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

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

AFFIDAVIT OF ALEXANDER L. CHENEY

STATE OF CALIFORNIA)
)
COUNTY OF SAN MATEO)

BEFORE ME, the undersigned authority, personally appeared Alexander L. Cheney, who after being duly sworn, upon his oath affirms and says:

1. My name is Alexander L. Cheney. I am over the age of twenty-one and am capable of making this affidavit.

2. I am a member of the bar of the State of California and a partner at Willkie Farr & Gallagher LLP, outside counsel to Oto Analytics, Inc. d/b/a Womply ("Womply"), in the arbitration captioned *Oto Analytics, Inc. d/b/a Womply v. Fountainhead SBF LLC*, No. 1100-111-808 (the "Arbitration").

3. I submit this affidavit in support of Womply's Motion to Compel Arbitration and Opposition to Plaintiff's Verified Amended Petition for Order to Show Cause for Expedited Temporary Injunctive Relief in the above-captioned matter.

4. I base this affidavit on my personal knowledge and on information obtained in the course of the Arbitration.

5. On or about March 23, 2021, Fountainhead and Womply entered into a PPP Loan Referral Agreement (the "Agreement"), a copy of which is attached as Exhibit 1 to the Complaint.

6. Womply terminated the Agreement, as it is expressly permitted to do, because Fountainhead failed to pay Womply over $90 million in fees due under the Agreement and a separate contract between Womply and Fountainhead.

7. On June 15, 2021, Womply commenced arbitration against Fountainhead captioned *Oto Analytics, Inc. d/b/a Womply v. Fountainhead SBF LLC*, No. 1100-111-808, by filing with JAMS an arbitration demand and statement of claim (the "Arbitration Demand").

8. In its Arbitration Demand, Womply asserted claims for, among other things, breach of contract and declaratory judgment based on Fountainhead's failure to pay Womply more than $90 million in fees.

9. On July 23, 2021, Fountainhead submitted an answer to Womply's Arbitration Demand and asserted counterclaims against Womply in the Arbitration (the "Arbitration Counterclaims").

10. A true and correct copy of relevant excerpts from the Arbitration Counterclaims is attached hereto as Exhibit A.

11. On August 5, 2021, JAMS appointed as arbitrator in the Arbitration the Honorable Elaine Rushing (Ret.) (the "Arbitrator"), a former California state court judge.

12. On July 27, 2021, Womply and Fountainhead submitted their respective "strike lists" to JAMS ranking the possible arbitrators provided by JAMS.

13. On August 20, 2021, Womply answered Fountainhead's counterclaims, disputing that it breached its obligations under the Agreement.

14. The Arbitrator has scheduled a conference with the parties for September 17, 2021.

15. Fountainhead has not sought emergency relief in the Arbitration.

STATE OF CALIFORNIA
COUNTY OF SAN MATEO

The foregoing instrument was sworn to and subscribed before me, by means of ☐ physical presence or ☐ online notarization, this ____________________ by Alexander L. Cheney, who is personally known to me or who has produced ____________________ as identification.

Alexander L. Cheney

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

Notary Public

State of California
County of San Mateo

Name typed, printed or stamped
My Commission Expires:________

Subscribed and sworn to (or affirmed) before me on this 11th day of Sep, 2021 by Alexander L. Cheney
proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

(Seal) Signature Atieh

ATIEH RAMEZANI
COMM. #2215599
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
My Comm. Exp. Sep.23, 2021

EXHIBIT A

JAMS ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN

OTO ANALYTICS, INC. D/B/A WOMPLY, **No. 1100-111-808**

Claimant,

v.

FOUNTAINHEAD SBF LLC,

Respondent.

____/

RESPONDENT'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS

Respondent, Fountainhead SBF LLC ("**Fountainhead**"), submits its Answer and Affirmative Defenses to the Demand for Arbitration and Statement of Claim (the "**Statement of Claim**") filed by Claimant, Oto Analytics, Inc. d/b/a Womply ("**Womply**").[1] Fountainhead also submits its Counterclaims against Womply.

I. INTRODUCTION AND PRELIMINARY STATEMENT

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

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. 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. The program concluded accepting applications on May 31, 2021.

[1] Fountainhead denies all allegations in the Statement of Claim not specifically addressed in this Answer, Affirmative Defenses, and Counterclaim.

2. JAMS has jurisdiction over these Counterclaims pursuant to Section 12 of the Operative Agreement. **Ex.** 3, at § 12.

<u>COUNT I – BREACH OF CONTRACT</u>
(FAILURE TO PROVIDE LOAN FILES)

3. Fountainhead repeats and re-alleges the allegations of paragraphs 1 – 2 of these Counterclaims, as if fully set forth herein.

4. On or about March 23, 2021, Fountainhead and Womply entered into the Operative Agreement, with an effective date of February 9, 2021, pursuant to which Fountainhead engaged Womply to provide referrals and technology access to Fountainhead in connection with applicants seeking loans under the PPP. **Ex.** 3.

5. The term of the Operative Agreement was [redacted] **Ex.** 3, at §§ 6.1 & 6.2.

6. On or about May 26, 2021, while Womply was seeking to obtain additional fees from Fountainhead, Womply sent Fountainhead the Notice of Termination, through which Womply terminated the Operative Agreement pursuant to Section 6.2 based upon Fountainhead's alleged breach of contract.

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

[redacted]

Ex. 3, at § 6.3.

8. After receiving Womply's Notice of Termination on June 1, 2021, Fountainhead requested that Womply comply with its obligations under Section 6.3 of the Operative Agreement by providing it with copies of the Loan Files.

9. As of July 23, 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.

10. Moreover, Section 11 of the Operative Agreement provides that the Operative Agreement is [redacted] The SBA regulations require lenders of record to maintain access to their loan files.

11. In connection with Womply's decision to block lenders' access to their own loan files, the SBA sent a "reminder" to certain lenders regarding the need to provide the SBA with access to lender files, including "all records and documents, relating to SBA guaranteed loans," citing a number of regulations and pieces of authority concerning items that must be maintained in the loan file.

12. 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.

13. Womply's failure and refusal to provide Fountainhead with copies of the Loan Files constitutes a breach of Womply's contractual obligation under Section 6.3 and Section 11 of the Operative Agreement.

14. Womply's breach has prevented Fountainhead from funding loan applications, servicing existing borrowers, complying with law enforcement requests, and adhering to SBA regulations, causing economic and reputational damage to Fountainhead.

<u>COUNT II – BREACH OF CONTRACT</u>
(FAILURE TO PROVIDE A FUNCTIONAL TECHNOLOGY PLATFORM)

15. Fountainhead repeats and re-alleges the allegations of paragraphs 1 – 14 of these Counterclaims, as if fully set forth herein.

16. On or about March 23, 2021, Fountainhead and Womply entered into the Operative Agreement, with an effective date of February 9, 2021, pursuant to which Fountainhead engaged Womply to provide referrals and technology access to Fountainhead in connection with applicants seeking loans under the PPP. **Ex.** 3.

17. Section 2 of the Operative Agreement provides that [redacted]

18. Womply breached Section 2 of the Operative Agreement because of the many defects in the Technology Platform, including, among other things: (i) the Technology Platform failing to adequately track loans, such that Fountainhead was not even aware of the existence of over 100 potential loans, which Fountainhead could not fund as a result; (ii) the Technology Platform failing to adequately require potential Borrowers to provide critical tax documentation, resulting in Fountainhead having to decline hundreds of loan applications; (iii) in many cases, missing or incomplete documentation relating to loans and potential loans, or delays in obtaining such documentation, including know-your-customer information, banking information, signed documentation, and required SBA forms for each loan, and (iv) lack of customer service or support, requiring Fountainhead to hire a team of contractors to handle customer support phone calls from

disgruntled potential borrowers, and attempt to help such potential borrowers solve problems related to the Technology Platform.

19. These defects resulted in Fountainhead's inability to fund hundreds of PPP loans, causing significant economic loss to Fountainhead in lost lender fees and reputational damage.

<u>COUNT III –BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING</u>

20. Fountainhead repeats and realleges the allegations in paragraphs 1-19 of these Counterclaims, as if fully set forth herein.

21. A contractual relationship existed between the parties by virtue of the Operative Agreement and predecessor agreements (*i.e.*, the Initial Agreement and the Letter Agreement).

22. The parties entered into those agreements with the understanding and expectation that the parties would act in good faith and deal fairly with each other pursuant to their terms.

23. The law implies in every contract a covenant of good faith and fair dealing, and the obligations imposed by the implied covenant of good faith and fair dealing govern the manner in which the contractual obligations must be discharged - fairly and in good faith.

24. Womply has violated the covenant of good faith and fair dealing in various significant ways, including: (i) improperly abusing its power by renegotiating its agreements with Fountainhead to obtain more favorable economic terms for itself, (ii) attempting to utilize its control of the Loan Files to extract even more favorable economic terms for itself, (iii) improperly terminating the Operative Agreement in order to block Fountainhead's access to the Loan Files, (iv) refusing to provide Fountainhead with its Loan Files by relying on a baseless and arbitrary definition of the term "Loan File," (v) refusing to comply to law enforcement requests for Loan File information, and (vi) refusing to cooperate with Fountainhead in connection with law enforcement requests and Fountainhead's regulatory obligations.

25. As a result of this conduct by Womply, Fountainhead has suffered damages and will continue to suffer damages in the future, including fees that otherwise would not have to be paid to Womply (per the initial agreements), lost lender fees, and reputational harm.

COUNT IV – TORTIOUS INTERFERENCE

26. Fountainhead repeats and realleges the allegations in paragraphs 1-25 of these Counterclaims, as if fully set forth herein.

27. As Womply was well-aware, a primary purpose of the Technology Platform was to facilitate referrals of potential PPP borrowers and allow Fountainhead to provide loans to those potential borrowers in a commercially viable manner.

28. For the purpose of obtaining improper negotiating leverage in a fee dispute with Fountainhead, Womply cut off Fountainhead's access to the Technology Platform, in an effort to disrupt the relationship between Fountainhead and its borrowers and prospective borrowers.

29. In many instances – and the number continues to increase with each day that Fountainhead does not have access to the Technology Platform – those relationships are disrupted because Fountainhead is unable to access Loan Files, fund loans or service existing borrowers.

30. This improper conduct on the part of Womply has caused – and will continue to cause – economic and reputational harm to Fountainhead.

COUNT V – DECLARATORY RELIEF

31. Fountainhead repeats and realleges the allegations in paragraphs 1-30 as if fully set forth herein.

32. An actual, present controversy regarding Fountainhead's rights and obligations exist, which is the proper subject of declaratory relief.

33. Fountainhead seeks a declaratory judgment that: (i) the Initial Agreement and Letter Agreement have been superseded to the extent they concern the same subject matter as the Operative Agreement, given the existence of the Entire Agreement Clause, (ii) Fountainhead does not owe

Womply a [redacted] for loans referred to Fountainhead through the Technology Platform, (iii) the fee table set forth in Section 4.3 of the Operative Agreement is to be read progressively, not retroactively, and (iv) Womply is obligated under the Operative Agreement to return to Fountainhead its Loan Files, which include all of the information contained on the Technology Platform.

VI. REQUEST FOR RELIEF

Fountainhead respectfully requests an award in arbitration as follows:

(i) Womply takes nothing by reason of the Statement of Claim;

(ii) Fountainhead is awarded its damages resulting from Womply's breach of Section 6.3 and Section 11 of the Operative Agreement, which respectively provide that Womply must return Fountainhead's Loan Files and the Operative Agreement is subject to SBA regulations, which require lenders to maintain access to their loan files, in an amount to be determined by the arbitrator;

(iii) Fountainhead is awarded its damages resulting from Womply's breach of Section 2 of the Operative Agreement, which provides that Womply must make available to Fountainhead a technology platform that facilitates loan referrals, in an amount to be determined by the arbitrator;

(iv) Fountainhead is awarded its damages resulting from Womply's breach of the covenant of good faith and fair dealing, in an amount to be determined by the arbitrator;

(v) Fountainhead is awarded its damages resulting from Womply's tortious interference with Fountainhead's relationship with its borrowers and potential borrowers, in an amount to be determined by the arbitrator;

(vi) A declaration that: (i) the Initial Agreement and Letter Agreement have been superseded to the extent they concern the same subject matter as the Operative Agreement, given the existence of the Entire Agreement Clause, (ii) Fountainhead does not owe [redacted] for loans referred to Fountainhead through the Technology Platform, (iii) the fee table set forth in Section 4.3 of the Operative Agreement is to be read progressively, not retroactively, and (iv) Womply is obligated under the Operative Agreement to return to Fountainhead its Loan Files, which include all of the information contained on the Technology Platform; and

(vii) Any other relief the arbitrator deems just and proper.

Dated: July 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer, Defenses, and Counterclaim was served via the JAMS Portal and electronic mail on July 23, 2021 upon:

/s/ Daniel Tramel Stabile
Daniel Tramel Stabile, Esq.