

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

FOUNTAINHEAD SBF,	)	
	)	
Plaintiff,	)	CIVIL DIVISION
	)	
v.	)	
	)	
OTO ANALYTICS, INC. d/b/a WOMPLY,	)	CASE NO.: 2021-CA-002143
	)	
Defendant.	)	
	)	
	)	
	)	

**DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY OF COURT
RECORDS**

Defendant, OTO ANALYTICS, INC. d/b/a WOMPLY ("Defendant" or "Womply"), by and through its undersigned counsel and pursuant to Rule 2.420(e) of the Florida Rules of Judicial Administration, hereby moves this Court for the entry of an Order designating Exhibits 1 and 2 to the Complaint filed by Plaintiff, FOUNTAINHEAD SBF ("Plaintiff" or "Fountainhead"), as confidential and exempt from public disclosure. In support thereof, Womply states as follows:

BACKGROUND

1. On August 27, 2021, Fountainhead filed its Complaint seeking specific performance and injunctive relief based upon an alleged breach of the PPP Loan Referral Agreement (the "Agreement") entered into by and between Fountainhead and Womply. The Agreement is attached as Exhibit 1 to Plaintiff's Complaint. A letter terminating the Agreement (the "Notice of Termination") is attached as Exhibit 2 to Plaintiff's Complaint.

2. In recognition of Womply's position that the Agreement and the Notice of Termination contain competitively sensitive, confidential and proprietary information, Fountainhead filed the Agreement and Notice of Termination in connection with a Notice of Confidential Information Within Court Filing.

3. On August 31, 2021, the Clerk of the Seminole County Circuit Court issued a Memorandum stating that Exhibits 1 and 2 “will not be held confidential for more than 10 days unless steps are taken according to the Florida Rules of Court, Judicial Administration Rule 2.420(d)(3).”

4. Accordingly, Womply brings this Motion requesting an Order deeming the Agreement and Notice of Termination as confidential.

LEGAL ARGUMENT

5. Rule 2.420(c)(9)(A)(ii), Fla. R. Jud. Admin., provides that documents containing confidential business information and trade secrets shall be considered confidential and exempt from public disclosure when filed in the Court records, and that the Courts can order such protection prior to filing. Here, Womply maintains confidential and proprietary business information, the protection of which is mandated by the Florida Rules of Judicial Administration. Specifically, Womply seeks to protect proprietary, confidential pricing information, which is set forth in both the Agreement and the Notice of Termination.

6. It is Womply’s position the pricing information is confidential and proprietary to Womply, pursuant to Section 2 of the Agreement and subject to all terms and conditions of the Womply Master Developer Agreement (the “MDA”), a copy of which is attached to this Motion as **Exhibit A**.

7. The MDA, which is incorporated by reference into the Agreement, provides in pertinent part:

All materials and information provided by Womply to Client and identified at the time of disclosure as “Confidential” or bearing a similar legend, ***and all other information that Client reasonably should have known is the Confidential Information of Womply, will be considered Confidential Information***; for the avoidance of doubt, the Service, API Package, ***all pricing information*** and terms of this Agreement, are Confidential Information. Client will maintain the

confidentiality of the Confidential Information and will not disclose such information to any third-party without the prior written consent of Womply.

Ex. A, § 4.

8. Further, Womply maintains that the Agreement, the Notice of Termination, and the pricing information detailed therein contain competitively sensitive, confidential and proprietary material—the disclosure of which would significantly harm Womply.

9. Given that the Agreement and Notice of Termination contain proprietary and non-public information, confidentiality is required in order to protect Womply's trade secrets and to avoid unfair disadvantage to Womply in revealing to the public, competitors or other third parties, the terms of the Agreement, Notice of Termination, and the pricing information detailed therein.

10. Womply brings this Motion to comply with the deadline set forth in the Clerk's Memorandum and to protect its confidential and proprietary business information. Womply in no way intends to waive, and this Motion should not be construed as a waiver of, its right to arbitrate pursuant to the Agreement.

11. The undersigned counsel has conferred with counsel for Fountainhead, and Fountainhead does not oppose the relief sought herein.

WHEREFORE, Womply moves the Court to designate the Agreement and Notice of Termination as confidential, and direct that the Clerk allow the Agreement and Notice of Termination, which are identified as Exhibits 1 and 2 to Plaintiff's Complaint and are attached to Plaintiff's Notice of Confidential Information Within Court, to remain in the Court records as confidential and exempt from public disclosure.

Rule 2.420(e) Certificate of Good Faith

The undersigned attorney certifies that this motion is made in good faith and is supported by a sound factual and legal basis.

Dated this 10th day of September, 2021.

/s/ Emily J. Lang

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d/b/a Womply*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2021, a true copy of the foregoing was filed with the Clerk of Court via the Florida Court E-filing Portal which was directed to electronically furnish a copy of the forgoing to all counsel/parties of record.

/s/ Emily J. Lang

Emily J. Lang

Florida Bar No.: 1011367

EXHIBIT A



[SOLUTIONS](#) [PRICING](#) [RESOURCES](#) [COMPANY](#) [APPS LOG IN](#)

[PPP FAST LANE
SIGN IN](#)



[Terms of Service](#)

[Privacy Policy](#)

[Copyright Dispute Policy](#)

[Master Developer
Agreement](#)

[Referral Terms](#)

[Storefront Terms](#)

[Offers Terms](#)

[Bills Terms](#)

[Business Loan Assistance
Terms](#)

[PPP Loan Assistance
Terms](#)

[HIPAA Business Associate
Agreement](#)

[Affiliate Terms and
Conditions](#)

[Data Access Agreement](#)

Master Developer Agreement

This Master Developer Agreement (the “Agreement”) is entered into on the Order Effective Date (the “Effective Date”) between Oto Analytics, Inc. (“Womply”) and the Account listed on the Order Form (the “Client”).

The parties hereby agree as follows:

1. ACCESS RIGHTS; RESTRICTIONS

- 1.1. **Access.** Subject to the Client’s compliance with the terms and conditions of this Agreement, Womply hereby agrees that during the Term (as defined below) of this Agreement, the Client has the non-exclusive right to: (i) internally use the package of application programming interface materials provided by Womply (the “API Package”) solely as necessary to make an application owned and operated by the Client (the “Client Application”) interoperate with the Womply service described on womply.com (collectively with the

API Package, the “Service”), (ii) use the Service in the Client Application provided to end users (consumers or businesses) (the “End Users”), and (iii) use the End User information and data provided via the Service (the “Output”) solely in the Client Application or for your internal business purposes. Client’s use of the Service and Output shall comply with the terms and conditions of this Agreement, Womply’s Privacy Policy, applicable documentation, and all other Womply-provided written instructions.

- 1.2. **Restrictions.** Unless Womply specifically agrees in writing, Client will not, and will use commercially reasonable efforts to make sure a third party does not: (i) attempt to reverse engineer (except as permitted by law), decompile, disassemble, or otherwise attempt to discover the source code, object code, or underlying structure, ideas, or algorithms of the Service; (ii) modify, translate, or create derivative works based on the Service; (iii) make the Service or Output available to, or use the Service or Output for the benefit of anyone other than Client or End Users; (iv) sell, resell, license, sublicense, distribute, rent or lease any Service or Output to any third party, or include any Service or Output in a service bureau, time-sharing, or equivalent offering or (v) attempt to create a substitute or similar service through use of, or access to, the Services or Output.

Client will use the Service and Output only in compliance with (i) the rights granted hereunder, (ii) any agreements between Client and End Users, and (iii) all applicable laws and regulations.

- 1.3. **Ownership.** Except for the rights expressly granted under this Section 1, Womply reserves and retains all right, title, and interest in and to the Service which includes but is not limited to the API Package and any related Output, software, products, works, and other intellectual property created, used, or provided by Womply for the purposes of this Agreement. To the extent the Client provides Womply with any feedback relating to the Service (including, without limitation, feedback related to usability, performance, interactivity, bug reports and test results) ("Feedback"), Womply will own all right, title and interest in and to such Feedback (and the Client hereby makes all assignments necessary to achieve such ownership).
- 1.4. **Privacy and Authorization.** The Client represents that its privacy policy shall, for the duration of this Agreement, (a) be maintained in a manner that is compliant with applicable law and (b) obtain sufficient consents and provide sufficient notice for Womply to use and process End User data in accordance with Womply's Privacy Policy.

2. **PAYMENTS**

Client will pay Womply for the Service as set forth in the Order Form provided to the

Client (the "Payments"). Payments must be made within fifteen (15) days from the date of Womply's invoice. Unpaid invoices are subject to a finance charge of 1.5% per month or the maximum permitted by law, whichever is lower, plus all expenses of collection. The Client will be responsible for all (i) taxes associated with Service other than taxes based on Womply's net income and (ii) Womply's costs of collection in the event of the Client's delinquent payment. All Payments made are non-refundable, non-cancellable, and not subject to set-off.

3. **TERM; TERMINATION**

- 3.1. **Term.** This Agreement will have a term that begins on the Effective Date and continues through to the API Access End Date on the Order Form (the "Initial Term"). After the Initial Term, this Agreement will automatically renew for successive one (1) year Terms (each, a "Renewal Term") unless either party provides the other party sixty (60) days advance written notice of non-renewal prior to the end of the Initial Term or then-current Renewal Term (as applicable). Together, the Initial Term and Renewal Terms will be referred to as the "Term." Womply may revise its rates for the following Renewal Term by providing Client ninety (90) days written notice prior to the end of the then-current Initial Term or Renewal Term.
- 3.2. **Termination.** Either party may terminate this Agreement in the event the other party materially breaches this Agreement and fails to cure such breach within ten (10) days from receipt of written notice

thereof. Womply may terminate this Agreement at any time for any reason or no reason by providing five (5) days' written notice to Client. In addition, Womply may immediately suspend the Services in the event it determines or believes that (i) there is unauthorized access to the Service via Client's account, (ii) continued provision of the Service may do material harm to Womply or its networks or systems or reputation or subject Womply to liability or (iii) Client materially breached Section 1 or 2 of this Agreement. Upon termination of this Agreement, all rights granted herein to Client will terminate and Client will make no further use of the Services or API Package (copies of which will be immediately returned to Womply or destroyed). But for Section 1.1, all provisions of this Agreement will remain in force and effect in the event of this Agreement's termination.

4. **CONFIDENTIALITY**

During the term of this Agreement, Womply may provide Client with confidential and/or proprietary materials and information ("Confidential Information"). All materials and information provided by Womply to Client and identified at the time of disclosure as "Confidential" or bearing a similar legend, and all other information that Client reasonably should have known is the Confidential Information of Womply, will be considered Confidential Information; for the avoidance of doubt, the Service, API Package, all pricing information and

terms of this Agreement, are Confidential Information. Client will maintain the confidentiality of the Confidential Information and will not disclose such information to any third-party without the prior written consent of Womply. Client will only use the Confidential Information internally for the purposes contemplated hereunder. The obligations in this Section 4 will not apply to any information that: (i) is made generally available to the public without breach of this Agreement, (ii) is developed by the Client independently from the Confidential Information, (iii) is disclosed to Client by a third-party without restriction, or (iv) was in Client's lawful possession prior to the disclosure to Client and was not obtained by Client either directly or indirectly from Womply. Client may disclose Confidential Information as required by law or court order; provided that, Client provides Womply with prompt written notice thereof and uses its best efforts to limit disclosure. At any time, upon Womply's request, Client will return to Womply all Confidential Information in its possession, including, without limitation, all copies and extracts thereof. Notwithstanding the foregoing, Client may disclose Confidential Information to any third-party to the limited extent necessary to exercise its rights, or perform its obligations, under this Agreement; provided that, all such third parties are bound in writing by obligations of confidentiality and non-use at least as protective of the Confidential Information as in this Agreement. With respect to data provided by Client to Womply hereunder, Womply will comply with the obligations set forth in Womply's Privacy Policy, and

Womply will not be obligated by any previously executed nondisclosure agreement between Womply and Client.

5. **INDEMNITY**

The Client will defend, indemnify and hold Womply and its suppliers, agents, representatives and affiliates harmless from and against all third-party claims, actions, proceedings, damages, losses, judgments, settlements, costs and expenses (including attorneys' fees arising from or in connection with (i) Client breach of any laws or regulations (including with respect to privacy), (ii) Client's use of the Services and Output, or (iii) Client's violation of any agreements it has with any End User.

6. **WARRANTY; DISCLAIMER**

THE SERVICE AND ANYTHING ELSE PROVIDED BY WOMPLY HEREUNDER IS PROVIDED "AS IS." TO THE FULLEST EXTENT PERMITTED BY LAW, NEITHER WOMPLY NOR ITS AFFILIATES, SUPPLIERS, LICENSORS, OR DISTRIBUTORS MAKE ANY WARRANTY OF ANY KIND, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR ANY WARRANTY THAT THE SERVICE IS FREE FROM DEFECTS. WOMPLY DOES NOT MAKE ANY WARRANTY AS TO THE OUTPUT THAT MAY BE OBTAINED FROM USE OF THE SERVICE.

7. **LIMITATIONS OF LIABILITY**

TO THE FULLEST EXTENT PERMITTED BY LAW, NEITHER WOMPLY NOR ITS AFFILIATES, SUPPLIERS, LICENSORS, AND DISTRIBUTORS WILL BE LIABLE UNDER THIS AGREEMENT FOR ANY: (A)

INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES, OR (B) LOSS, ERROR, OR INTERRUPTION OF USE OR DATA (IN EACH CASE, WHETHER DIRECT OR INDIRECT), OR (C) COST OF COVER OR LOSS OF BUSINESS, REVENUES, OR PROFITS (IN EACH CASE WHETHER DIRECT OR INDIRECT), IN EACH CASE EVEN IF THE PARTY KNEW OR SHOULD HAVE KNOWN THAT SUCH DAMAGES WERE POSSIBLE AND EVEN IF A REMEDY FAILS OF ITS ESSENTIAL PURPOSE. TO THE FULLEST EXTENT PERMITTED BY LAW, WOMPLY'S AGGREGATE LIABILITY UNDER THIS AGREEMENT WILL NOT EXCEED THE AMOUNT PAID OR PAYABLE BY CLIENT TO WOMPLY DURING THE SIX (6) MONTH PERIOD PRIOR TO THE EVENT GIVING RISE TO LIABILITY (PROVIDED THAT, IF NO FEES ARE PAID OR PAYABLE, SUCH AMOUNTS WILL BE LIMITED TO ONE HUNDRED DOLLARS (US\$100)).

8. **MISCELLANEOUS**

Womply reserves the right to amend this Agreement at any time its sole discretion. In the event of any such amendment, Womply will notify you by email and/or place a notice on Womply's site located at <https://www.womply.com/legal/mda/>. If Client does not agree with such changes, Client may stop using the Service at any time. Client's continued use of the Service in any way means that Client agrees to all of the changes to this Agreement. Except for changes by Womply as described in the foregoing, no other amendment or modification of this Agreement will be effective unless in writing and signed by both Womply and Client. If any provision of this Agreement

is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. This Agreement is not assignable or transferable by a party except with the other party's prior written consent; but, a party may transfer and assign its rights and obligations under this Agreement without consent to an affiliate or in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets to which this Agreement relates. If such a transfer or assignment is made in favor of a direct competitor with the other party, then the other party may terminate this Agreement upon written notice. This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications, and other understandings relating to the subject matter of this Agreement, and all waivers and modifications must be in a writing signed by both parties, except as otherwise provided herein. No agency, partnership, joint venture, or employment is created as a result of this Agreement. Any notices in connection with this Agreement will be in writing and sent by first class US mail, confirmed facsimile or major commercial rapid delivery courier service to the address specified below (or such other address as may be properly specified by written notice hereunder). Email notice will be permitted by Womply if sent to the applicable account email address. This Agreement will be governed by the laws of the State of California,

without regard to the conflict of law provisions thereof. Except for claims for injunctive or equitable relief or claims regarding intellectual property rights (which may be brought in any competent court), any dispute arising under this Agreement will be finally settled in accordance with the Streamlined Arbitration Rules of JAMS (formerly operating as Judicial Arbitration and Mediation Service, Inc.) by a single arbitrator appointed in accordance with such Rules. The arbitration will take place in San Francisco, California, USA, in the English language and the arbitral decision may be enforced in any court. With respect to all disputes arising in relation to this Agreement, but subject to the preceding arbitration provision, the parties consent to exclusive jurisdiction and venue in the state and Federal courts located in San Francisco, California.

UNOFFICIAL

UNOFFICIAL