

IN THE CIRCUIT COURT OF THE 18TH
JUDICIAL CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA.

CIVIL DIVISION

CASE NO. 2021CA002143

FOUNTAINHEAD SBF,

Plaintiff,

vs.

OTO ANALYTICS, INC. d/b/a WOMPLY,

Defendant.

COMPLAINT FOR EQUITABLE RELIEF
(SPECIFIC PERFORMANCE AND INJUNCTIVE RELIEF)

Plaintiff, Fountainhead SBF (“**Fountainhead**”), by and through its undersigned counsel, hereby sues Defendant, OTO Analytics, Inc. d/b/a Womply (“**Womply**”), for equitable relief, and alleges as follows:

INTRODUCTION

1. Fountainhead is a lender that is licensed and supervised by the United States Small Business Association (the “**SBA**”). Among other things, Fountainhead funds and services loans created under the Paycheck Protection Program (the “**PPP**”).

2. The PPP is a relief program designed to assist small businesses struggling with the economic disruption that has resulted from the COVID-19 pandemic, by providing inexpensive loans to small businesses to allow them to pay certain expenses, such as employee payroll.

3. In early February 2021, the United States government and the SBA made modifications to the PPP, for the purpose of providing sole proprietors, independent contractors, and self-employed business owners better access to PPP funding.

4. To make the funding and servicing of loans to these types of business more economically viable to lenders, Womply, with the assistance and input of Fountainhead and other lenders, designed a technology platform known as “Fast Lane” (along with the related Teslar system, the “**Technology Platform**”). The Technology Platform allows lenders, such as Fountainhead, to efficiently manage and track loans, as well as to administer, track and maintain certain loan files that were generated for each loan.

5. Fountainhead has originated loans through the Technology Platform (the “**Fast Lane Loans**”). As Womply is not a lender, and because Fountainhead is the licensed and regulated lender of record for the Fast Lane Loans, Fountainhead is responsible for reviewing and submitting each loan to the SBA for approval, and also for servicing the loans and facilitating forgiveness of the loans.

6. Fountainhead and Womply entered into agreements to govern their relationship, including the operative agreement that is relevant to this dispute: the PPP Loan Referral Agreement (the “**Agreement**”). Fountainhead agreed to compensate Womply for its services in connection with the Fast Lane Loans. To date, Fountainhead has paid Womply substantial fees for such referrals.

7. Recently, Womply has taken the position that it is entitled to more money from Fountainhead (as well as other lenders, as has been publicly reported), and has asserted that, by failing to pay all that is required, Fountainhead has materially breached the Agreement.¹

8. The Agreement specifically contemplates the situation in which one party has allegedly materially breached the Agreement. In that situation, the other party may submit a termination notice (as Womply has done here), and Womply is then required to return all loan files to Fountainhead within thirty days. This clause, of course, recognizes the importance of Fountainhead maintaining such loan files, even if the relationship between Fountainhead and Womply has ended.

9. Despite its contractual obligation to provide the loan files within thirty days of a termination notice, Womply has refused to provide Fountainhead with any of the loan files in its possession. Womply's refusal has caused – and is continuing to cause – harm to borrowers because, in many instances, without access to the Technology Platform or its loan files, Fountainhead is unable to assist borrowers in obtaining access to funds they need. Moreover, this situation has been exacerbated in recent weeks because Fountainhead has received – and is unable to fully comply with – law enforcement requests, subpoenas (including Grand Jury subpoenas), and regulatory inquiries regarding certain of the loan files.

10. Despite many requests from Fountainhead to Womply, highlighting the importance of the loan files, Womply has continued to block Fountainhead's access to them. Although Fountainhead repeatedly has attempted to resolve this loan file dispute with Womply amicably, including asking Womply to simply reinstate Fountainhead with access to the

¹ Fountainhead has paid Womply greater than 80% of the amount Womply claims it is entitled to in fees.

Technology Platform for a brief period, such that Fountainhead could retrieve the loan files in question at no expense to Womply, Womply has refused to cooperate.

11. Accordingly, Fountainhead brings this action seeking equitable relief. In particular, Fountainhead is seeking specific performance of Womply's obligation in the Agreement to provide Fountainhead with its loan files and related injunctive relief.

THE PARTIES, JURISDICTION AND VENUE

12. The Plaintiff, Fountainhead, is a Florida limited liability company with its principal place of business located in Seminole County, Florida.

13. The Defendant, Womply, is a California corporation doing business with Fountainhead in Seminole County, Florida.

14. This Court has personal jurisdiction over Womply because, among other reasons, (i) Womply breached the Agreement with Fountainhead by failing to deliver the loan files that are the subject of this dispute to Fountainhead in Florida, and (ii) Womply is engaged in substantial and not isolated activity in Florida, including the solicitation of PPP loan applications from small businesses located in Florida.

15. Venue is proper in Seminole County, Florida because the cause of action accrued here. Specifically, Fountainhead's breach of contract claim seeking specific performance against Womply accrued in Seminole County, Florida because Womply is obligated under the Agreement to deliver the loan files in dispute to Fountainhead in this county. In any event, as Womply is not a resident of the state of Florida, venue is proper in any county in Florida, including Seminole County.

16. Although the Agreement generally provides for arbitration of disputes between the parties, it expressly carves out “a party’s right to seek injunctive or other equitable relief in court.”

GENERAL ALLEGATIONS

17. On or about March 23, 2021, Fountainhead and Womply entered into the Agreement, with a retroactive effective date of February 9, 2021, pursuant to which Fountainhead engaged Womply to provide referrals and technology access to Fountainhead in connection with loan applicants seeking loans under the PPP.²

18. The term of the Agreement was one year, but it provided that either party had the right to terminate the Agreement prior to that time by giving the other party 7 days’ prior written notice “if the other party is in material breach of any warranty, representation, covenant or obligation under this Agreement . . . and is not able to cure such breach within seven (7) calendar days of receiving the Notice of Termination. Ex. 1 (Agreement), at §§ 6.1 & 6.2.

19. On or about May 26, 2021, while the parties were negotiating a fee issue, Womply sent Fountainhead a notice of termination, through which Womply terminated the Agreement pursuant to Section 6.2 of the Agreement based upon Fountainhead’s alleged breach of contract (the “**Notice of Termination**”).³

20. Section 6.3 of the Agreement provides in its entirety (with emphasis added):

² As Womply has taken the position that the Agreement contains confidential and proprietary information, Fountainhead is simultaneously submitting a Notice of Confidential Information within Court Filing pursuant to Florida Rule of Judicial Administration 2.420(d)(2), such that the Agreement (Exhibit 1) will remain non-public.

³ As Womply has taken the position that the Notice of Termination contains confidential and proprietary information, Fountainhead is simultaneously submitting a Notice of Confidential Information within Court Filing pursuant to Florida Rule of Judicial Administration 2.420(d)(2), such that the Notice of Termination (Exhibit 2) will remain non-public.

Upon Lender's receipt of a Notice of Termination, Lender may request from Womply, and Womply shall reasonably provide to Lender, a plan for **transmitting to Lender electronic copies of loan files in its possession that relate to the Referred Loans**, to the extent not otherwise in the possession of Lender. Womply will not unreasonably withhold its cooperation in such selection and transmissions. Both parties shall agree upon a data format and method of transmission. **Womply shall reasonably provide such requested information to Lender no later than thirty (30) days following the termination of this Agreement.**

Ex. 1, at § 6.3.

21. After receiving Womply's Notice of Termination on June 1, 2021, Fountainhead requested that Womply comply with its obligations under Section 6.3 by providing it with copies of all loan files referred by Womply through the Technology Platform (the "**Loan Files**").

22. As of August 27, 2021, however, Womply has failed and refused to provide Fountainhead with copies of the Loan Files, at various points in time: (i) asserting that it is not under any obligation to produce the Loan Files because Womply believes it is entitled to more money from Fountainhead, (ii) relying upon an arbitrary and baseless interpretation of the term "loan file" that is inconsistent with standard lending practice and regulatory authority, and (iii) complaining of the burden imposed on it by making the required production of the Loan Files.

23. Fountainhead has been negotiating with Womply for a number of weeks, in good faith, to attempt to reach an all-encompassing resolution, but Womply continues to refuse to provide the Loan Files.

24. In order to comply with its obligations to provide the Loan Files, Womply could simply reinstate Fountainhead's access to the Technology Platform, which would require little more than a click of a button.

COUNT I: SPECIFIC PERFORMANCE FOR BREACH OF CONTRACT

25. Fountainhead repeats and realleges the allegations set forth in paragraphs 1 through 24 of the Complaint, as if fully set forth in this Count.

26. Womply's failure and refusal to provide Fountainhead with the Loan Files constitutes a breach of Womply's contractual obligation under Section 6.3 of the Agreement.

27. The legal remedy available to Fountainhead of damages is inadequate. Fountainhead is responsible for both funding and servicing all of the loans at issue and complying with certain law enforcement and regulatory requests. Womply's failure and refusal to provide Fountainhead with the Loan Files, as required under the Agreement, prevents Fountainhead from being able to do so, and monetary damages are not capable of compensating Fountainhead for the resulting harm.

28. A mutuality of remedies exists between the parties under the Agreement. *See* Ex. 1 (Agreement). For example, Womply has the right to bring an arbitration against Fountainhead for damages if Fountainhead allegedly does not pay Womply the fees owed under the Agreement (as Womply has, in fact, done); and Fountainhead, in turn, has the right to seek equitable relief from Womply in court, as it is doing in this action. *Id.*

29. Womply's obligation to provide the Loan Files is sufficiently certain such that the Court can enforce the provision. Specifically, Fountainhead here is asking the Court to enforce the provisions of Section 6.3 of the Agreement requiring Womply to provide Fountainhead with the requested Loan Files, which Womply has failed and refused to do. *See* Ex. 1 (Agreement), at § 6.3.

30. As demonstrated above, the requested performance by Womply is substantially similar (and, in fact, identical) to that promised by Womply in Section 6.3 of the Agreement.

31. All conditions precedent to the bringing of this action have occurred, been waived, or been performed.

WHEREFORE, Plaintiff, Fountainhead, respectfully requests that the Court enter a final judgment in its favor and against Defendant, Womply, decreeing that Womply shall immediately transmit to Plaintiff electronic copies of the Loan Files, and granting Plaintiff such other and further relief as this Court deems just and proper.

COUNT II: INJUNCTIVE RELIEF FOR BREACH OF CONTRACT

32. Fountainhead repeats and realleges the allegations set forth in paragraphs 1 through 24 of the Complaint, as if fully set forth in this Count.

33. Womply's failure and refusal to provide Fountainhead with the Loan Files constitutes a breach of Womply's contractual obligation under Section 6.3 of the Agreement.

34. Fountainhead has no adequate remedy at law to compensate for Womply's failure to provide the Loan Files.

35. Fountainhead will suffer irreparable harm if Womply is not required to provide Fountainhead with the Loan Files. Fountainhead is responsible for both funding and servicing all of the loans at issue and complying with certain law enforcement and regulatory requests. Womply's failure and refusal to provide Fountainhead with the Loan Files, as required under the Agreement, prevents Fountainhead from being able to do so, and monetary damages are not capable of compensating Fountainhead for the resulting harm.

36. Fountainhead has a substantial likelihood of prevailing on the merits of its claim against Womply because the parties' Agreement requires Womply to return the Loan Files upon termination of the Agreement.

37. An injunction serves the public interest. Absent an injunction requiring Womply to provide the Loan Files, Womply's failure to provide the Loan Files harms innocent third parties, including small businesses, who have been denied access to loans. It has also caused harm to law enforcement efforts, as Fountainhead is presently unable to comply with certain requests from law enforcement.

WHEREFORE, Plaintiff, Fountainhead, respectfully requests that the Court enter a temporary and permanent injunction in its favor and against Defendant, Womply, decreeing that Womply shall immediately transmit to Plaintiff electronic copies of the Loan Files, and granting Plaintiff such other and further relief as this Court deems just and proper.

Dated this 27th day of August, 2021.

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EXHIBIT 1

UNOFFICIAL

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EXHIBIT 2

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REDACTED

UNOFFICIAL

IN THE CIRCUIT COURT OF THE 18TH
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CIVIL DIVISION

CASE NO. _____

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vs.

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Defendant.

CASE MANAGEMENT PLAN

(STREAMLINED)

The parties are to meet, review, and discuss the Case Management Plan to agree upon dates according to the guidelines set forth in the above Case Management Plan. The parties are to sign the certification below and submit the proposed Case Management Order with the agreed upon dates to the Court for approval and signature. This is required to be submitted to the court or filed in the court file for approval of the Case Management Order.

1. Date of First Response (i.e., Answer, Notice of appearance, Motion for Extension of Time, Motion to Dismiss)	The date of the first filing
2. Deadline for adding new parties, amendment of pleadings	Should be 45-60 days since response date
3. Deadline for Witness & Exhibit List (Witnesses MUST be listed by actual NAME of the witness, and not by designation (i.e., use of such designations as "Corporate Representative," "Records Custodian," "Adjustor," or "IME Doctor" standing alone is insufficient)	Should be 45-60 days before Trial
4. Deadline for Expert Disclosure	Should be 90-120 days prior to projected trial date for Plaintiff

(Parties should furnish opposing counsel with the names and addresses of all expert witnesses under Rule 1.390(a) to be called at trial and all information regarding expert testimony that is required by Rule 1.28(b)(5). Each party is limited to one expert per specialty. No other expert testimony should be permitted at trial. Information furnished pursuant to this paragraph should be timely filed with the Clerk of the Court.)	Should be 60-90 days prior to projected trial date for Defendant
5. Objections to pleadings	Should be resolved 120-150 days prior to projected trial date
6. Deadline for Discovery Completion (including Depositions)	Should be 30 days prior to projected trial date
7. Deadline for Dispositive Motions, including <i>Daubert</i> Motions-Failure to do so shall constitute a waiver at Trial of any <i>Daubert</i> related evidence objection or issue Responsibility for scheduling of the Hearing shall be upon the party filing the Motion or Objection.	Should be heard 15-30 days prior to projected trial date
8. Deadline for Mediation:	Should be 45-60 days prior projected trial date
9. Trial Date	Must include length of trial period and projected date trial is desired to commence approximately 12 months from date of the Case Management Plan and submission of Case Management Order to Court

I hereby certify that all parties have met and conferred regarding all proposed dates for the Case Management Plan and Case Management Order and certify that all dates proposed in the Case Management Order have been agreed to by the parties.

Date: _____

Signature of Counsel and Unrepresented Parties. Counsel must state FL Bar number. Unrepresented parties must include email address for service.

EXHIBIT A

IN THE CIRCUIT COURT OF THE 18TH
JUDICIAL CIRCUIT, IN AND FOR
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CIVIL DIVISION

CASE NO. _____

FOUNTAINHEAD SBF,

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Defendant.

**CASE MANAGEMENT
ORDER (STREAMLINED)**

Pursuant to the dictates of Administrative Order AOSC20-23 of the Florida Supreme Court, and AO 21-24, Eighteenth Judicial Circuit, it is, hereby,

ADJUDGED that the following deadlines are applicable to this action, and that same will be strictly applied by the Court:

The projected date of trial for this matter is the trial docket beginning _____. A firm trial date will be ordered by the presiding judge when this matter is at issue and notice as to same is filed in accordance with Rule 1.440, Fla. R. Civ. P.

Any request(s) for the addition of new parties, or amendments to the pleadings, shall be served within _____ days of the date of this Order.

The fact witnesses of all parties shall be disclosed to all other parties no later than _____ days prior to the above projected trial date.

All of Plaintiff's Expert Witnesses shall be disclosed to all other parties no later than _____ days prior to the above projected trial date. Defendant's Expert Witnesses shall be disclosed to all other parties within 30 days thereafter.

All fact AND expert discovery shall be completed no later than _____ days prior to the above projected trial date.

All objections to the pleadings, and all pre-trial motions shall be resolved no later than__days prior to the above projected trial date.

Mediation shall be completed no later than_____days prior to the above projected trial date.

ORDER

THE COURT, having reviewed the preceding Case Management Dates finding them to be satisfactory. Accordingly, it is hereby **ORDERED** that

1. COMPLIANCE WITH THIS CASE MANAGEMENT ORDER: The parties shall strictly comply with the terms of this Case Management Plan and Case Management Order unless otherwise ordered by the Court. **FAILURE TO COMPLY WITH ALL REQUIREMENTS OF THIS ORDER WILL RESULT IN THE IMPOSITION OF SANCTIONS.**

2. ADDITIONAL EIGHTEENTH CIRCUIT AND DIVISION SPECIFIC GUIDELINES: All counsel and unrepresented parties shall familiarize themselves and comply with the requirements of the following: (i) **Amended Administrative Order Establishing the Eighteenth Judicial Circuit Courtroom Decorum Policy (AO 09-06)**; and (ii) **any division-specific guidelines and policies that may be applicable.**

3. MODIFICATION OF THIS ORDER: The parties may not, individually or by agreement, alter or extend the deadlines in **this Order**, or waive any of the provisions of this Order. The provisions of this Order may be **modified** only upon motion/stipulation and Court order in accordance with applicable law.

4. NOTICES FOR TRIAL: Within ten (10) days of the case being at issue as defined by Rule 1.440, Fla. R. Civ. P., or within ten (10) days from the date of this Order if the case has been at issue longer than ten (10) days, the Plaintiff shall confer with opposing counsel/party regarding the anticipated length of trial and file a Notice for Trial. The Plaintiff shall forward a copy of the Notice for Trial to the Case Manager at the email address noted on the Eighteenth Judicial Circuit website.

5. DISCOVERY: All counsel and unrepresented parties shall familiarize themselves with the current edition of the Florida Handbook on Civil Discovery Practice and seek to resolve discovery issues without court intervention whenever possible.

6. SERVICE OF THIS ORDER: Counsel is ordered to promptly serve and file proof with the Clerk, no more than five (5) business days from the date of this Order that all *pro se* parties, subsequently named or appearing herein, have been served copies of this Order. In the event a party is unrepresented and has not designated an email address for purposes of electronic service, counsel for Plaintiff shall be responsible for serving this Order and all future orders of the Court via a non-electronic means (U.S. mail, Federal Express or the equivalent) and shall file a Certificate of Service with the Court indicating who was served, the date of service, and the method of service (including any address or email used) within three (3) business days. If Plaintiff is unrepresented, Counsel for the Defendant shall have this same obligation. If all parties are unrepresented, the Plaintiff shall provide stamped addressed envelopes to the Court with submission of this and any other proposed Order.

7. SETTLEMENT: *The case will not be removed from the docket until all documents necessary for closure of the case are filed with the Clerk and notification has been provided to the*

judicial assistant. A notice of settlement is not sufficient to remove the case from the trial docket.

DONE AND ORDERED this _____ day of _____, 2021, in

_____,
_____, County, Florida.

CIRCUIT JUDGE

A true and correct copy of the foregoing was distributed to all parties by filing and service via the eportal to all attorney(s)/interested parties identified on the eportal Electronic Service List.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in your county at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days. If you are hearing or voice impaired, call 711.

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