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.

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PLAINTIFF'S AMENDED PETITION FOR ORDER TO SHOW CAUSE FOR EXPEDITED TEMPORARY INJUNCTIVE RELIEF

Plaintiff, Fountainhead SBF LLC ("Fountainhead"), by and through its undersigned counsel, and pursuant to Section 11 of the Administrative Policies and Procedures of this Court and Florida Rule of Civil Procedure 1.610(a), files this Amended Petition for Order to Show Cause for Expedited Temporary Injunctive Relief ("Petition") against Defendant, OTO Analytics, Inc. d/b/a Womply ("Womply").

INTRODUCTION

1. Fountainhead is a lender that is licensed and supervised by the United States Small Business Administration (the "**SBA**"). Exhibit 1, Affidavit of Christopher G. Hurn ("**Hurn Dec.**")[1] dated September 7, 2021, 2021, at ¶ 5. Among other things, Fountainhead funds and services loans created under the Paycheck Protection Program (the "**PPP**"). *Id.*

[1] The Hurn Dec was filed under a Notice of Confidential Information on September 8, 2021 as part of the original Verified Petition for Order to Show Cause for Expedited Temporary Injunctive Relief, and incorporated herein to the Amended Petition for Order to Show Cause for Expedited Temporary Injunctive Relief.

2. Womply is a business that referred loans and provided technology services to Fountainhead, and presently controls access to certain of Fountainhead's Loan Files (defined below). Hurn Dec., ¶¶ 8, 14. Womply has blocked Fountainhead's access to such Loan Files. *Id.*, ¶¶ 14, 19, 20.

3. In this Petition, Fountainhead respectfully requests that the Court issue an Order requiring Womply to show cause why the Court should not require Womply to provide Fountainhead with its Loan Files.

4. As explained below, the operative agreement between Womply and Fountainhead explicitly states that Womply is required to provide Fountainhead with its Loan Files no later than thirty days following the termination of the operative agreement, if the Loan Files have been requested by Fountainhead. Hurn Dec., Ex. A. That agreement was terminated on June 8, 2021, and Fountainhead's request for its Loan Files was made on June 16, 2021. Hurn Dec., ¶ 12; Hurn Dec., Ex. B. Accordingly, the Loan Files should have been provided by Womply to Fountainhead approximately two months ago. During that time period, Fountainhead has persistently devoted significant time and resources attempting to persuade Womply to honor its contractual obligation, without the need for Court intervention, but has been unsuccessful. Hurn Dec., ¶ 19.

5. Unfortunately, the urgency of Womply's refusal to provide the Loan Files has become more acute, and the situation requires expedited judicial relief, because: (i) seventy-seven loans to small businesses are pending and cannot be funded without the Loan Files, which loans the SBA has indicated must be funded in the coming days or not at all, (ii) in the wake of Womply's refusal to provide Fountainhead with its Loan Files, the SBA has stressed to Fountainhead (and other PPP lenders) its regulatory obligation to maintain ready access to its

Loan Files, emphasizing the need to remedy this situation promptly, and (iii) more than sixty-five regulatory inquiries and subpoenas have been issued to Fountainhead seeking information contained in the Loan Files that Fountainhead cannot provide, with initial return dates that have passed or are quickly approaching. Hurn Dec., ¶¶ 15-18.

BACKGROUND FACTS

6. 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.

7. 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.

8. 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**"). Hurn Dec., ¶ 6. 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. *Id.*

9. Fountainhead has originated more than 263,000 loans through the Technology Platform (the "**Fast Lane Loans**"). Hurn Dec., ¶ 8. As Womply is not a lender, and because Fountainhead is the licensed and regulated lender of record for their 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. *Id.*

10. 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**"). Hurn Dec., Ex. A. Fountainhead agreed to compensate Womply for its services in connection with the Fast Lane Loans. *Id.*; Hurn Dec., ¶ 10. To date, Fountainhead has paid Womply substantial fees for such referrals. Hurn Dec., ¶ 10.

11. Recently, Womply has taken the position that it is entitled to more money from Fountainhead, and has asserted that, by failing to pay all that is required, Fountainhead has materially breached the Agreement. Hurn Dec., ¶ 11. Fountainhead vigorously disputes that it owes Womply any additional fees and, in any event, has paid Womply greater than 80% of the amount Womply claims it is owed. *Id.* The issue of whether any additional fees are owed is presently being arbitrated in an alternative dispute forum. *Id.*[2]

12. The Agreement specifically contemplates the situation in which one party has allegedly materially breached the Agreement, such as by failing to make payments pursuant to the terms of the Agreement. Hurn Dec., Ex. A. In that situation, (i) the other party may submit a termination notice (as Womply has done here), (ii) Fountainhead may then request its Loan Files (as Fountainhead has done here), and (iii) Womply is then required to return all Loan files to Fountainhead within thirty days. *Id.*, at § 6.3. This clause, of course, recognizes the importance of Fountainhead maintaining such Loan Files, even if the relationship between Fountainhead and Womply has ended.

[2] In the alternative dispute forum, Fountainhead has raised a number of counterclaims, including a claim for declaratory relief. In the declaratory relief claim, Fountainhead seeks, among other things, a declaration that Womply is obligated to return the Loans Files. Fountainhead is not seeking injunctive relief or specific performance in that forum, and seeks injunctive relief here on an expedited basis to preserve the status quo. There is no hearing scheduled or motion before the alternative dispute forum regarding the Loan Files.

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

> 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**.

Hurn Dec., Ex. A, at § 6.3.

14. On June 16, 2021, after receiving the Notice of Termination from Womply, Fountainhead requested from Womply, pursuant to Section 6.3 of the Agreement, a plan for transmitting to Fountainhead the Loan Files in its possession. Hurn Dec., ¶ 13.

15. Despite its contractual obligation to provide the Loan Files within thirty days of the termination of the Agreement (i.e., on or before July 8, 2021), Womply has refused to provide Fountainhead with any of the Loan Files in its possession. Hurn Dec., ¶ 14.

16. 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. Hurn Dec., ¶ 15. Moreover, this situation has been exacerbated in recent weeks because Fountainhead has received law enforcement requests, subpoenas (including Grand Jury subpoenas), and regulatory inquiries regarding certain of the Loan Files. *Id.*

17. Despite many requests from Fountainhead to Womply, highlighting the importance of the Loan Files, Womply has continued to block Fountainhead's access to them. Hurn Dec., ¶ 19. 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 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. *Id.*

18. Fountainhead has an obligation to maintain all documents and supporting material relating to its loans. In this regard, the Loan Files Fountainhead is seeking for each of its loans consist of the following: (i) "Know Your Customer" information; (ii) bank information; (iii) funding instructions; (iv) "Audit Report"; (v) the applicant's tax documentation; (vi) Lender Form 2484; (vii) all other data utilized to determine applicant eligibility; (viii) all other applicant information from Plaid and Persona; and (ix) any and all communications with borrowers or potential borrowers (the "**Loan Files**"). Hurn Dec., ¶ 16. ("Loan files" also consist of a signed Borrower Application Form 2483 and promissory note, but Fountainhead already has access to those documents through a DocuSign system and therefore is not seeking them from Womply in this Petition.)

19. In order to comply (or largely comply)[3] 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.

20. Based on the foregoing, on August 27, 2021, Fountainhead filed a Complaint against Womply seeking Specific Performance and Injunctive Relief. Fountainhead served its Complaint on Womply on Womply's counsel on August 31, 2021.[4]

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[3] Some "Loan File" information appears to be maintained by Womply in a location other than the Technology Platform. However, assuming there has been no deletion or modification of information contained on the Technology Platform, access to the Technology Platform is likely to provide Fountainhead with the majority of the information it needs on an expedited basis.

[4] As explained in note 3, below, Womply's outside counsel agreed to accept service of process.

21. By this Petition, Fountainhead seeks a temporary injunction against Womply decreeing that Womply immediately transmit or cause to transmit to Fountainhead electronic copies of the Loan Files.

ARGUMENT

Section 11 of the Administrative Policies and Procedures of this Court authorize a party to file a Petition for Order to Show Cause, and, if the Order to Show Cause is granted, to schedule a hearing date to have the matter heard. In this Verified Petition, as supported through the Sworn Affidavit of Fountainhead's CEO, Fountainhead seeks an Order requiring Womply to show cause why a temporary injunction should not be issued requiring Womply to immediately provide Fountainhead with the Loan Files.

Essentially, Fountainhead is seeking an injunction against Womply's continued breach of contract; in particular, Fountainhead is seeking specific performance of Womply's obligation under the Agreement to provide Fountainhead with the Loan Files. "[T]he same general rules apply to injunctions against the breach of a contract that apply to specific performance." *Professional Golfer's Ass'n of America v. Bankers Life & Cas. Co.*, 166 So. 2d 488, 492 (Fla. 2d DCA 1964); *Grant v. U.S.*, 289 F. Supp. 2d 1361, 1367 (S.D. Fla. 2003) ("Specific performance is a form of injunctive relief.").

Florida Rule of Civil Procedure 1.610(a) provides for relief in the form of a temporary injunction if the movant establishes: (i) a likelihood of irreparable harm, (ii) the unavailability of an adequate remedy at law, (iii) a substantial likelihood of success on the merits, and (iv) support for the injunction is within considerations of public interest. *Phantom of Clearwater, Inc. v. Pinellas Cnty.*, 894 So. 2d 1011, 1014 (Fla. 2d DCA 2005). Establishment of these elements carries with it the duty to grant an appropriate remedy—in this case, injunctive relief. *See Sentry*

Ins. v. Dunn, 411 So. 2d 336, 336 (Fla. 5th DCA 1982). In deciding whether to issue an injunction in a particular case, the Court should consider the totality of the circumstances and determine whether injunctive relief is necessary to achieve justice between the parties. *Davis v. Joyner*, 409 So. 2d 1193, 1195 (Fla. 4th DCA 1982).

A. <u>Fountainhead Has Suffered and Will Continue to Suffer Irreparable Harm</u>

Fountainhead will suffer irreparable harm if an injunction is not issued against Womply requiring Womply to return the Loan Files. A party suffers irreparable injury where the party "cannot be adequately compensated if, at some later point in time, it prevails on the merits of the case." *Glen Raven Mills, Inc. v. Ramada Int'l, Inc.*, 852 F. Supp. 1544, 1547 (M.D. Fla. 1994).

Under the Agreement, Womply is required to provide Fountainhead with the Loan Files following occurrences that indisputably have occurred here (*i.e.*, Womply issued a Notice of Termination of the Agreement and Fountainhead requested its Loan Files). Hurn Dec., Ex. A. Inexplicably, Womply has refused to provide Fountainhead with the Loan Files, which has and will continue to cause severe hardship to Fountainhead, innocent third parties, and law enforcement efforts. Hurn Dec., ¶¶ 15-19.

As an initial matter, because Fountainhead has been deprived of access to the Loan Files, it is unable to assist certain borrowers in obtaining access to funds that these borrowers desperately need in order to continue operating their businesses. Hurn Dec., ¶ 16. Recently, Fountainhead received notice from the SBA's Office of Credit Risk Management concerning loans in "undisbursed" status, stating that Fountainhead needed to fund the loans within three business days. *Id.* (Fountainhead is seeking additional time to fund the loans, during the pendency of this Petition. *Id.*) This is a direct result of Fountainhead not having access to the Loan Files from Womply. *Id.* Currently, there are seventy-seven loans, with a total loan principal of $1,060,499, that are unable to be funded because Fountainhead cannot access the Loan Files due to Womply's conduct. *Id.* In particular, Fountainhead does not have access to the due diligence information, bank and financial information, and fraud check information, which prevents Fountainhead from completing the loan process, and, in turn, assisting these small businesses. *Id.* If these seventy-seven loans are not funded promptly, they never can be funded.

Moreover, as of September 2, 2021, Fountainhead has received more than sixty-five subpoenas from government agencies and law enforcement officials, including the Secret Service, the U.S. Attorney's Office, and the U.S. Department of Homeland Security, regarding more than 125 separate borrowers for loans referred through Womply. Hurn Dec., ¶ 17. Fountainhead is unable to fully comply with law enforcement and judicial requests because it does not have access to the complete Loan Files. *Id.* If Fountainhead, at some later date, is provided with access to its Loan Files, it likely will be of less utility to law enforcement officials.

Furthermore, due to Womply's actions, and despite the contractual protections specifically designed to avoid this situation, Fountainhead's ability to comply with its regulatory obligations has been compromised. Hurn Dec., ¶ 18. In this regard, under SBA regulations and rules, Fountainhead is obligated to maintain, for a period of six years following final disposition of its PPP loans, all applications for financing, financing instruments, and "all other documents and supporting material relating to such loans, including correspondence." 13 CFR 120.461(d). Fountainhead is further required to allow the SBA's authorized representatives to review, inspect and copy all records and documents relating to the loans or as requested for SBA oversight. 13 CFR 120.1010. Fountainhead is unable to maintain this documentation because of Womply's refusal to honor the terms of the Agreement and provide Fountainhead with the Loan Files. Hurn Dec., ¶¶ 18, 19.

This irreparable harm will continue and worsen if Womply's actions remain unchecked, as Womply continues to flout its clear obligations under the Agreement to return to Fountainhead its Loan Files.

B. <u>Fountainhead Has No Adequate Remedy at Law</u>

A party seeking temporary injunctive relief must also show that it lacks an adequate remedy at law. This requirement is similar to the "irreparable harm" requirement, and Florida courts recognize that a party has an inadequate remedy at law where money will not compensate the party for its injuries. *See Women's Emergency Network v. Vush*, 191 F. Supp. 2d 1356, 1360 (S.D. Fla. 2002).

For the reasons discussed in the preceding section, Fountainhead has no adequate remedy at law to redress Womply's conduct. Womply's continued refusal to comply with its contractual obligation to provide Fountainhead with the Loan Files will result in Fountainhead: (i) being unable to fund otherwise appropriate loans, (ii) running afoul of its regulatory obligations, and (iii) being unable to respond to subpoenas and other law enforcement / judicial requests. Hurn Dec., ¶¶ 17-19. None of these harms is compensable by mere money damages.

C. <u>Fountainhead Has a Substantial Likelihood of Success on the Merits</u>

To establish a right to a temporary injunction, the plaintiff must show it has a "substantial likelihood of success on the merits" of this action. *See Cushman & Wakefield, Inc. v. Cozart,* 561 So. 2d 368, 371 (Fla. 2d DCA 1990).

Here, Fountainhead has asserted entitlement to specific performance because of Womply's breach of the Agreement. As explained more thoroughly above, Fountainhead is seeking what it is plainly entitled to under the Agreement: its Loan Files. While Womply has taken the position that it will not return the Loan Files until it is paid additional fees, that is an entirely separate issue (that presently is being arbitrated in an alternative dispute resolution forum). The Agreement specifically contemplates the scenario that one party has allegedly breached the Agreement, such as not paying the fees it is required to pay under the Agreement. Hurn Dec., Ex. A. In that circumstance, the other party may issue a termination notice (as Womply has done), and Fountainhead then may request the return of the Loan Files (as Fountainhead has done). Hurn Dec., Ex. B; Hurn Dec. ¶¶ 12-13. Womply is then required to return the Loan Files within 30 days of the Notice of Termination, which it has failed to do here. Hurn Dec., ¶ 14. For these reasons, Fountainhead respectfully submits that the ultimate issue before the Court – whether Womply is obligated to provide the Loan Files to Fountainhead – is straightforward, and Fountainhead has a very high probability of success on the merits.

D. <u>The Requested Relief Will Promote and Protect the Public Interest</u>

Finally, courts consider whether the issuance of an injunction will promote and protect the public interest, looking to the effect of the requested injunction on non-parties. *See Dragomirecky v. Town of Ponce Inlet*, 882 So. 2d 495, 497 (Fla. 5th DCA 2004). Florida courts have held that consideration of the public interest weighs against injunctive relief only where the injury to the public (if the injunctive relief is granted) outweighs the moving party's right to injunctive relief. *Id.*

In this case, entry of the requested injunctive relief would not cause injury to the public; on the contrary, it would significantly serve the public interest. Perhaps most obviously, if Womply complies with its contractual obligation to provide Fountainhead with its Loan Files, Fountainhead will be in a position to fund scores of loans to small businesses that otherwise cannot be funded due to Womply's restriction of access. Hurn Dec., ¶ 16. Moreover, as evidenced by the more than sixty-five law enforcement subpoenas served on Fountainhead seeking loan file information, law enforcement official and regulators require certain Loan File information, but are being deprived of the information because of Womply's refusal to provide the Loan Files. *Id.*, ¶ 12. Finally, for reasons designed to ultimately serve the public interest, the SBA requires that lenders maintain ready access to their complete Loan Files, and it is axiomatic that the return of Fountainhead's Loan Files will serve that objective. Hurn Dec., ¶ 18.

WHEREFORE, Fountainhead respectfully requests that this Court enter an Order to Show Cause scheduling an expedited hearing and requiring Womply to show cause why injunctive relief should not be granted directing Womply to immediately transmit or cause to transmit to Fountainhead electronic copies of the Loan Files, and granting such other relief as this Court deems just and proper.

Dated this 10th day of September, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed through the Florida statewide E-Portal system this 10th day of September, 2021, which will send a copy to Alexander L. Cheney, Esq., Counsel for OTO Analytics, Inc. d/b/a Womply, acheney@willkie.com[5] and OTO Analytics, Inc. d/b/a Womply Co-Counsel, Kevin D. Fowler, kfowler@foley.com and Emily J. Lang, elang@foley.com.

/s/ Eric C. Reed
ERIC C. REED, ESQ.

[5] On August 27, 2021, Alexander L. Casey, Esq. of Willkie Farr & Gallagher, LLP agreed to accept service on behalf of Womply, and on August 31, 2021, a copy of the Complaint was provided to Alexander L. Casey, Esq.