of Texas," Order at 9, and Womply does not claim that that was manifest error.

devotes five pages of argument to that specific legal point (Mot. at 5-10)—longer than the four pages it devoted in its original opposition to addressing *all* aspects of personal jurisdiction on both the contract *and* tort claims (Womply Mem. in Opp. at 11-14)—the question is wholly academic. Regardless of whether both conditions would be required, or only one, the Court found that *neither* condition is alleged here. Womply does not challenge those two dispositive findings on this motion. It accepts that the Womply-Blueacorn contracts were not "signed" in Texas; and it points to nothing in those contracts that "call[ed] for" performance in Texas.[3]

2. Womply similarly fails to demonstrate "manifest error" in this Court's holding that *Burger King*, Womply's sole contract-jurisdiction case (Womply Mem. in Opp. at 13), does not support personal jurisdiction. In *Burger King*, the Supreme Court recognized that a "State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 473. Among other things, the Florida court there had personal jurisdiction over the Michigan defendant because the defendant had "reached out" to the plaintiff, Florida-based Burger King, to solicit and purchase a 20-year franchise relationship, *id.* at 480-81; he had "voluntary[ily] accept[ed] the long-term and exacting regulation of his business from Burger King's Miami headquarters," *id.* at 480; and he had agreed that his contract would be "governed by Florida law," *id.* at 481. As this Court observed, the agreements in that

[3] Womply's motion does lazily assert (Mot. at 8) that Blueacorn "contracted with Womply" to take "applications from Womply, send them to Capital Plus in Texas, receive fees from Texas-based Capital Plus, and send payment to Womply." But that is a materially false characterization of the Blueacorn-Womply contracts, which did not require Blueacorn to submit Womply's applications to *any* lender at all, Referral Agreement § 2.2 (giving Blueacorn "sole and absolute discretion" over whether to submit applications to a lender), much less dictate what lender in what state Blueacorn would submit them to. *See* Blueacorn Mot. to Dismiss at 10-11. Womply's blind-to-the-facts insistence (Mot. at 7) that Blueacorn "'conduct[ed] business' in Texas" by submitting loans to Texas-based Capital Plus, despite itself remaining outside Texas at all times (Order at 9), is just a "rehash[]" of its previously-made argument that the Court properly refused to accept. *Aubrey*, 2020 WL 619839, at *2 (internal quotation marks omitted); *see* Womply Mem. in Opp. at 12-13 (making this argument). As the Court recognized in its dismissal order, "[a] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." Order at 10 (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014)).

case were "made in and enforced from Miami," and "caused foreseeable injuries to the corporation in Florida." Order at 17. In light of all of that, the in-state Florida plaintiff was permitted to bring suit in the courts of its own state against the franchisee.

None of those factors are present here, so this Court was correct to find that the Womply-Blueacorn contracts did not create the kind of substantial relationship between the plaintiff, the defendant, and the forum state that was present in *Burger King*; and that "Womply's reliance on *Burger King* … for this prong of the specific personal jurisdiction analysis" was therefore "unavailing," Order at 16:

- **Out of State Plaintiff.** Womply is not an in-state plaintiff. Unlike in *Burger King*, where courts in Florida had a "manifest interest" in assisting a Florida plaintiff to vindicate its rights, the State of Texas has no "manifest interest" in allowing a non-resident plaintiff like Womply to use Texas courts to sue two non-resident defendants over contracts, like those here, with no facial connection to Texas and which are by their terms governed by California law.

- **No "Reaching Out" to Texas.** To form the contracts underlying the dispute here, Womply alleges that Blueacorn reached out from its non-Texas location to Womply, in California. *See* First Amended Complaint at ¶ 55. This is unlike the defendant in *Burger King*, who could be sued in Florida in part because he had reached out to the Florida company to solicit a relationship with it.

- **No Acceptance of Texas Dealings with Plaintiff.** In *Burger King*, the Florida plaintiff could sue in Florida because the defendant had accepted an ongoing relationship with it and so accepted the risk it would be sued in Florida. Womply is a California company with no relationship to Texas, so in agreeing to contract with Womply, Blueacorn did not promise an ongoing relationship with a Texas plaintiff and had no reason to expect to be sued by Womply in Texas.

- **Texas Law Does Not Apply.** The contracts here are governed by California law, unlike in *Burger King* where a Florida forum was appropriate in part because the defendant had consented to the application of Florida law.

- **Contracts Neither Made in Nor Enforced From Texas.** As the Court recognized and as Womply does not dispute, "Womply and the Blueacorn Defendants negotiated their agreements and conducted all discussions during the course of performance of the agreements outside of Texas." Order at 16.

- **No Injury (Foreseeable or Otherwise) to Womply in Texas.** Womply is not in Texas, and does not (and could not) claim to have suffered injury there. That is unlike *Burger King*, where jurisdiction in Florida was supported by the fact that the Florida-based plaintiff foreseeably suffered injury in Florida.

Having barely briefed *Burger King* in its opening brief on the underlying motion to dismiss, Womply of course did not address these myriad distinctions there. And it ignores them all again here. But these distinctions, which this Court recognized (Order at 11-12), show that dismissal was proper. Womply fails to show that this Court exhibited "complete disregard for the law" in holding that *Burger King* does not support personal jurisdiction.

3. Finally, Womply never takes issue with the last part of the Court's analysis, a failure that by itself provides sufficient basis for denying reconsideration as to the contract claims. In that part, the Court held that Womply's claims separately failed *McGee*'s "substantial connection" test because, unlike in *McGee*, whatever contacts Blueacorn might otherwise have had with Texas, nothing alleged by Womply "establish[ed] that *the agreements between Womply and Blueacorn* had a 'substantial connection' with Texas" such that it could be said that "the breach-of-contract causes of action . . . *arise from* Blueacorn's contacts with Texas." Order at 18 (emphasis added); *see also McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (action was "based on a contract which had substantial connection with" California where defendant insurance company delivered the insurance contract at issue to California, insured was a resident of California, and insured regularly paid the contractually required premiums by mailing them from California). The Court's *McGee* analysis was fully correct. The Court appropriately focused on the underlying agreements *between Womply and Blueacorn*, rather than on Blueacorn's relationship with "third party" Capital Plus, *see Walden*, 571 U.S. at 286. Its conclusion that specific jurisdiction is lacking is correct under *Walden*'s straightforward rule that contacts with a "third party" that is in the forum state is

not enough, especially since Womply was not even allegedly injured in the forum state.[4] The Court instead properly considered whether Womply's claims for breach of the Blueacorn-Womply contracts arose from Blueacorn's connections with Texas, which they did not. *See* Order at 18.

Womply's sole, brief discussion of *McGee* is the irrelevant claim that "under *Burger King* and *McGee*, 'even a single act can support jurisdiction.'" Mot. at 12. Under the right circumstances, that might be true. But that has nothing to do with Womply's failure here to identify any such act *from which its claim for breach of the Womply-Blueacorn contracts arises* that generates sufficiently substantial contacts to warrant specific jurisdiction. And unlike *McGee*, this is not a case where "[the forum state] has a manifest interest in providing effective means of redress for its resident[]," *McGee*, 355 U.S. at 223; Womply is a California resident, not a Texas resident. By failing to contest the Court's conclusion that the Blueacorn-Womply contracts lack comparable contacts to those in *McGee*, and failing to show how the Court could possibly assert jurisdiction notwithstanding this deficiency, Womply necessarily has not made the case for reconsideration.

The Court was also correct to conclude that Blueacorn's relationship with Capital Plus, even if considered, itself fails *McGee*'s substantial connection test because Blueacorn's purported contacts with Texas (via its relationship with Capital Plus) did not sufficiently "flow[] into and out of the forum state." Order at 17. Womply fails to grapple with the Court's finding that this case is distinguishable from *McGee* because the "agreements were not delivered in Texas, no premiums were sent to Texas, and neither Blueacorn nor Womply reside in Texas," and that while Womply

[4] Womply's latest reconsideration motion tries to make something of *Walden*'s observation that "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties." Mot. at 12 (citing *Walden*, 571 U.S. at 286). Womply first of all cannot "raise an argument for the first time" on this reconsideration motion, *Mullen*, 2017 WL 7520608, at *2, but its reliance on that one sentence of *Walden* is misplaced anyway. All that sentence indicates is that if the claim arises out of the defendant's *own* contacts with the forum state, the fact that those contacts happen to also involve another party will not foreclose jurisdiction. But here, where Womply seeks to point to Blueacorn's relationship with a "third party, standing alone,"—*i.e.*, Blueacorn's relationship with Capital Plus, rather than Blueacorn's relationship with Womply—*Walden* is clear that jurisdiction will not lie.

sent "loan applications" to Texas—something neither mandated nor even addressed by the Womply-Blueacorn contracts on which Womply is suing—the lack of other connections to Texas means that the agreements between Womply and Blueacorn had no "substantial connection" with Texas.

That was indisputably correct. The Fifth Circuit has "repeatedly held" that "mailing payments" and "communications related to the execution and performance of the contract" even in combination "are insufficient . . . to support the exercise of specific personal jurisdiction over [a] nonresident defendant." *Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 344 (5th Cir. 2004). That doctrine should apply with additional force when the payments are not even pursuant to the contract at issue in the case, which is the contract between *Womply* and Blueacorn, no matter how hard Womply tries to misdirect the Court to the separate contract between Blueacorn and third-party Capital Plus. *See Walden*, 571 U.S. at 286. Thus, the Court was entirely correct that the only contacts Blueacorn had with Texas were "one-way." Order at 17. Womply has failed to demonstrate "manifest error" in the Court's contract-jurisdiction analysis, and its motion for reconsideration as to Womply's contract claims should be denied.

C. The Court Correctly Held that it Lacked Specific Personal Jurisdiction over Womply's Tort Claims, Which Did Not Arise out of Blueacorn's Contacts with Texas.

The Court also appropriately held that it lacked specific personal jurisdiction over the Blueacorn Defendants for Womply's tort claims because none of the alleged conduct occurred in Texas or was directed at Texas. Order at 14.

Specific personal jurisdiction for tort claims arises when a nonresident "commits a tort within the state, or an act outside the state . . . cause[d] tortious injury within the state." *McFadin v. Gerber*, 587 F.3d 753, 761 (5th Cir. 2009). The Court correctly applied this rule. The Court found that "none" of the Blueacorn Defendants' "conduct for the tort claims '*occurred* in Texas,'" that the Blueacorn Defendants "did not direct any fraudulent or negligent misrepresentations to

Texas," and that "Womply suffered the alleged injuries outside of Texas." Order at 15. The Court therefore concluded that it lacked specific personal jurisdiction over the Blueacorn Defendants with respect to the tort claims. *Id*. The Court recognized that "[t]he only acts of the Blueacorn Defendants *connected* to Texas are the submission of loan applications to Capital Plus in Texas, which did not involve Womply." *Id.* (emphasis in original). It correctly found that this was not enough to exercise specific personal jurisdiction.

Womply's sole argument for reconsideration is that specific personal jurisdiction is warranted because of the "effects" of Blueacorn's actions in Texas. Mot. at 3. This is an argument that Womply has previously raised, *see* Womply Mem. in Opp. at 13-14, and which the Court has already rejected, Order at 15. Womply conclusorily alleges that the Blueacorn Defendants' actions "caus[ed] significant, anticipated effects in the forum state," Mot. at 3, and that they had the "foreseeable effect of causing Capital Plus's business activity in Texas," *id*. at 14.

Womply first of all misunderstands the effect-on-the-plaintiff test, first articulated in *Calder v. Jones*, 465 U.S. 783, 790 (1984). As the Blueacorn Defendants explained and as this Court recognized, the question under *Calder* is whether the defendant's conduct foreseeably injured the plaintiff in the forum state. *See* Order at 15; Reply at 1-2. So the Court correctly found that personal jurisdiction was unwarranted under the "effects" test because *Womply* did not "suffer any 'effects' from" Blueacorn's actions in Texas. Order at 15 (citing *Calder*, 465 U.S. at 788-89); *see also Calder*, 465 U.S. at 790 (holding that defendant could foresee "that injury would be felt by

respondent in the State in which she lives and works," and that "[a]n individual *injured in California* need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly *cause the injury in California*." (emphasis added)).[5]

In seeking reconsideration of the Order, Womply argues that the Court's analysis regarding personal jurisdiction was in error because "[a]ll that is required [to establish personal jurisdiction] is that the alleged misconduct have the 'foreseeable' effect of 'causing business activity in the forum state.'" Mot. at 13. But that is not the law, as Womply's own cases make clear. In *Defense Distributed v. Grewal*, the court explained that whether a defendant's actions had a foreseeable effect in Texas was relevant to the question of whether the defendant had minimum contacts with the forum state, but that "minimum contacts in-and-of themselves are insufficient to create jurisdiction." 971 F.3d 485, 496 (5th Cir. 2020). Instead, a plaintiff must also show that the cause of action *arises from* the forum-related contacts. *Id.* The Court correctly recognized that this case is more similar to *Danziger & De Llano L.L.P. v. Morgan Verkamp, L.L.C.*, 24 F.4th 491 (5th Cir. 2022). There the court upheld dismissal where the only tortious conduct "even plausibly *connected* to Texas" was an allegedly fraudulent email reply to plaintiff in Texas. *Id.* at 497. The facts supporting jurisdiction are even weaker here, where the only tort alleged is that Blueacorn deliberately or negligently made misrepresentations on a single phone call with Womply outside of Texas. Order at 14; Reply at 1.

[5] Premising jurisdiction on the "effects" of an act done outside of the forum state is also "rare," *Stroman Realty v. Wercinski*, 513 F.3d 476, 486 (5th Cir. 2008), and "is not sufficient to confer specific jurisdiction, absent the direction of specific acts toward the forum." *McFadin*, 587 F.3d at 762. As the Blueacorn Defendants explained (Reply at 5), and as the Court specifically recognized, the Blueacorn Defendants "did not direct any fraudulent or negligent misrepresentations to Texas," Order at 15, so there is no personal jurisdiction in Texas arising from the tort claims.

Womply's remaining authorities also do not undermine the Court's decision. In *Central Freight Lines v. APA Transport*, the Fifth Circuit found personal jurisdiction proper because defendant had sufficient contacts with Texas "related to the. . . events giving rise to th[e] specific cause of action." 322 F.3d 376, 381 (5th Cir. 2003). And in *Calder*, the Supreme Court permitted the exercise of personal jurisdiction where it was clear that defendants had "expressly aimed" their allegedly tortious conduct at California and knew that the resident plaintiff would be harmed there. 465 U.S. at 789-80. These cases highlight the deficiencies of Womply's arguments, which cannot overcome the fact that Womply has no presence or connection to Texas, cannot show any tortious conduct taking place in Texas, or point to an injury it suffered in Texas.[6]

Thus, the Court correctly held that there was no specific personal jurisdiction over Blueacorn with respect to the tort claims, and the motion should be denied.

II. The Court Should Deny Womply the Opportunity to Replead Its Claims Against Blueacorn.

Womply has failed to proffer any new evidence or allegations suggesting that Blueacorn's "contacts with the forum state arise from, or are directly related to, [its] cause of action," Order at 6 (quoting *Gundle Lining Constr. Corp. v. Adams Cnty. Asphalt, Inc.*, 85 F.3d 201, 205 (5th Cir. 1996)), so it has not shown how it could remedy the failure of its prior complaint to provide for personal jurisdiction over the Blueacorn Defendants. Because Womply has done nothing more than assert that personal jurisdiction exists over the Blueacorn Defendants, the Court should deny

[6] Womply also newly argues that the Court has jurisdiction over Blueacorn by virtue of an alleged conspiracy with Capital Plus. Mot. at 14. The new argument should be rejected because a party may not raise new arguments on reconsideration. *Aubrey*, 2020 WL 619839, at *2. And in any event, no doctrine of "conspiracy jurisdiction" exists in this Circuit. *GlobeRanger Corp. v. Software AG*, 2013 WL 1499357, at *3 (N.D. Tex. Apr. 12, 2013) (Boyle, J.) ("[E]ven with allegations of a conspiracy, the Court must still evaluate each of the Defendants' contacts separately to determine whether personal jurisdiction exists."); *see also Delta Brands Inc. v. Danieli Corp.*, 99 F. App'x 1, 6 (5th Cir. May 5, 2004) (plaintiff had to "demonstrate" that defendant "individually, and not as part of the conspiracy, had minimum contacts with Texas").

Womply the opportunity to replead its claims against the Blueacorn Defendants. Allowing a futile amendment that will be immediately countered with another motion to dismiss would waste the resources of the Court, the parties, and the Blueacorn Defendants.

While leave to amend may be "granted liberally," it should be denied if the "amendment would be futile." *Jebaco Inc. v. Harrah's Operating Co. Inc.*, 587 F.3d 314, 322 (5th Cir. 2009). An amendment is futile, and so should not be allowed, if the amended complaint "would be subject to dismissal." *Varela v. Gonzales*, 773 F.3d 704, 707 (5th Cir. 2014) (per curiam) (internal quotation marks omitted); *see also, e.g.*, *Stem v. Gomez*, 813 F.3d 205, 215-16 (5th Cir. 2016) (district court may deny amendment "[w]hen an amended complaint would still fail to survive a Rule 12(b)(6) motion" (internal quotation marks omitted)). In seeking leave to amend, Womply has the burden of showing that its new allegations would overcome the deficiencies that led the Court to dismiss its prior complaint. *See M3Girl Designs, LLC v. Blue Brownies, LLC*, 2011 WL 13129681, at *2 (N.D. Tex. May 9, 2011).

Here, far from detailing new factual allegations that would improve its position, Womply's motion once again emphasizes allegations made in its First Amended Complaint and factual contentions it raised in its Opposition to Blueacorn's Motion to Dismiss, all of which the Court has already considered and rejected as insufficient to establish personal jurisdiction. Womply relies on the following:

- "Blueacorn was established to operate as a Lender Service Provider to just two PPP loan lenders, one of which is Texas-based Capital Plus." Mot. at 16. Womply alleged this fact in Paragraph 9 of its First Amended Complaint, and specifically pushed this point in its original Opposition to the Motion to Dismiss (at 11 n.3).

- "Blueacorn's CEO communicated directly with Capital Plus about the proposed Agreements; [] Blueacorn and Capital Plus had joint 'diligence items' and calls with Womply about the proposed Agreements; and [] Blueacorn and Womply coordinated to provide Capital Plus with access to Womply's Technology Platform." Mot. at 16-17. Womply

made these allegations in Paragraphs 55 through 58 of the First Amended Complaint, and cited them on page 12 of its Opposition to the Motion to Dismiss.

- "[S]pecific emails and chats show[] 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. For example, Blueacorn told Womply that '*we = Cap Plus.'" Mot. at 17 (internal quotations omitted). Womply urged this material on the Court at length on pages 9 and 10 of its Opposition to the Motion to Dismiss.

The only other purportedly new allegations in Womply's proposed new complaint concern Blueacorn's activities as a lender service provider to Capital Plus, whereby Blueacorn [redacted] including *inter alia* [redacted] Mot. at 16. (internal quotation marks and alterations omitted). As part of those functions, Womply alleges that "Blueacorn marketed its services in Texas [and] provided services to PPP loan applicants in Texas." *Id.* at 17.[7] Womply also alleges that "Blueacorn and entities associated with it" are entitled to a percentage of the "fees Capital Plus received for the Womply-referred loans," and that Capital Plus paid substantial "fees to the loan servicer provider Blueacorn related to Capital Plus's participation in the PPP program." *Id.* at 16. These new allegations merely expand on, but add nothing new to, a basic fact that has been pleaded in this litigation from the start—that Blueacorn acted as a lender service provider to Capital Plus, pursuant to contracts with Capital Plus. Repeating and amplifying them contributes

[7] Womply has also already attempted to advance this argument, without success, in its Opposition to the Motion to Dismiss, where it alleged, "Because Blueacorn 'has continuously and deliberately exploited [Texas's] market, it must reasonably anticipate being haled into [Texas] court[] to defend actions.'" *Ford Motor Co. v. Mont. Eight Jud. Dist. Ct.*, 141 S. Ct. 1017, 1027 (2021)." Womply Mem. in Opp. at 14.

nothing new to the personal jurisdiction analysis, because Womply still does not allege that its claims against Blueacorn arise from Blueacorn's contacts with Texas.

Finally, Womply points to a Texas choice-of-law provision and forum selection clause in the Blueacorn Defendants' agreements with Capital Plus. *Id.* at 16. Even that citation is misleading, because those agreements *also* contain an arbitration provision that requires arbitration in Arizona under Arizona law. Which of those might ultimately govern in any particular dispute between Blueacorn and Capital Plus is beside the point here, just as those clauses are beside the point—because those clauses govern disputes between Blueacorn and *Capital Plus*, not suits between Blueacorn and Womply, so again, under *Walden*, they are irrelevant to Womply's assertion of personal jurisdiction. Instead, as Blueacorn has noted from the beginning, Womply agreed that any dispute with Blueacorn would be arbitrated in California and that the agreements would be governed by California law, Blueacorn Defendants' Mot. to Dismiss at 9. The bottom line is that provisions in contracts to which Womply was not a party do not ground personal jurisdiction. *See Burger King*, 471 U.S. at 482; *Miele v. Blockbuster Inc.*, 2005 WL 176170, at *3 (N.D. Tex. Jan. 26, 2005).

Womply has failed to identify any material additional facts that were not initially pled, and therefore its revived claims against the Blueacorn Defendants would be met with another Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction that would have the same outcome. *See Goldstein v. MCI WorldCom*, 340 F.3d 238, 255 (5th Cir. 2003) (district court did not abuse its discretion when it denied leave to amend when the plaintiff "did not suggest in their responsive pleading any additional facts not initially pled that could, if necessary, cure the pleading defects raised by the defendants"); *see also Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) (finding that "conclusory allegations or legal conclusions masquerading as factual

conclusions will not suffice to prevent a motion to dismiss"). Without any new allegations, Womply's proposed complaint fails to cure the deficiencies that the Court identified in its Order dismissing the Blueacorn Defendants. Allowing Womply to re-include the Blueacorn Defendants in a new complaint would be futile, and the Court should deny Womply's request for leave to replead its claims against Blueacorn.

III. The Court Should Deny Womply's Request for an Entry of Partial Final Judgment.

Finally, the Court should deny Womply's request that it enter partial final judgment against the Blueacorn Defendants under Rule 54(b) of the Federal Rules of Civil Procedure. Granting the request would lead to piecemeal appeals in this case, and Womply has failed to explain how waiting to pursue an appeal in the ordinary course will cause hardship or injustice.

"In a lawsuit which contains multiple claims and/or multiple parties, a final judgment exists only if it meets one of two conditions: The judgment must either adjudicate all claims, rights, and liabilities of all parties or the district court must expressly conclude that no just reason exists for delaying the entry of final judgment and must expressly order the entry of that judgment pursuant to Rule 54(b)." *Bader v. Atl. Intl., Ltd.*, 986 F.2d 912, 914-15 (5th Cir. 1993). A district court should only grant certification under Rule 54(b) "when there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal; it should not be entered as a courtesy to counsel." *PYCA Indus. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996).

Womply argues that without a directed entry of final judgment, it will be forced to "choose between deferring its claims against [Blueacorn] to be resolved at a much later date," and "proceeding simultaneously in two courts." Mot. at 18 (internal quotation marks omitted). But even assuming that is correct, neither of those options counts as hardship or injustice. *See Nieman v. Milam*, 2017 WL 11638394, at *2 (N.D. Tex. Nov. 20, 2017), *adopted by* 2017 WL 11638382

(N.D. Tex. Nov. 21, 2017) (Plaintiff's 54(b) request should be denied when plaintiff failed to explain how an immediate appeal would prevent hardship or injustice or materially advance the ultimate termination of the litigation); *see also Nieman v. City of Dallas*, 2016 WL 470235, at *3 (N.D. Tex. Feb. 8, 2016). Womply's perfunctory request fails to grapple with the schedule in this case or the actual, practical results of the relief it requests. Its motion fails to acknowledge or address the following:

This Case is Set for Trial in Ten Months, and Womply Has Not Shown Prejudice. The Court has set this case for trial on May 1, 2023, less than 10 months from the date on which briefing on this motion to reconsider will be complete. Womply has not explained how waiting just over 9 months before commencing a single, orderly appeal in the ordinary way will prejudice it. Many litigations take far longer. Womply only speculates that the current schedule may not hold, but that is not a valid reason for the Court to stray from the normal course. In other contexts, the Fifth Circuit has recognized that "the mere possibility of prejudice from delay" is "inherent in every case," and is "insufficient" to warrant relief. *Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1280 (5th Cir. 1985) (setting aside summary judgment entered by default). The same is true here.

Piecemeal Appeals Will Result in Disarray. Womply seeks leave to appeal immediately. The correct and most likely result of an appeal is affirmance: the Court's dismissal order was correct. Womply, of course, has no special interest in obtaining speedy confirmation that this Court's dismissal was correct, and it could instead simply accept that this Court lacks personal jurisdiction, dismiss the action as to the Blueacorn Defendants, and commence arbitration (or attempt to sue in a different district). Womply seeks leave to appeal now because it hopes to win reversal—but if the Fifth Circuit were to reverse, the effect on these proceedings will be disarray.

According to the latest Judicial Conference statistics, the current median time to decision on an appeal to the Fifth Circuit is 9.7 months.[8] If the Fifth Circuit were to reverse as to personal jurisdiction on that timeframe, then on the eve of trial against Capital Plus—or perhaps in the middle of it—this Court would have to simultaneously and hurriedly address the remainder of Blueacorn's arguments for dismissal, including its motion to dismiss in favor or arbitration, and all of Blueacorn's arguments under Rule 12(b)(6).

Among other things, that could entail holding an *evidentiary hearing* regarding Womply's claims of fraud regarding inducement to arbitration featuring the same key witness, Toby Scammell, who would simultaneously be appearing as a trial witness in the Capital Plus trial. *See* Reply at 7 & n.5.

Then, in the unlikely event that the case was not dismissed, the case against Blueacorn would have to proceed through discovery and trial. And while *that* was happening, Capital Plus and Womply would either be proceeding with their *own* piecemeal appeals related to the trial outcome; or their partial judgment would have to await the resolution of the Womply-Blueacorn trial before being taken up on appeal. In short, in the best-case scenario for Womply in which they prevail on the appeal they seek leave to pursue, the result in this Court would be disarrayed proceedings.

This Court Is Efficient; It Is Womply That Wastes Time. Litigation in general takes time, and while Womply thinks this Court will resolve this case only at "a much later date," this Court has already shown that it moves with alacrity and efficiency. If any actor in the case is killing time, it is not the Court, but Womply: for example, Womply itself waited months before

[8] *See* U.S. Court of Appeals Summary—12-Month Period Ending March 31, 2022, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0331.2022.pdf (last visited June 20, 2022).

suing Capital Plus; waited months more before belatedly adding Blueacorn as a party; waited five weeks after the Court dismissed the Blueacorn Defendants before asking the Court to reconsider or enter partial final judgment; and sought and obtained extra time before filing its permitted Second Amended Complaint against Capital Plus. Womply even needlessly delayed the resolution of this motion by originally filing it without bothering to prepare and attach a proposed complaint, requiring the Court to order Womply to comply and spawning a new round of briefing. If Womply wished to reach an appeal and eventual resolution of this case sooner, it should have demonstrated that by moving the case forward with speed before asking the Court to relieve it of the effects of its own delay-inducing decisions.

Womply Has Not Shown a Colorable Appellate Issue. Finally, while Womply complains that it will have to wait a long time to get final resolution, nothing in its papers suggests that it has a colorable appeal or any reason to hope for relief from the Fifth Circuit. The Court's Order dismissing as to the Blueacorn Defendants is sound. Womply has the right to trouble the Fifth Circuit with an eventual appeal under 28 U.S.C. § 1291, of course, just as it in some sense had the right to trouble this Court with this belated reconsideration motion. When it loses that appeal, it may seek *en banc* review, and then may petition for certiorari, and then may seek reconsideration of the denial of certiorari. But although the rules do not bar a party from pursuing losing appeals and motions, the courts need not facilitate them. Congress has specified, in 28 U.S.C. § 1291, that appeals are allowed only from "final decisions." Rule 54(b) does give the Court discretion to allow piecemeal appeals with respect to dismissed parties, but nothing in the law or the Rules suggests that the Court *should* exercise that discretion to let a party pursue an unfounded and ill-fated partial appeal with special speed, when the statute, considerations of judicial efficiency, and the Fifth Circuit itself all clearly favor one consolidated appeal per case rather than multiple, and when all

other appeals must await final resolution in the district court. For all of these reasons, Womply has failed to show that entry of partial final judgment is warranted or practical in this case. "The rule that only final decisions are appealable is intended to promote judicial economy by preventing multiple appeals in the same case." *Pemberton v. State Farm Mut. Auto. Ins. Co.*, 996 F.2d 789, 791 (5th Cir. 1993). The Court should adhere to that sound policy and deny Womply's request for entry of partial final judgment. [9]

CONCLUSION

For the foregoing reasons, the Court should deny reconsideration, leave to amend, and the entry of partial final judgment.

[9] Womply's alternative request that the Court certify its Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) should also be denied. Mot. at 19 n.9. Such requests are "sparingly granted" and "reserved for 'exceptional' cases." *In re Hallwood Energy, L.P.*, 2013 WL 524418, at *2 (N.D. Tex. Feb. 11, 2013). Womply merely recites the elements of the test and makes no effort to show why this Court should allow Womply to burden the court of appeals with an interlocutory appeal of Womply's run-of-the-mill, fact-bound, and legally anemic claims to personal jurisdiction.

Dated: July 19, 2022

Respectfully submitted,

/s/ *Christopher M. Egleson*

Penny P. Reid
Texas Bar No. 15402570
preid@sidley.com
Claire Homsher
Texas Bar No. 24105899
chomsher@sidley.com
SIDLEY AUSTIN LLP
2021 McKinney Ave No. 2000
Dallas, Tex. 75201
(214) 981-3300
(214) 981-3400 (facsimile)

Michael A. Levy
(admitted *pro hac vice*)
mlevy@sidley.com
Christopher M. Egleson
(admitted *pro hac vice*)
cegleson@sidley.com
Katelin Everson
(admitted *pro hac vice*)
keverson@sidley.com
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, N.Y. 10019
TEL: (212) 839-5300
FAX: (212) 839-5599

Attorneys for the Blueacorn Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure and this Court's CM/ECF filing system on this day, July 19, 2022.

/s/ *Christopher M. Egleson*