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**UNITED STATES DISTRICT COURT****DISTRICT OF NEVADA**DEAN KROGSTAD, Individually and On  
Behalf of All Others Similarly Situated,

Plaintiff

v.

NATIONWIDE BIWEEKLY  
ADMINISTRATION, INC., *et al.*,

Defendants

Case No.: 2:16-cv-00465-APG-DJA

**Order Denying Motions to Dismiss for  
Lack of Personal Jurisdiction**

[ECF Nos. 136, 141]

Named plaintiff Dean Krogstad filed this putative class action for breach of contract and unjust enrichment against Nationwide Biweekly Administration, Inc. (NBA) and Loan Payment Administration LLC (LPA) in 2016. After I dismissed NBA and LPA's third-party complaint and the Ninth Circuit affirmed, Krogstad filed an amended complaint joining NBA and LPA's founder and sole shareholder, Daniel Lipsky. NBA, LPA, and Lipsky now move to dismiss for lack of personal jurisdiction. I deny the motions because (1) NBA and LPA have waived the affirmative defense of lack of personal jurisdiction; (2) I may exercise specific jurisdiction over NBA, LPA, and Lipsky for Krogstad's claims; and (3) exercise of personal jurisdiction over NBA, LPA, and Lipsky for the unnamed, out-of-state class members' claims does not violate due process.

**I. BACKGROUND**

NBA and LPA offered an "Interest Minimizer" (IM) program that permitted customers to divide their monthly mortgage payments into smaller installment payments made to NBA and LPA. ECF No. 122 at ¶ 2. NBA and LPA marketed the IM program through direct mail, including to consumers in Nevada. *Id.* at ¶ 25. NBA and LPA also marketed the program more

1 broadly on the internet and on television. *Id.* at ¶ 29. Customers who enrolled signed a form  
2 contract under which NBA and LPA promised to make payments on behalf of the customer until  
3 the loan was paid in full. *Id.* at ¶ 19. NBA and LPA collected a setup fee of up to \$995 from  
4 each participant. *Id.* at ¶ 23. In 2015, however, NBA and LPA’s partner banks terminated their  
5 relationships with NBA and LPA. *Id.* at ¶ 40. In turn, NBA and LPA suspended the IM program,  
6 ceased making payments on behalf of their customers, and retained the setup fees. *Id.* at ¶¶ 40,  
7 42-43.

8 Lipsky is the “founder, sole officer, sole shareholder, [and] principal managing control  
9 person” of NBA and LPA. *Id.* at ¶ 14. Krogstad alleges that Lipsky “controlled all of NBA’s and  
10 LPA’s business activities within the State of Nevada and throughout the nation.” *Id.* at ¶ 30.  
11 Among other things, Lipsky “personally obtained the names, addresses and loan balance  
12 information from public records” for the direct mailers, which he authored. *Id.* at ¶ 25.

13 Krogstad is a resident of Clark County, Nevada. *Id.* at ¶ 11. He executed the form  
14 contract with NBA and LPA to join the IM program in January 2015. *Id.* After NBA and LPA  
15 suspended the IM program, Krogstad filed this putative class action against them. ECF No. 1.  
16 NBA and LPA filed an answer and a third-party complaint against one of their banking partners,  
17 BMO Harris Bank. ECF Nos. 11; 40. BMO moved to dismiss the third-party complaint and  
18 compel arbitration. ECF No. 51. I granted BMO’s motion, the Ninth Circuit affirmed, and the  
19 United States Supreme Court denied certiorari. ECF Nos. 76; 89; 94.

20 The parties stipulated to stay proceedings pending the appeal. ECF No. 83. After the stay  
21 was lifted, Krogstad filed an amended complaint naming Lipsky as a defendant. ECF No. 122.  
22 NBA, LPA, and Lipsky now move to dismiss for lack of personal jurisdiction. ECF Nos. 136;  
23 141.

1 **II. DISCUSSION**

2 NBA, LPA, and Lipsky argue that I cannot exercise general or specific personal  
3 jurisdiction over them for Krogstad's claims and, alternatively, that I cannot exercise personal  
4 jurisdiction over them for the unnamed class members' claims. Krogstad responds that NBA and  
5 LPA waived their right to challenge personal jurisdiction and that I can exercise specific personal  
6 jurisdiction over the defendants for both his and the unnamed class members' claims.

7 **A. NBA and LPA's Waiver of Challenge to Personal Jurisdiction**

8 Federal Rule of Civil Procedure 12(b)(2) allows a party to assert the defense of lack of  
9 personal jurisdiction by motion before filing a responsive pleading. In turn, Rule 12(h)(1)  
10 provides that the defense is waived by failing to bring such a motion or include it in a responsive  
11 pleading. "[A] party's failure to satisfy those minimum steps" in Rule 12(h)(1) does not  
12 "constitute[] the only circumstance under which the party will be deemed to have waived a  
13 defense." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998), *as amended on*  
14 *denial of reh'g and reh'g en banc* (June 15, 1998). Instead, "[m]ost defenses, including the  
15 defense of lack of personal jurisdiction, may be waived as a result of the course of conduct  
16 pursued by a party during litigation." *Id.*

17 Here, NBA and LPA did not raise lack of personal jurisdiction in either their answer or a  
18 pre-answer motion. Instead, they moved to dismiss over three and a half years after Krogstad  
19 filed his complaint. And even putting aside Rule 12(h)(1), NBA and LPA's conduct  
20 demonstrates waiver because they filed an answer, a third-party complaint, and appealed my  
21 order dismissing the third-party complaint to the United States Supreme Court without once  
22 raising lack of personal jurisdiction. NBA and LPA argue that these proceedings have not  
23 moved to the merits, but neither the Federal Rules nor the Ninth Circuit's decisions explicitly

1 require that as a basis for waiver. NBA and LPA have waived their defense based on lack of  
2 personal jurisdiction.

3         The trio of United States Supreme Court decisions NBA and LPA rely on do not mandate  
4 a different result. First, they argue that under *Rockwell International Corp. v. United States*, 549  
5 U.S. 457 (2007), Krogstad’s amended complaint supersedes his initial complaint and “any  
6 alleged waiver of [the allegations in that complaint] become[s] irrelevant . . . .” ECF No. 144 at  
7 2. But *Rockwell* involved a motion to dismiss for lack of subject matter jurisdiction, which  
8 cannot be waived. 549 U.S. at 473-74; *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.  
9 1983) (“The defense of lack of subject matter jurisdiction cannot be waived, and the court is  
10 under a continuing duty to dismiss an action whenever it appears that the court lacks  
11 jurisdiction.”). NBA and LPA do not identify any cases where a party waived personal  
12 jurisdiction through its conduct but then raised a successful attack on personal jurisdiction after  
13 the filing of an amended complaint. Indeed, such a result would undermine Rule 12(h)(1)’s  
14 policy favoring litigation of personal jurisdiction at the outset of litigation.

15         NBA and LPA next point to two Supreme Court decisions issued since the beginning of  
16 this litigation. However, *BNSF Railway Company v. Tyrrell* addresses general jurisdiction,  
17 which Krogstad concedes does not apply here. 137 S. Ct. 1549, 1559 (2017); ECF No. 143 at 11.  
18 And in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, the  
19 Supreme Court “concededly undertook a ‘straightforward’ application of ‘settled principles’ of  
20 specific personal jurisdiction . . . .” *McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142, 165  
21 (S.D. Cal. 2019) (quoting *Bristol-Myers*, 137 S. Ct. 1773, 1783 (2017)). NBA and LPA thus  
22 could have raised their jurisdictional challenge under existing precedent. So I deny their motion  
23 because they waived the defense of lack of personal jurisdiction. Even if they had not waived

1 this defense, as discussed below, NBA and LPA are subject to specific personal jurisdiction on  
2 the claims asserted against them.

### 3 **B. Personal Jurisdiction for Krogstad’s Claims**

4 “When no federal statute governs personal jurisdiction, the district court applies the law  
5 of the forum state.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Nevada’s long-  
6 arm statute is co-extensive with federal standards, so I may exercise personal jurisdiction if  
7 doing so comports with federal constitutional due process. Nev. Rev. Stat. § 14.065(1); *Walden*  
8 *v. Fiore*, 571 U.S. 277, 283 (2014). “For a court to exercise personal jurisdiction over a  
9 nonresident defendant, that defendant must have at least minimum contacts with the relevant  
10 forum such that the exercise of jurisdiction does not offend traditional notions of fair play and  
11 substantial justice.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir.  
12 2004) (quotation omitted). “There are two forms of personal jurisdiction that a forum state may  
13 exercise over a nonresident defendant—general jurisdiction and specific jurisdiction.” *Boschetto*,  
14 539 F.3d at 1016. Krogstad concedes that general jurisdiction does not apply, so I address only  
15 whether he has established specific jurisdiction. ECF Nos. 143 at 11; 145 at 11.

16 Specific jurisdiction depends on an “activity or an occurrence that takes place in the  
17 forum State and is therefore subject to the State’s regulation.” *Goodyear Dunlop Tires*  
18 *Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). “In contrast to general, all-purpose  
19 jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected  
20 with, the very controversy that establishes jurisdiction.” *Id.* (quotation omitted). I apply a three-  
21 prong test to determine whether specific jurisdiction exists: (1) the defendant “must have  
22 performed some act or consummated some transaction with the forum by which it purposefully  
23 availed itself of the privilege of conducting business” in the forum state; (2) the plaintiff’s claims

1 “must arise out of or result from [those] forum-related activities; and (3) the exercise of  
2 jurisdiction must be reasonable.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th  
3 Cir. 2002).

4 When a defendant moves to dismiss for lack of personal jurisdiction on the basis of  
5 written materials rather than an evidentiary hearing, I must determine whether the plaintiff’s  
6 “pleadings and affidavits make a prima facie showing of personal jurisdiction.” *Schwarzenegger*,  
7 374 F.3d at 800 (quotation omitted). In deciding whether a plaintiff has met his burden, I must  
8 accept as true the uncontroverted allegations in his complaint, but a plaintiff cannot rest on the  
9 “bare allegations” of his complaint. *Id.* (quotation omitted).

#### 10 1. *Purposeful Availment*

11 The term “purposeful availment” describes two distinct analyses: purposeful availment  
12 and purposeful direction. *Schwarzenegger*, 374 F.3d at 802. “A purposeful availment analysis is  
13 most often used in suits sounding in contract.” *Id.* “Purposeful availment requires that the  
14 defendant engage in some form of affirmative conduct allowing or promoting the transaction of  
15 business within the forum state.” *Doe v. Am. Nat. Red Cross*, 112 F.3d 1048, 1051 (9th Cir.  
16 1997) (quotation omitted). “This requirement ensures that a defendant ‘will not be haled into a  
17 jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral  
18 activity of another party or third person.’” *Id.* (quoting *Burger King v. Rudzewicz*, 471 U.S. 462,  
19 475 (1985)).

20 Krogstad alleges that NBA, LPA, and Lipsky marketed the IM program to Nevada  
21 residents through direct mail. Moreover, Lipsky “personally obtained the names, addresses and  
22 loan balance information from public records” for the direct mailers, which Lipsky authored.  
23 ECF No. 122 at ¶ 25. Taken together, these allegations suggest that NBA, LPA, and Lipsky

1 obtained information about Nevada residents and purposefully marketed the IM program to those  
2 individuals. Because Krogstad alleges that the defendants engaged in affirmative conduct to  
3 promote the IM program in Nevada, Krogstad has made a prima facie showing of purposeful  
4 availment.

### 5 2. *Relation between contacts and claim*

6 Krogstad must plead facts showing that he would not have suffered an injury “but for”  
7 the defendants’ activities in Nevada. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007).  
8 Lipsky argues in reply that *Bristol-Myers* overruled this standard, as well as the Ninth Circuit’s  
9 three-part test for assessing specific jurisdiction. ECF No. 146 at 4-5. However, the *Bristol-*  
10 *Myers* court noted that it was applying “settled principles” of specific personal jurisdiction. 137  
11 S. Ct. at 1783. And the Ninth Circuit has regularly applied the “but for” standard and the three-  
12 part test after *Bristol-Myers*. See, e.g., *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064,  
13 1068 (9th Cir. 2017) (applying three-part test); *Morris on behalf of Oregon Cascade Corp. v.*  
14 *Harley*, 720 F. App’x 326, 328 (9th Cir. 2017) (applying “but for” standard). So I apply the “but  
15 for” standard as part of the three-part test. Here, but for NBA, LPA, and Lipsky’s affirmative  
16 conduct marketing the IM program to Nevada residents, Krogstad would not have suffered his  
17 injury from the program’s suspension. So Krogstad has shown that his claim arises out of the  
18 defendants’ contacts with Nevada.

### 19 3. *Reasonableness*

20 Because Krogstad has “shown that the exercise of personal jurisdiction satisfies the first  
21 two prongs of the personal jurisdiction test, the burden shifts to the defendant[s] to make a  
22 ‘compelling case’ that the exercise of jurisdiction would be unreasonable.” *In re W. States*  
23 *Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 745 (9th Cir. 2013) (quoting *Burger King*,

1 471 U.S. at 476-77). None of the defendants explicitly argues the exercise of jurisdiction would  
2 be unreasonable. Thus, they have not made a “compelling case” of unreasonableness. Krogstad  
3 therefore has established specific jurisdiction over the defendants on his claims.

#### 4 **C. Personal Jurisdiction for the Unnamed, Out-of-State Class Members’ Claims**

5 The defendants also turn to *Bristol-Myers* for the proposition that exercise of jurisdiction  
6 over them for the unnamed, out-of-state class members’ claims would violate due process. ECF  
7 No. 136 at 8-9. In *Bristol-Myers*, the Supreme Court held that the exercise of personal  
8 jurisdiction over a non-resident defendant for non-resident plaintiffs’ claims would violate due  
9 process because the non-resident plaintiffs’ claims were insufficiently related to the defendant’s  
10 forum-state contacts. 137 S. Ct. at 1781. The Supreme Court explicitly left open the questions of  
11 whether its holding reaches the federal courts and whether its logic applied to class actions. *Id.* at  
12 1783-84; *id.* at 1789 n.4 (Sotomayor, J., dissenting) (“The Court today does not confront the  
13 question whether its opinion here would also apply to a class action in which a plaintiff injured  
14 in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were  
15 injured there.”).

16 Although the Ninth Circuit has not reached these questions, the Seventh Circuit has since  
17 held that, in a federal class action, unnamed class members are not required to establish personal  
18 jurisdiction over the defendant. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020). Other  
19 district courts in the Ninth Circuit agree and distinguish *Bristol-Myers* from federal class actions.  
20 *See, e.g., Lacy v. Comcast Cable Commc’ns, LLC*, No. 3:19-CV-05007-RBL, 2020 WL  
21 1469621, at \*2 (W.D. Wash. Mar. 26, 2020). As one district court reasoned, (1) every plaintiff  
22 in a mass action is a “real party in interest” while only the named plaintiffs in a class action are,  
23 and (2) Federal Rule of Civil Procedure 23 “imposes additional due process safeguards on class



1 actions that do not exist in the mass tort context.” *Sotomayor v. Bank of Am., N.A.*, 377 F. Supp.  
2 3d 1034, 1038 (C.D. Cal. 2019). I agree with these decisions. Additionally, the defendants’  
3 interpretation would effectively limit personal jurisdiction in many nationwide class actions to a  
4 defendant’s home state and could lead to duplicative nationwide class actions if the defendants  
5 hailed from different states. So I deny the defendants’ motions to dismiss.

6 **III. CONCLUSION**

7 I THEREFORE ORDER that defendants Nationwide Biweekly Administration, Inc.,  
8 Loan Payment Administration LLC, and Daniel Lipsky’s motions to dismiss for lack of personal  
9 jurisdiction [ECF Nos. 136, 141] are **DENIED**.

10 DATED this 3rd day August, 2020.

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13 ANDREW P. GORDON  
14 UNITED STATES DISTRICT JUDGE  
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