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

CAPITAL PLUS DEFENDANTS' MOTION TO STAY DISCOVERY AND MOTION FOR AN INTERIM STAY PENDING RESOLUTION OF THIS MOTION

The Court holds broad discretion to ensure that discovery proceeds in a just and economical fashion. Fed. R. Civ. P. 26(c). A court's use of its discretion to stay discovery is appropriate pending a motion that would dispose of substantial issues or all of a case. Defendants Capital Plus Financial, LLC ("Capital Plus"), Crossroads Systems, Inc. ("CS"), and Eric Donnelly (collectively, "Capital Plus Defendants") respectfully move this Court to stay discovery while two motions are pending:

1. Defendants BA Fin Orion, LLC and Barry Calhoun's (collectively, "Blueacorn") Motion to Dismiss in Favor of Arbitration and Under Rules 12(b)(2) and 12(b)(6) (ECF 31); and

2. Capital Plus Defendants' Motion to Dismiss Plaintiff's Amended Complaint (ECF 42).

Capital Plus Defendants respectfully submit that a stay of discovery is appropriate here until both motions are decided because:

1. Womply, Capital Plus Defendants, and the Court appear to agree that Capital Plus Defendants' motion to dismiss includes a purely legal question that could resolve all the claims against Capital Plus Defendants. This would mean that any discovery produced in the meantime would have been unnecessarily burdensome and expensive.

2. Blueacorn's Motion to Dismiss includes a jurisdictional challenge which would affect the discovery available from Blueacorn and the viability of Womply's claims in this Court.

Finally, because this motion presents colorable grounds for a stay, and to avoid prejudice to Capital Plus Defendants while this motion is briefed and decided, Capital Plus Defendants respectfully request that the Court enter the attached proposed interim order granting a temporary administrative stay of discovery during the pendency of this motion.

ARGUMENT

"A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Fujita v. United States*, 416 F. App'x 400, 402 (5th Cir. 2011) (quoting *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987)). A discovery stay is justified "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Further, a stay "may be appropriate where the disposition of a motion to dismiss 'might preclude the need for the discovery altogether thus saving time and expense.'" *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 766, 768 (W.D. Tex. 2008) (quoting *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990)).

I. Rulings in Capital Plus Defendants' favor on purely legal questions like the interpretation of applicable SBA guidance would foreclose all discovery against them, so the Court should stay discovery pending its ruling on their Motion to Dismiss.

A stay "may be appropriate where the disposition of a motion to dismiss 'might preclude the need for the discovery altogether thus saving time and expense.'" *Fresenius Med Care*, 571 F. Supp. 2d at 768 (quoting *Landry*, 901 F.2d at 436). Although Rule 12(b)(6) does not automatically stay discovery, the rationale underlying the 12(b)(6) standard on a motion to dismiss provides good cause for the Court to exercise its discretion to enter a stay in an appropriate case. The Supreme Court and Fifth Circuit have each stated that the purpose of Rule 12(b)(6) is to determine whether a plaintiff has stated a plausible claim for relief that would entitle that plaintiff to seek discovery on those plausible claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise

a reasonable expectation that discovery will reveal evidence of illegal agreement."); *id.* at 558–59 (collecting cases and secondary sources regarding high cost of discovery and reasoning that plausibility standard would mitigate such costs); *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."); *In re S. Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir. 2008) (interpreting *Twombly* standard outside antitrust context and holding that Rule 12(b)(6) 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements"); *Shaver v. Barrett Daffin Frappier Turner & Engel, L.L.P.*, 593 F. App'x 265, 274 (5th Cir. 2014) ("It is not uncommon to stay discovery pending a decision on a motion to dismiss, insofar as a Rule 12(b)(6) motion to dismiss focuses on the adequacy of the pleadings, while discovery helps a plaintiff obtain enough evidence to succeed on the merits."). *Accord Levey v. Brownstone Inv. Grp., LLC*, 590 F. App'x 132, 137 (3d Cir. 2014) (" 'The Rule 12(b)(6) procedure 'streamlines litigation by dispensing with needless discovery and factfinding,' *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989), and motions to dismiss filed under it should typically 'be resolved before discovery begins.' *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997).").

This is an appropriate case for a stay of discovery pending resolution of Capital Plus Defendants' Rule 12(b)(6) motion to dismiss. Three reasons provide good cause under Rule 26(c):

First, Capital Plus Defendants, Womply, and the Court appear to agree that the Motion to Dismiss raises a "nearly pure issue of law" because the Court's interpretation of federal rules may be "dispositive of Womply's state law claims." Mar. 1, 2022 Order at 3–4 (ECF 48); Pl. Response at 12, 14 of 22 (ECF 17). Where both sides agree that the case may be resolved on a single legal question, it would be appropriate for the Court to stay discovery until that legal question is answered, as the ruling "might preclude the need for the discovery altogether thus saving time and expense." *Landry*, 901 F.2d at 436.

Second, the Court should not permit Womply to engage in a fishing expedition to look for different claims in hopes of finding one that is viable. Womply appears already to anticipate amending its pleadings based on its investigation in discovery. *See* Joint Status Report ¶ 5 (ECF 33). Such fishing expeditions cannot justify discovery if Womply's existing complaint fails to state a plausible claim for relief. *Twombly*, 550 U.S. at 556, 558–59; *Iqbal*, 556 U.S. at 686. This concern is confirmed by the initial discovery served by Womply. Specifically, Womply seeks discovery almost exclusively about Capital Plus's contractual arrangements with other parties unrelated to the loans at issue in this case.[1] This discovery is irrelevant and objectionable. The only plausible explanation for why Womply seeks this information is to uncover evidence that Capital Plus has not followed the regulations that Capital Plus invokes against Womply in the Motion to Dismiss when contracting with other vendors. While this explanation cannot justify the intrusive discovery (the Court's legal interpretation of the regulations should not be impacted by what private parties have or have not done), it reveals that Womply seeks discovery solely to find evidence to amend its complaint to circumvent Capital Plus Defendants' pending Motion to Dismiss.

Third, contrary to Womply's assertions in the Joint Status Report, the factual issues in question are not fading away. These are matters that occurred ***within the past ten months*** regarding a short-term, unusual government program, so Womply cannot credibly assert that individuals will forget what happened. Womply waited until February 25, 2022 to serve any discovery—even though it could have been served as early as January 13, 2022, the date of the parties' conference under Rule 26(f). Fed. R. Civ. P. 26(d)(1). In fact, Womply's original state court petition did not even ask for initial disclosures,

[1] Womply has served four interrogatories and two requests for production. Two of the interrogatories and one of the requests for production request information or copies of Capital Plus's referrals from or agreements with vendors ***other than*** Blueacorn. Similarly, a third interrogatory concerns sensitive details regarding ***all*** Capital Plus's financial accounts and the ***total*** amount of processing fees Capital Plus received for PPP loans, without any semblance of limiting this interrogatory to financial accounts or processing fees related to the loans or alleged statements at issue in this case.

which is common for Texas state court pleadings. Further, as the litigation has already begun, Capital Plus has begun a litigation hold that would address the matters in dispute. Therefore, there is no real risk to Womply of files being lost or people losing their memory before the Court rules on the Motion to Dismiss. On the other hand, requiring Capital Plus Defendants to proceed with discovery would ***certainly*** cause them to incur significant costs and burden that may prove unnecessary. A stay is thus appropriate given the limited prejudice faced by Womply and the undue burden on Capital Plus Defendants.

II. The Court should stay discovery pending its ruling on Blueacorn's Motion to Dismiss: Rulings in Blueacorn's favor on arbitration or personal jurisdiction would affect the viability of Womply's claims in this Court and would limit discovery from Blueacorn.

Should this Court compel arbitration or dismiss Womply's claims against Blueacorn for want of jurisdiction, discovery on the remainder of Womply's claims against Capital Plus Defendants would be more limited in scope than if Blueacorn remained an actual party. While Blueacorn's Motion to Dismiss is pending, it is unlikely that any party could move to compel discovery form Blueacorn as either a party or non-party. *See Bell v. Koch Foods of Miss.*, 358 F. App'x 498, 501 (5th Cir. 2009) (affirming denial of pre-arbitration discovery, including because it would "defeat the FAA's requirement of summary and speedy disposition of motions and petitions to enforce arbitration clauses"); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("[T]he district court properly deferred discovery while deciding whether the defendants were proper parties to the action."). Moreover, Blueacorn possesses a significant portion of the documents potentially relevant to this dispute because Blueacorn—rather than Capital Plus—negotiated and signed the underlying agreement with Womply.

Moreover, if the Court determines that it lacks jurisdiction over Blueacorn, Capital Plus Defendants may move to dismiss under Rule 19(a) because Blueacorn may be an indispensable party. Fed. R. Civ. P. 19(b); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279–80 (10th Cir. 2012). Womply's complaint makes clear that it is seeking the full value of its agreement with Blueacorn due

to Capital Plus's alleged tortious interference with their agreement. Am. Compl. ¶¶ 130, 139, 148, 155–56, 161–63, 171, 177, 190 (ECF 20). At the same time, Womply alleges that Capital Plus actually owed these fees to Blueacorn, which in turn would owe the fees to Womply. *E.g.*, *id.* ¶¶ 128, 161. As a result, if Blueacorn is dismissed from this lawsuit, it could seek fees from Capital Plus, which would include any fees that were owed by Blueacorn to Womply. This would expose Capital Plus to a substantial risk of double liability, while Womply could still maintain its claims in arbitration as stated in its agreement with Blueacorn. Fed. R. Civ. P. 19(a)(1)(B)(ii); *see Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1312–13 (5th Cir. 1986). Therefore, dismissal of Blueacorn would also justify dismissal of Womply's claims against Capital Plus Defendants. Because Blueacorn's Motion to Dismiss could resolve the entire suit, any discovery taken in the meantime would be unnecessarily burdensome and expensive, so the Court should exercise its discretion to stay discovery pending that motion.

CONCLUSION

For the foregoing reasons, Capital Plus Defendants respectfully request that the Court stay discovery during the pendency of the motions to dismiss. For the same reasons, Capital Plus Defendants further respectfully request that the Court grant a temporary administrative stay of discovery during the pendency of this stay motion.

Dated: March 16, 2022

Respectfully submitted,

SUSMAN GODFREY L.L.P.

/s/ Megan E. Griffith

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CERTIFICATE OF CONFERENCE

Counsel for Capital Plus Defendants conferred with counsel for Blueacorn Defendants and Womply by phone on January 13, 2022 and by email on January 25, 2022. *See* Joint Status Report (ECF 33). Capital Plus Defendants understand that Womply is opposed as to the disposition of the matters raised in this motion and that Blueacorn does not oppose the requested relief.

/s/ Megan E. Griffith
Megan E. Griffith

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, a true and correct copy of the foregoing document was filed with the Court and served on all counsel of records via the Electronic Case Filing (ECF) system in the United States District Court for the Northern District of Texas.

/s/ Megan E. Griffith
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