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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BENWORTH CAPITAL PARTNERS LLC,

Petitioner,

v.

OTO ANALYTICS, LLC,

Respondent.

Case No. 3:24-cv-4840-AMO

OPPOSITION TO PETITION TO VACATE FINAL ARBITRATION AWARD

Hon. Araceli Martínez-Olguín

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Respondent Oto Analytics, LLC (f/k/a Oto Analytics, Inc., d/b/a Womply) ("Womply") respectfully submits this opposition to the Petition to Vacate Final Arbitration Award ("Petition" or "Pet.") filed by Petitioner Benworth Capital Partners LLC ("Benworth").

INTRODUCTION

After nearly two years of litigation, including a seven-day hearing (the "Evidentiary Hearing") akin to a trial, an arbitrator issued a 73-page award in a JAMS arbitration captioned *Oto Analytics, Inc. d/b/a Womply v. Benworth Capital Partners LLC*, JAMS Ref. No. 1210038203 (the "Arbitration").[1] The defendant in that proceeding, Benworth, now asks this Court to vacate the award, ostensibly for the narrow reasons for vacatur permitted by the Federal Arbitration Act (the "FAA"). In reality, however, Benworth's 67-page brief (and over 2,000-page appendix) seeks the type of full-blown appeal of the Arbitrator's legal conclusions and factual findings that is prohibited by the FAA. Benworth's Petition should be denied.

Benworth is a Florida-based lender that made Paycheck Protection Program ("PPP") loans to small businesses. In 2021, Benworth contracted with Womply, a technology company, to use the technology services Womply developed specifically for PPP lenders. After Benworth failed to pay Womply all of the fees due under the parties' agreements, Womply commenced the Arbitration against Benworth for breach of contract. In an effort to avoid paying Womply its fees (and to recoup fees it already paid to Womply), Benworth asserted several affirmative defenses and counterclaims raising novel issues of first impression based on the complicated and barely litigated regulatory scheme governing the PPP. The Arbitrator rejected those arguments, found that Benworth breached its agreements with Womply, and awarded Womply approximately $118 million. Womply has moved to confirm the award in this Court.

Now, Benworth argues that the award should be vacated for the principal reason that the Arbitrator exceeded his powers by "manifestly disregarding the law." Benworth's own authority makes clear that Benworth carries a high burden to prove this claim, and even simple errors of

[1] The arbitrator was Alexander L. Brainerd (the "Arbitrator"), a Fellow of the American College of Trial Lawyers with decades of litigation and arbitration experience. *See* https://www.jamsadr.com/brainerd/.

law or unsubstantiated findings of fact are insufficient. Instead, Benworth must establish that the Arbitrator understood a law that is "***well defined, explicit, and clearly applicable***," correctly interpreted the law, and disregarded it. *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879–80 (9th Cir. 2007) (emphasis in original) (cleaned up). As detailed below, the Arbitrator did not manifestly disregard any law. Moreover, the laws at issue in the Arbitration were not well defined, explicit, or clearly applicable. To the contrary, Benworth's affirmative defenses and counterclaims were based on a complex regulatory scheme involving laws, regulations, rules, and administrative guidance that are virtually untested in court.

The PPP was a first-of-its-kind government program hastily implemented in 2020 in the midst of a national crisis. In response to the COVID-19 pandemic, Congress passed legislation that created the PPP (Pet. at 7), which was administered by the United States Small Business Administration ("SBA") and authorized private lenders to "loan" money to businesses to keep them afloat. (Pet. App'x 3185–3257 (Final Award ("FA")) at 2.) Those loans were forgivable if the borrower used the funds for certain purposes, meaning most businesses would never have to pay them back. (FA at 9.) The loans were also guaranteed by the federal government, virtually eliminating any risk to the lenders so long as the lenders followed program rules. (*Id.*) For making the loans, the federal government paid PPP lenders lucrative lender processing fees. (*Id.*) The PPP was governed by a complex web of laws, regulations, rules, and SBA guidance—some of which were specifically tailored to the PPP and others that pre-existed the PPP and applied generally to a broad category of SBA loan programs. The PPP ended in 2021.

In the Arbitration, Benworth relied on various regulations, rules, and SBA guidance to argue that (i) certain of Womply's fees were illegal because they exceeded an SBA limit on fees a lender could pay to an agent for helping a borrower prepare a loan application, and/or (ii) all of Womply's fees were illegal because the SBA never reviewed Benworth's agreements with Womply. Apart from one decision from a federal court in Texas (discussed below), the parties were unable to identify any case law from any state or federal court in the United States that interpreted or applied many of the regulations, rules, and guidance relevant to Benworth's arguments. The Arbitrator therefore was tasked with resolving several issues of first impression. In resolving those issues, the Arbitrator considered substantial evidence submitted by the parties. During the Evidentiary Hearing, the parties submitted 240 exhibits into evidence and elicited testimony from five fact witnesses and one expert witness who testified regarding the regulatory scheme applicable to the PPP. The parties also submitted more than 200 pages of pre- and post-hearing briefing. The Arbitrator drew legal conclusions, made findings of fact, and ultimately rejected Benworth's arguments. Under the FAA, the Court is not permitted to review the Arbitrator's legal conclusions and findings of fact, let alone overturn them if the Court finds the Arbitrator committed error (he did not), which is what Benworth seeks here.

The Arbitrator also did not, as Benworth claims, disregard applicable laws and apply "his own rough sense of justice" in order to reach a result that he thought was more "fair." (*See, e.g.*, Pet. at 5, 28–29, 61–62.) As Benworth acknowledges, the Arbitrator expressly recognized that "it is not, actually, the Arbitrator's role to decide what is 'fair;' he is instead merely tasked with interpreting the contract provisions." (FA at 54; *see also* Pet. at 48.) But what Benworth fails to disclose is that the Arbitrator made this statement in response to ***Benworth's*** request that the Arbitrator ignore the parties' Agreements and applicable law in order to reach a result that Benworth believed would be more equitable. In his award, the Arbitrator wrote that he was "somewhat sympathetic to Benworth's argument that, in light of this damages award, it will receive only a fraction of its compensation from the SBA." (FA at 54.) However, he made clear that he was not supposed to decide what is "fair," and that "Benworth chose to enter into these Agreements with Womply; no evidence was introduced that it was coerced in any way." (*Id.*) He continued that "Benworth therefore cannot now argue that the Agreements are unfair or too one-sided. Such arguments should have been made during the parties' negotiations," which he described as "arms-length." (*Id.*) Benworth's suggestion in its Petition that the Arbitrator's refusal to dispense "rough justice" in Benworth's favor is somehow evidence of the Arbitrator's manifest disregard of the law is disingenuous and deeply misleading.

Benworth's argument that the Arbitrator's decision is against public policy also should be rejected. Benworth does not actually identify any "'explicit, dominant and well-defined' public policy" that the award purportedly violates, as it must. *See Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995) ("The party seeking to vacate the arbitration award bears the burden of showing that the arbitration award violates an 'explicit, dominant and well-defined' public policy."). Instead, Benworth does little more than rehash its arguments that the Arbitrator's decision is incorrect, which is not a basis to vacate the award under the FAA.

Finally, Benworth's argument that the Arbitrator engaged in misconduct by failing to stay the Evidentiary Hearing is similarly deficient. For years, Benworth has asserted that the SBA is on the precipice of resolving some issue that would bear on the dispute, but despite repeated requests from the Arbitrator, Benworth failed to provide compelling evidence supporting its assertion. It has been more than 17 months since Benworth first made this claim, and Benworth still is unable to provide evidence of some imminent decision from the SBA that would inform the Arbitrator's resolution of the dispute. Under these circumstances, the Arbitrator was not required to indefinitely stay the Arbitration, as Benworth requested.

For these reasons, and the reasons below, the Petition should be denied.

<u>BACKGROUND</u>

A. Womply Is A Technology Company That Provided Technology Services To Benworth, A PPP Lender.

Womply is a technology company that, in 2021, developed "PPP Fast Lane," a technology platform that made it easy for applicants to apply for a PPP loan and more efficient for lenders to process and manage a large volume of PPP loan applications. (FA at 2, 16; Pet. at 18–19.) PPP Fast Lane also allowed applicants to submit information to apply for a PPP loan, and Womply routed applicant information to PPP lenders that contracted to use PPP Fast Lane. (FA at 22–23.) Womply's technology also included a lender-facing portal, the Teslar Portal, which allowed lenders like Benworth to efficiently review applicant information, generate loan documents, submit information to the SBA for approval, and initiate payment of loan proceeds. (*Id*. at 25–29.)

Benworth is a Florida-based lender that was authorized to make PPP loans. (Pet. at 6, 10.) In February 2021, "Benworth and Womply were introduced by a mutual business connection" and the "companies decided to enter into a business relationship." (FA at 17.) The Parties entered into two separate Agreements pursuant to which Benworth received Womply's PPP Fast Lane services: (i) the "Referral Agreement" and (ii) the "Order Form," which incorporated Womply's Master Developer Agreement by reference (collectively, the "Agreements"). (*Id.* at 18.) The Agreements specified the services Womply agreed to provide to Benworth and the associated fees Benworth agreed to pay to Womply.

First, under the Referral Agreement, "Benworth agreed to pay Womply a . . . Referral Fee for applicant information collection and referral services" (the "Referral Fee"). (*Id.* at 20 (citing Referral Agreement (Pet. App'x 3982 § 1.1)).) The Referral Fee was "1% of the amount of each Womply-referred PPP loan that the SBA approved and Benworth ultimately funded." (*Id.* (citing Referral Agreement (Pet. App'x 3982–83 § 2.2)).)

Second, "[p]ursuant to the separately executed Order Form, Benworth agreed to pay Womply an Application Programming Interface [] Fee (the 'API Fee') and a tier-based 'Technology Fee' for access to Womply's technology services and the Teslar Portal." (*Id.* at 20–21.) This "API Package" of services integrated several third-party technology services. (*Id.* at 20.) The API Fee was a flat $250 for each PPP loan that Benworth funded using PPP Fast Lane. (*Id.* at 21 (citing Order Form (Pet. App'x 3986)).) The Technology Fee was calculated as a percentage of the Lender Processing Fee that Benworth received from the SBA. (*Id.* at 21 (citing Order Form (Pet. App'x 3987 § 2)).)

Womply's services proved to be a boon to Benworth. In 2020, before Benworth used PPP Fast Lane, Benworth funded fewer than 700 PPP loans. (Pet. at 11.) In 2021, with Womply's PPP Fast Lane, Benworth funded more than 300,000 PPP loans with a total principal amount of more than $4 billion. (*Id.*; FA at 17–18, 22.) Benworth received at least ***$680 million*** in Lender Processing Fees from the SBA for making these loans. (Pet. at 11.)

B. Womply Commenced The Arbitration After Benworth Stopped Paying Womply's Fees.

On July 1, 2021, Benworth informed Womply that it was withholding nearly $42 million in fees due under the Agreements. (FA at 29.) "Thereafter, Benworth stopped paying Womply its fees altogether." (*Id.*) Womply commenced the Arbitration on August 25, 2021, asserting breach of contract claims for Benworth's failure to pay its Referral Fees, Technology Fees, and API Fees, as well as related declaratory judgment claims. (FA at 30.) In its defense, and in support of counterclaims it asserted against Womply, Benworth relied on two SBA regulations to argue that Womply's fees were illegal.[2] These arguments are discussed below.

1. <u>Benworth's Agent Fee Cap Argument</u>

Benworth argued that Womply's Technology Fees were illegal because they exceeded a cap that the SBA imposed on fees a lender could pay for certain services. Specifically, an SBA regulation states that "[t]he total amount that an agent may collect from the lender ***for assistance in preparing an application for a PPP loan (including referral to the lender***) may not exceed: . . . [o]ne (1) percent for loans of not more than $350,000 . . . ." (the "Agent Fee Cap"). (Pet. at 9 (citing 85 Fed. Reg. 20,811, 20,816 (Apr. 15, 2020)) (emphasis added).) Benworth claimed that both Womply's Referral Fee and Technology Fee were subject to the Agent Fee Cap, and because the Referral Fee was 1% of a PPP loan, paying an additional Technology Fee would violate the Agent Fee Cap. (FA at 30.) Womply argued that its Technology Fee was not subject to the Agent Fee Cap because that fee was for technology services that helped Benworth (among other things) process loans, and not for helping an applicant prepare an application or for referring the applicant to Benworth (for which Womply received its Referral Fee).

Accordingly, to resolve this issue, the Arbitrator had to make factual findings regarding the nature of the various services that Womply provided for its Referral Fees, API Fees, and Technology Fees, interpret the SBA regulation providing the Agent Fee Cap, and make a determination as to whether and to what extent the Agent Fee Cap applied to those fees.

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[2] Benworth also disputed Womply's interpretation of the Technology Fee in the Order Form.

2. Benworth's Lender Service Provider Argument

Benworth also argued that all of Womply's fees were illegal because, it claimed, Womply was a "Lender Service Provider" ("LSP") as defined by SBA regulations, and Womply's Agreements were not reviewed and approved by the SBA, as required by SBA guidance. An LSP is "an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender," 12 C.F.R. § 103.1(d), and the SBA has advised that "[a]n LSP may only receive compensation from the 7(a) Lender for services provided under an SBA-reviewed LSP Agreement." (Ex. 1[3], SBA, *Standard Operating Procedure 50 10 6 Lender and Development Company Loan Programs* (Oct. 1, 2020) (the "SOP") at 185.)[4] It was undisputed that Benworth's Agreements with Womply were not reviewed by the SBA before Womply provided services to Benworth. However, Womply disputed that it was an LSP.

To resolve this issue, the Arbitrator had to make factual findings regarding the services that Womply provided to Benworth, interpret SBA regulations and SOPs regarding the definition of an LSP, and determine whether Womply fit within the SBA's definition of an LSP. In addition, to the extent Womply was an LSP, the Arbitrator had to determine what impact (if any) that would have on Benworth's contractual obligation to pay Womply's fees.

C. The Arbitrator Rejects Benworth's Illegality Arguments In A Final Award.

On December 21, 2023, following a "seven-day evidentiary hearing akin to a full-fledged trial," the Arbitrator issued an Interim Award finding that Benworth breached the Agreements by failing to pay Womply its fees. (FA at 68.)

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[3] All references to "Exhibit" or "Ex." refer to exhibits to the accompanying declaration of Alexander L. Cheney in support of the Opposition to Petition to Vacate Final Arbitration Award ("Cheney Decl."), dated August 26, 2024.

[4] The nearly 600-page SOP is published by the SBA and contains "the SBA's participation requirements for 7(a) Lenders and Certified Development Companies (CDCs) . . . and the policies and procedures governing the 7(a) and 504 loan programs." (Ex. 1 (SOP) at 7.) The PPP was one of the SBA's 7(a) loan programs, which are implemented pursuant to Section 7(a) of the United States Small Business Act. 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020).

The Arbitrator also rejected Benworth's arguments that Womply's fees were illegal. The Arbitrator held that the Technology Fees "are not illegal" because the "Technology Services provided by Womply to Benworth were not subject to the SBA's 1% Agent Fee Cap." (FA at 41.) The Arbitrator also determined that Womply was not an LSP and, therefore, its Agreements did not have to be reviewed by the SBA. (*Id.* at 41–45.) The Arbitrator further held that, even if Womply were an LSP, Benworth nevertheless would be required to pay Womply's Technology Fees because: (i) Benworth did not cite to any rule or regulation stating that its failure to obtain SBA review would render the Agreements invalid or void, and (ii) California law provides that Womply should be compensated for the services Benworth used to "earn[] hundreds of millions of dollars," even if the Agreements technically violated SBA rules or regulations. (*Id.* at 45–47.) The Arbitrator awarded Womply approximately $86 million in unpaid fees,[5] and reserved decision on the amount of interest, attorneys' fees, and costs of collection to which Womply was entitled under the Agreements. Benworth unsuccessfully moved for reconsideration of the decisions in the Interim Award that Benworth now seeks to vacate.[6] (Pet. at 24; Pet. App'x 2957–2973; FA at 56.)

After extensive briefing, the Arbitrator held an evidentiary hearing from April 8 to April 11, 2024, concerning the amount of attorneys' fees, costs of collection, and finance charges Benworth owed Womply. (FA at 57.) On June 26, 2024, the Arbitrator entered a 73-page Final Award.

ARGUMENT

Under the FAA and Ninth Circuit precedent, "judicial review of an arbitrator's decision is both limited and highly deferential." *Barnes v. Logan*, 122 F.3d 820, 821 (9th Cir. 1997) (cleaned up). Courts must accept an arbitrator's findings of fact, *HayDay Farms, Inc. v. FeeDx Holdings,*

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[5] The Arbitrator found in Benworth's favor on the interpretation of the Technology Fees provision. (FA at 47–50.) This reduced Womply's damages by approximately $65 million.

[6] Womply consented to a declaratory judgment on its obligation to provide loan files to Benworth. (Cheney Decl. ¶ 6; FA at 58.) Womply complied with the Arbitrator's order and delivered the loan files to Benworth on June 12, 2024. (*Id.*)

Inc., 55 F.4th 1232, 1241 (9th Cir. 2022), and "[n]either erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award." *Bosack v. Soward*, 586 F.3d 1096, 1102 (9th Cir. 2009) (cleaned up). That is because the FAA allows only four narrow grounds on which a court may vacate an arbitration award, only two of which are at issue here:

> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . .; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[7]

9 U.S.C. § 10(a); *see also Bosack*, 586 F.3d at 1102 ("Our review is limited by the [FAA], which enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award."). "The burden of establishing grounds for vacating an arbitration award is on the party seeking it." *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010); *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (holding that the party seeking vacatur of an arbitral award under the FAA "bears a heavy burden").

The limited judicial review permitted by the FAA is "designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures." *U.S. Life*, 591 F.3d at 1173 (quotation omitted). To allow a more expansive review also would undermine some of the reasons that parties choose arbitration, which include efficiency and cost saving. *See Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (discussing advantages of arbitration, such as speed and economy). As the Supreme Court has explained, "[i]f parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." *Oxford*, 569 U.S. at 568–69 (cleaned up).

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[7] An award also may be vacated if it "was procured by corruption, fraud, or undue means" or "there was evident partiality or corruption in the arbitrators." 9 U.S.C § 10(a)(1) and (2). Benworth does not seek to vacate the Final Award on either of those grounds.

Here, Benworth seeks to vacate the Final Award on the grounds that: (i) the Arbitrator exceeded his powers because the Final Award is completely irrational and manifestly disregards law concerning the Agent Fee Cap and LSPs, (ii) it is contrary to public policy, and (iii) the Arbitrator is guilty of misconduct for not postponing the Evidentiary Hearing. In reality, as shown below, the vast majority of Benworth's 67-page petition (supported by an over 2,000-page appendix) seeks the type of "full-bore legal and evidentiary appeal[]" of the Arbitrator's legal conclusions and factual findings that is prohibited by the FAA.[8] In any event, Benworth fails to establish that any of the narrow grounds for vacating an arbitral award under the FAA apply here.

I. THE ARBITRATOR DID NOT EXCEED HIS POWERS.

As Benworth's own authority acknowledges, manifest disregard of the law is a "high standard." *HayDay*, 55 F.4th at 1240 (quotation omitted). The moving party must show that the arbitrator: (1) understood and correctly stated the law, but (2) proceeded to disregard it. *Id.* at 1241. To meet this high standard, "there must be some evidence in the record, other than the result, that the arbitrator[] [was] aware of the law and intentionally disregarded it." *Bosack*, 586 F.3d at 1104 (cleaned up). "[E]ven misstatements of the law followed by erroneous application of the law do not provide grounds upon which a reviewing court may vacate an arbitral award under the FAA." *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 668 n.7 (9th Cir. 2012). "Moreover, to rise to the level of manifest disregard the governing law alleged to have been ignored by the arbitrators must be ***well defined, explicit, and clearly applicable***." *Collins*, 505 F.3d at 879–80 (emphasis in original) (cleaned up).

Similarly, the completely irrational standard "is extremely narrow and is satisfied only 'where the arbitration decision fails to draw its essence from the agreement.'" *Bosack*, 586 F.3d at 1106 (quoting *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009)) (cleaned up). In applying this standard, courts do not "decide the rightness or wrongness of the

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[8] That Benworth spends 67 pages of briefing and a more than 2,000-page appendix challenging the Arbitrator's legal conclusions and factual determinations reveals that it has not identified one of the narrow grounds for vacatur allowed by the FAA. Petitions to vacate are motions, 9 U.S.C. § 6, subject to the 25-page limit in Civil Local Rule 7-2(b).

arbitrators' contract interpretation," nor do courts consider whether "findings of fact are correct or internally consistent," but rather courts review to determine only "whether the award is 'irrational' with respect to the contract." *Id.* "[T]he court must defer to the arbitrator's decision as long as the arbitrator even arguably construed or applied the contract." *Hayday*, 55 F.4th at 1241 (quoting *U.S. Life*, 591 F.3d at 1177).

Benworth fails to satisfy its heavy burden to show that the Arbitrator manifestly disregarded the law or that the Final Award was completely irrational.

A. The Arbitrator Did Not Manifestly Disregard The Law Concerning The Agent Fee Cap.

Benworth spends nearly 20 pages of its Petition arguing that "the Arbitrator's conclusion that the Agent Fee Cap does not apply to the Technology Fees is legally irreconcilable with the undisputed facts" and that he "conscientiously chose to ignore the SBA Regulations . . . because [he] did not agree that the regulations were fair to Womply." (Pet. at 29.) Benworth's argument is based on the faulty premise that it was "undisputed" that the services in the Order Form—defined as "Technology Services" for which Benworth agreed to pay Technology Fees—were for helping borrowers prepare their applications, as opposed to helping Benworth process those applications. Benworth also mischaracterizes the Arbitrator's Final Award.

As explained in the Final Award, "Benworth d[id] not dispute that . . . the 1% Agent Fee Cap applies only to fees paid to Agents for 'assist[ing] an eligible recipient'—***i.e., a borrower***—'to prepare an application for a [PPP] loan.'" (FA at 35 (emphasis added).) In other words, Benworth admitted that fees owed to Womply for providing assistance to Benworth—***a lender***—were not subject to the Agent Fee Cap. Thus, the nature and purpose of Womply's various services, including whether they assisted borrowers or Benworth, were some of the most hotly contested factual issues in the Arbitration, with both sides submitting substantial evidence.

Far from ignoring the evidence, the Arbitrator devoted more than thirteen pages of the Final Award to describing and analyzing the evidence presented at the Evidentiary Hearing. (*See* FA at 22–29, 33–41.) The Arbitrator ultimately concluded that the services for which Womply received the Technology Fee ***benefited Benworth*** (FA at 37), a factual finding that this Court may not reconsider. *HayDay*, 55 F.4th at 1241 ("We also must accept the arbitrator's findings of fact."). The Arbitrator's determination was based on (among other evidence) testimony from Benworth's own CEO, finding that "it is undisputed that without Womply's Technology Services, Benworth would have had to conduct manual reviews of each PPP loan applicant's information, making it impossible for it to have successfully processed billions of dollars in PPP loan applications." (FA at 37 (citing Hr'g Tr. (Scammell) at 317:25–318:7; Hr'g Tr. (Navarro) (Benworth's CEO) at 1327:2–12, 1413:1–21, 1415:11–16, 1417:8–1420:18 (testifying that [redacted]).) The Arbitrator further found that "Womply's Technology Services also allowed Benworth to review each 'Paycheck Protection Application Form' and confirm receipt of the certifications contained therein," and that "[a]ll the services directly benefited Benworth and allowed it to process and make over 300,000 loans" and "were distinct from and had nothing to do with assisting a potential borrower in completing an application." (*Id.* at 37–38). In summarizing his factual findings, the Arbitrator concluded that it was "***wholly disingenuous and a complete distortion of the evidence*** for Benworth to now argue that no benefit was received from the Womply technology." (*Id.* at 39 (emphasis added).)

While the Arbitrator concluded that the services for which Womply earned the Technology Fee were distinct from its services that assisted applicants, Benworth tried to conflate Womply's services during the Arbitration. The Arbitrator expressly found that Benworth "conflate[d] Womply's referral services, API Services, and Technology Services," which, he observed, "the parties clearly perceived [as] . . . different at the time of contracting since they were enumerated separately in different contracts and each service had a different formula for fees." (FA at 36.) Indeed, the Referral Agreement provided that Womply would be compensated for its referral services (which included preparing or referring PPP loan applications) with a

Referral Fee of 1% of a loan's principal amount (what was subject to and consistent with the Agent Fee Cap). (*Id.* at 20, 33). The ***separate*** Order Form provided that Womply would be compensated for its API Package in the form of an API Fee and Technology Fee for each loan, which ***were not*** subject to the Agent Fee Cap. (*Id.* at 20–21, 41.) Accordingly, the Arbitrator did not manifestly disregard the Agent Fee Cap, but simply rejected Benworth's argument that it also applied to the Technology Fees, stating that "[u]nder Benworth's interpretation, the Technology Services and associated fee provision would be impermissibly rendered meaningless since they would be subsumed within the Agreements' referral services and fees." (FA at 36.)

In its Petition, Benworth again distorts the record and conflates Womply's various services to contend that it was "undisputed" that Womply's services helped borrowers prepare applications. For example, Benworth claims that the "Arbitrator admitted that the Technology Services assisted in preparing and referring PPP loan applications." (Pet. at 44.) For support, Benworth relies on a rhetorical question its counsel asked during closing arguments: "Did ***any*** of Womply's technology assist in either preparing or referring PPP loan applications?" (Pet. App'x at 2776 (Closing Arguments) (emphasis added).) The Arbitrator answered "yes," which is consistent with his finding that the ***1% Referral Fee*** compensated Womply for "applicant information collection and referral services" and "was subject to the 1% Agent Fee Cap." (FA at 20, 33, 41 (emphasis added).) The Arbitrator was not signaling his agreement with Benworth's position that the Technology Fee also was subject to the Agent Fee Cap.

Benworth also asked the Arbitrator to ignore the parties' Agreements regarding services and associated fees and, instead, award Womply fees only for each individual service that Womply could prove did not benefit a borrower, with the amount of such fees based on Womply's cost for providing such service.[9] Relying on California law, the Arbitrator held that he "cannot disregard the parties' Agreements and create his own price for each of Womply's services." (FA at 36.) Indeed, he found that "nothing in the parties' Agreements demonstrates

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[9] The Arbitrator called Benworth's proposed methodology an "elaborate and unsubstantiated formula." (FA at 35–36.)

any intent by the parties to authorize payment of Womply's Technology Fees only if they can be tied to a particular cost or to authorize the Arbitrator to carve up the Technology Fees and allocate a portion of them to each of Womply's services based on the relative costs of those services." (*Id.* (citing *Founding Mems. of the Newport Beach Cntry. Club v. Newport Beach Cntry. Club, Inc.*, 109 Cal. App. 4th 944, 955 (2003)).)

While Benworth challenges the correctness of these factual findings and legal conclusions, that is beyond the scope of this Court's review under the FAA. *See HayDay*, 55 F.4th at 1241 ("We also must accept the arbitrator's findings of fact."); *Carter v. Health Net of Cal., Inc.,* 374 F.3d 830, 838 (9th Cir. 2004) ("Errors of fact do not generally constitute manifest disregard of federal law," for purposes of request to vacate arbitration award.). As Benworth's own authority makes clear, courts "have no authority to re-weigh the evidence." *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003).

For the same reason, Benworth's claim that the Arbitrator misinterpreted *Oto Analytics, Inc. v. Capital Plus Financial, LLC*, 2022 WL 1488441 (N.D. Tex. May 11, 2022), is beside the point. It also is wrong. *Capital Plus* concerned a lawsuit Womply filed against a different PPP lender that failed to pay Womply's fees. In a motion to dismiss Womply's complaint in that case, the PPP lender argued that, as a matter of law, the Agent Fee Cap prohibited Womply from collecting both a 1% Referral Fee and a separate Technology Fee. *Id.* at *9. The *Capital Plus* court rejected that argument, holding that the SBA regulation containing the Agent Fee Cap (i) did not "foreclose a Technology Fee like the one in the Developer Order Form," and (ii) "limit[s] the fee for preparing an application for a PPP loan, but ***not for any other reason***." *Id.* at *10 (citing 86 Fed. Reg. 3,692, 3,709–10 (Jan. 14, 2021)) (emphasis added). In criticizing the Arbitrator for referencing *Capital Plus*, Benworth claims the case should be given little weight because it was a motion to dismiss ruling that "left open the possibility that discovery would reveal additional information about the services Womply provided under the order form that may have resulted in the Agent Fee Cap precluding recovery of technology fees." (Pet. at 42.) But, as Benworth admits, "such additional information was presented to the Arbitrator here" (*id.*) and, after considering that information, the Arbitrator independently determined that the Technology Fees charged to Benworth did not compensate Womply for assisting a borrower to prepare a loan application and, therefore were not subject to the Agent Fee Cap (*see* FA at 35–41 (citing *Capital Plus* after analyzing the factual record)).

The Arbitrator's reference to *Capital Plus* is not evidence that the Arbitrator disregarded any law either. *Capital Plus* is the only decision we are aware of concerning the application of the Agent Fee Cap to fees charged to a lender, and the Arbitrator's decision is consistent with its holding. Accordingly, Benworth's reliance on *Comedy Club*, 553 F.3d 1277, and *Am. Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280 (9th Cir. 1982), in which courts found that arbitrators disregarded well-defined, explicit, and clearly applicable laws, is misplaced. Moreover, the lack of binding precedent eviscerates Benworth's argument that the Arbitrator manifestly disregarded the law. *See Collins*, 505 F.3d at 879–80 ("[T]o rise to the level of manifest disregard the governing law alleged to have been ignored by the arbitrators must be ***well defined, explicit, and clearly applicable***.") (emphasis in original) (cleaned up); *T-Mobile USA, Inc. v. Qwest Commc'ns Corp.,* 2007 WL 3171428 at *5 (W.D. Wash. Oct. 26, 2007) (declining to find manifest disregard where no binding precedent existed).

Finally, Benworth maintains that the Arbitrator relied on "extrinsic evidence" and some of the terms of the Agreements "to justify charging Benworth more than 1% for services that he had admitted were '[a]bsolutely' and without 'dispute' subject to the Agent Fee Cap." (Pet. at 47.) This is misleading. The first clause of the paragraph in the Final Award that Benworth takes issue with plainly states that the extrinsic evidence referenced by the Arbitrator is "not necessary to the resolution of this issue" (*i.e.*, whether the Agent Fee Cap applied to the Technology Fee). (FA at 40.) This is not a "rough sense of justice" as Benworth contends, but one of ***five distinct bases*** on which the Arbitrator rejected Benworth's arguments. (*Id.* at 36–41.)

B. The Arbitrator Did Not Manifestly Disregard Law Or Facts In Finding Womply Was Not An LSP.

As discussed above, an LSP is defined as "an Agent who carries out lender functions in ***originating, disbursing, servicing, or liquidating*** a specific SBA business loan or loan portfolio for compensation from a lender." 12 C.F.R. § 103.1(d) (emphasis added). In the Arbitration, Benworth argued that Womply was an LSP because it "originat[ed]" PPP loans for Benworth. (FA at 42.) It also argued that Womply was an LSP because it engaged in "underwriting" for Benworth, relying on a guidance document published by the SBA that provided "examples of when SBA considers an Agent to meet the definition of an LSP," which includes (among other things) "[e]ntities providing technology services to a 7(a) Lender that include underwriting." (Ex. 1 (SOP) at 185.)

After interpreting SBA regulations and carefully considering the evidence, the Arbitrator determined that Womply did not meet the definition of an LSP. (FA at 41–45.) Benworth seeks to vacate that decision on the grounds that: (i) Benworth disagrees with the Arbitrator's interpretation of the word "originating" in SBA regulations, (ii) Benworth disagrees with the Arbitrator's finding that Womply did not engage in "underwriting" as that term is used in the SOP, (iii) the Arbitrator did not give sufficient weight to the SBA's guidance in the SOP regarding examples of LSPs, and (iv) the Arbitrator improperly relied on facts supporting his conclusion that Womply was not an LSP. None of these arguments justify vacatur.

1. <u>The Arbitrator Did Not Manifestly Disregard the Law in Interpreting the Word "Origination" in SBA Regulations.</u>

Benworth takes issue with the Arbitrator's holding that, "[a]s the functions of an LSP are listed as 'originating, disbursing, servicing or liquidating' a loan, the most logical definition of originating is underwriting and approving a loan and submitting it to the SBA for final approval." (FA at 12; Pet. at 50.) However, Benworth fails to identify ***any*** law that the Arbitrator manifestly disregarded in reaching this conclusion. Nor does Benworth even propose any alternative definition of "originating" based on any applicable law, regulation, or rule. (*See* FA at 42 ("Benworth provides no statutory or regulatory definition of the term 'originate.'").)

Instead, Benworth complains that the Arbitrator "simply ignored" a snippet from a single email that Benworth received from an SBA office that it claims "informs" the definition. (Pet.

at 50.) In that email, the SBA's Office of Credit Risk Management asked Benworth to identify any third parties that engaged in "Originating Activities (application evaluation, gathering documents, processing, etc.)" for Benworth. (Pet. App'x 3990.) Benworth contends that this single, non-public email definitively establishes that the term "originating" in 12 C.F.R. § 101.3(d) means simply "gathering documents." (Pet. at 50.) Benworth further contends that, because the Arbitrator described some of Womply's work as "collect[ing] data from potential applicants to refer those applicants to Benworth," the Arbitrator was required to find that Womply was an LSP. (*Id.*) But the non-public SBA email on which Benworth relies is not a law, regulation, or rule that is "well defined, explicit, and clearly applicable." *Riley v. QuantumScape Corp.*, 2023 WL 1475092, at *15 (N.D. Cal. Feb. 2, 2023), *aff'd*, 2024 WL 885034 (9th Cir. Mar. 1, 2024). Nor is it dispositive of the SBA's supposed interpretation of the term, because the email does not even purport to define the word "originating" as used in SBA regulations. Benworth also fails to establish that the Arbitrator knew about the email and simply ignored it. *See Bosack*, 586 F.3d at 1104 ("There must be some evidence in the record, other than the result, that the arbitrator[] [was] aware of the law and intentionally disregarded it.") (cleaned up). Although the email was marked as an exhibit, the Arbitrator determined there was "[n]o persuasive evidence" in support of Benworth's position. (FA at 42–45.)

This Court is not permitted to review the Arbitrator's interpretation of "originating," nor may it vacate the Final Award even if it disagrees with the Arbitrator's interpretation. *See HayDay*, 55 F.4th at 1240–43 (affirming confirmation of portion of award and reversing vacatur of portion of award even though party moving for vacatur "probably offer[ed] the best interpretation of the parties' agreements" and the award "arguably violate[d] California law").

2. <u>The Arbitrator Did Not Manifestly Disregard The Law In Finding That Womply Did Not Engage In Underwriting.</u>

Benworth also asks this Court to review the Arbitrator's conclusion that Womply did not engage in "underwriting." (Pet. at 52–54.) After considering substantial evidence concerning the nature of Womply's services, the Arbitrator concluded that "it was Benworth, not Womply, that was underwriting the PPP loans," because "Benworth was required to take the information developed by the Womply technology and make a final determination that all necessary criteria had been met before submitting a loan to the SBA for approval." (FA at 43.) Benworth argues that it was irrational to conclude that Womply did not engage in underwriting given that "the Arbitrator specifically found that Womply's technology to some extent electronically performed the[] functions' of underwriting a PPP loan." (Pet. at 52 (quoting FA at 43).) But the Arbitrator found that "Womply provided Benworth with technology that to some extent automated and assisted Benworth with these [underwriting] functions." (FA at 14.) Just as a lawyer uses technology like Westlaw to practice law, Benworth used Womply's technology to perform underwriting. That does not make Westlaw a lawyer, nor does it make Womply an underwriter.

Benworth complains that the Arbitrator incorrectly interpreted the word "underwriting" in the SOP. (Pet. at 52–54.) But there is no definition of "underwriting" in the SOP or in SBA regulations. In the Arbitration, Benworth argued that the word "underwriting" in the SOP—which applied to all SBA 7(a) loan programs—should be interpreted as meaning the unique underwriting requirements specific to the PPP, which were significantly less stringent than for the SBA's other loan programs. Under the SBA's PPP-specific rules, lenders were required to only: (i) confirm that applicants certified they were entitled to receive a PPP loan and provided information regarding the applicant's employees and monthly payroll, and (ii) follow applicable Bank Secrecy Act requirements to confirm the identity of the applicant. (FA at 43.) In other words, Benworth asked the Arbitrator to assume that, by lowering the underwriting standards for the PPP, the SBA intended to simultaneously ***expand*** the LSP definition in its regulations to include third-party service providers that would not otherwise qualify as LSPs in other SBA loan programs. But there is no authority we are aware of supporting Benworth's position. In fact, we are not aware of any case that has interpreted the definition of an LSP in the context of the PPP. Thus, Benworth's position that the definition of LSP is informed by the unique underwriting requirements of the PPP is not law, let alone the type of "well defined, explicit, and clearly applicable" law that an arbitrator may not ignore. *Riley*, 2023 WL 1475092, at *15.

At bottom, Benworth asks this Court to consider whether the Arbitrator correctly interpreted the SOP, but that is beyond the scope of this Court's review under the FAA. *See LPL Fin., LLC v. Gardner*, 2022 WL 1750363, at *1 (N.D. Cal. May 31, 2022) ("In reviewing an arbitral award, courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does.") (cleaned up). Even if this Court disagrees with the Arbitrator's interpretation, that is not a basis to vacate the Final Award. *See Multicare Health Sys. v. Wash. State Nurses Assoc.*, 743 F. App'x 757, 758–59 (9th Cir. 2018) (reversing vacatur because district court wrongly vacated based on disagreement with arbitrator's contract interpretation).

3. The Arbitrator Did Not Manifestly Disregard The SOPs, Which Are Not Law In Any Event.

Benworth claims that the Arbitrator refused to apply the SOPs (Pet. at 48–58), but it does not actually identify any part of the SOPs that the Arbitrator understood but supposedly ignored. Instead, it cites to pages of the Final Award in which the Arbitrator discussed two examples the SBA provided of potential LSPs: (i) "[a]n individual or entity [that] generates a significant number of 7(a) Lender's loan originations" ("SOP Example 1"), and (ii) an entity that "provide[s] services for the purposes of obtaining Federal financial assistance that include[s] interaction with the Applicant either in-person or through the use of technology, to request or obtain eligibility and/or financial information that will be provided to the 7(a) Lender" ("SOP Example 2"). (*Id.* at 55–56 (citing FA at 44).) The Arbitrator did not ignore these examples.

For SOP Example 1, the Arbitrator expressly held that it "does not apply to Womply" because "there is no proof that Womply was originating loans." (FA at 43–44.) The Arbitrator also expressly acknowledged SOP Example 2, but did not interpret it as broadly as Benworth desired. In analyzing SOP Example 2, he noted that, "[a]s written, if this SOP were to be applied to the various entities involved in the PPP program, then virtually every individual or entity involved in the program would be considered an LSP," a result he found "absurd" and "in direct conflict with the SBA rules and regulations." (FA at 44.) Benworth's (or even this Court's) disagreement with that assessment "does not provide grounds upon which [this Court] may vacate" the Final Award. *Biller*, 668 F.3d at 668 n.7.

In addition, as Benworth itself argued in the Arbitration, "[a]gency guidance documents like the SBA SOPs [] generally do not carry the force of law" (Ex. 2 (Benworth's Motion to Disqualify Manger) at 17), and the SOP is certainly not the type of "well defined, explicit, and clearly applicable" law that, if ignored, could justify vacatur. *Riley*, 2023 WL 1475092, at *15; *see also Collins*, 505 F.3d 874 at 884 (holding that "the arbitrators could not manifestly disregard the law because no binding precedent existed" regarding the law they allegedly ignored). Indeed, we are not aware of any case law even referencing the SBA's examples of LSPs in the SOP.

Benworth attempts to elevate the significance of the SOP by claiming that the parties incorporated the SOP by reference into their Agreements, making them contract terms that the Arbitrator must strictly apply. (Pet. at 27–28, 57–58.) That is wrong. In the Agreements' choice-of-law provisions, the parties simply acknowledged that the Agreements were governed by California law and "subject to all Applicable Laws, including SBA Regulations." (Pet. App'x 3984 § 9.) The term SBA Regulations was defined to include (among other things) "guidance" issued by the SBA concerning the PPP. (*Id.*) This did not turn the nearly 600-page SOP into a "contract provision," just as it did not render every decision published in California's 174 years of jurisprudence into a contractual provision. Even if the SOPs were incorporated by reference, the Arbitrator would still have to interpret the SOPs—as he did in the Final Award. And this Court is not permitted to review the Arbitrator's legal interpretation of those SOPs, whether they are merely guidance, carry the force of law, or are contract terms. *See Bosack*, 586 F.3d at 1106 (explaining that courts "do not decide the rightness or wrongness of the arbitrator['s] contract interpretation, only whether [his] decision draws its essence from the contract") (cleaned up).

4. <u>This Court May Not Review the Arbitrator's Findings of Fact.</u>

In the Final Award, the Arbitrator identified four undisputed facts that he found supported his conclusion that Womply was not an LSP: (i) the parties' Agreements explicitly stated that Womply was not an LSP, (ii) Benworth's CEO told the SBA that "Womply is not an LSP," (iii) Benworth never claimed that Womply was an LSP until after the Arbitration began, and (iv) Benworth knew how to enter into an LSP agreement, because, before contracting with

Womply, it had entered into an LSP agreement with an LSP called Lendio. (FA at 44–45.) Now, Benworth argues that the Arbitrator's mere reference to these facts reflects that the Arbitrator must have ignored SBA regulations. (Pet. at 5.) But Benworth does not (because it cannot) cite anything in the Final Award to support that claim. Instead, Benworth relies on *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162 (9th Cir. 2019). (Pet. at 61–62.) But *Aspic* is inapposite. There, the arbitrator considered the contracts at issue, yet disregarded their controlling terms to give, in his view, the more "primitive" party a fair deal. *Aspic*, 913 F.3d at 1168. Here, the Arbitrator made his determination that Womply was not an LSP based on the Agreements, the parties' past practices, and the applicable law, not "his own rough sense of justice." (Pet. at 61; *see* FA at 54 ("[I]t is not, actually, the Arbitrator's role to decide what is 'fair;' he is instead merely tasked with interpreting the contract provisions.").)

II. THE FINAL AWARD DOES NOT VIOLATE PUBLIC POLICY.

The Ninth Circuit has repeatedly made clear that "courts should be reluctant to vacate arbitral awards on public policy grounds." *Ariz. Elec. Power Co-op., Inc. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995); *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 917 (9th Cir. 2007) (same); *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 534 (9th Cir. 2016) (same). Accordingly, courts should vacate an arbitral award as violating public policy only where there exists "an explicit, well-defined, and dominant public policy" applicable to the dispute that "specifically militates against the relief ordered by the arbitrator." *Va. Mason*, 511 F.3d at 916 (cleaned up). That is not the case here.

Benworth has not identified "an explicit, well-defined, and dominant public policy" that the Final Award purportedly violates. *Id.* Benworth's public policy argument assumes that Womply was an LSP and therefore violated SBA regulations governing LSPs. (Pet. at 62–63.) However, the Arbitrator expressly found that Womply was not an LSP (FA at 44–45), which is a factual finding that this Court may not revisit. *See HayDay*, 55 F.4th at 1241. Even if Womply were an LSP (it was not), SBA regulations applying to LSPs are neither explicit nor well-defined. (*See supra* Sections I.B.1–3.)

Benworth's attempt to couch this contract dispute as a matter of "public policy" is unavailing. Benworth points to the SOP to argue that "lender service providers 'may only receive compensation from the 7(a) lender for services provided under an SBA-reviewed LSP Agreement.'" (Pet. at 62 (quoting Ex. 1, SOP at 185).) However, as the Arbitrator explained in the Final Award, when "read in context it is clear that this provision, like most of the SBA regulations, is directed toward protecting the borrower, not the lender." (FA at 46.) Specifically, the SOP prohibits LSP's from charging fees that are passed on to borrowers or are paid out of SBA-guaranteed loan proceeds. (Ex. 1 (SOP) at 185.) To the extent SBA regulations account for LSP fees charged to lenders, they make clear that "lenders have reasonable discretion in setting compensation for Lender Service Providers" so long as such compensation is not "directly charged to an Applicant or Borrower," which Womply's fees were not. 13 C.F.R. § 103.5(c). Benworth exercised its discretion when it agreed to the fees in the Agreements. The fact that it now regrets having done so is not a matter of public policy.

Nor has Benworth shown that SBA regulations or guidance "specifically militate[]" against Final Award's relief. *Va. Mason*, 511 F.3d at 916. As the Arbitrator observed, the SOP "does not state that an agreement is illegal or invalid if it is not submitted to the SBA." (FA at 45–46.) In fact, Benworth has not identified any regulation, guidance, or case law specifically stating that an LSP agreement that has not been reviewed by the SBA is invalid or unenforceable against the lender. *Va. Mason*, 511 F.3d at 916 (holding that public policy must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests"). Rather, Benworth's authorities deal with arbitration awards that violated explicit statutory authority under the National Labor Relations Act ("NLRA"). (Pet. at 63.) *See Phoenix Newspapers, Inc. v. Phoenix Mailers Union Loc. 752, Int'l Bhd. of Teamsters*, 989 F.2d 1077 (9th Cir. 1993) (vacating arbitral award that mandated affirmative bargaining in violation of explicit requirement under the NLRA); *Broadway Cab Co-op., Inc. v. Local Union No. 281, IBT*, 710 F.2d 1379, 1385 (9th Cir. 1983) (reversing confirmation of arbitral award that "contradicted Supreme Court precedent and applied an incorrect legal standard" under the

NLRA). To the extent SBA regulations specify any consequences for noncompliant compensation agreements, those consequences are, again, designed to protect borrowers, not lenders. *See* 13 C.F.R. § 103.5(b) (where the SBA deems a compensation agreement unreasonable, an agent or packager must "refund any sum in excess of the amount SBA deems reasonable ***to the Applicant***, and refrain from charging or collecting, directly or indirectly, ***from the Applicant*** an amount in excess of the amount SBA deems reasonable") (emphasis added).

III. THE ARBITRATOR REASONABLY DECLINED TO STAY THE ARBITRATION.

Benworth claims that the Arbitrator is "guilty of misconduct for refusing to postpone the proceedings until the SBA completes its investigation of Womply." (Pet. at 63.) This is a mischaracterization of Benworth's attempts to delay the Arbitration on at least three occasions. Courts grant arbitrators significant deference in deciding requests to postpone arbitration proceedings. *See Cristo v. Charles Schwab Corp.*, 2021 WL 6051825, at *11 (S.D. Cal. 2021) ("Arbitrators are granted broad discretion and deference in their determinations of procedural adjournment requests.") (cleaned up). This Court should defer to the Arbitrator's discretion.

During the Arbitration, Benworth repeatedly requested that the Arbitrator stay the Arbitration proceedings based on Benworth's unsupported assertion that the SBA was on the verge of resolving whether any of Womply's fees violated SBA regulations. Benworth moved for a continuance and/or a stay on that basis on March 10, 2023, on September 13, 2023, and again on November 9, 2023, and the Arbitrator denied the motion in each instance for lack of support. (Pet. at 22–23.) Now, more than 17 months later, the SBA still has not made the determination that Benworth first claimed was imminent as early as March 10, 2023. (*Id.*) As Benworth admits, the SBA has extended Womply's purported suspension from doing business with the SBA three times without indicating if or when it will reach a decision that might bear on this dispute. (Pet. at 23.) Simply put, the Arbitrator properly exercised his discretion to not indefinitely postpone the Arbitration when faced with no compelling evidence of an imminent SBA decision or action relevant to the dispute.

Accordingly, Benworth's reliance on *Naing Int'l Enters., Ltd. v. Ellsworth Assocs., Inc.*, 961 F. Supp. 1 (D.D.C. 1997) is misplaced. In *Naing*, the SBA's Inspector General had recommended that the arbitration plaintiff be terminated from its lending program and—before the arbitration hearing began—instructed the SBA to take action on the recommendation within one month of the date set for the arbitration hearing. *Id.* at 4–5. Despite this, the arbitrator refused "to wait for a reasonable period upon SBA action on the [] investigation." *Id.* *Naing* also makes clear that "arbitrators are to be accorded a degree of discretion in exercising their judgment with respect to a requested postponement," so "if there exists a reasonable basis for the arbitrators' decision not to grant a continuance, the Court will be reluctant to interfere with the award on these grounds." *Id.* at 3; *see also Fordjour v. Wash. Mut. Bank*, 2010 WL 2529093, at *5 (N.D. Cal. 2010) (denying motion to vacate under Section 10(a)(3) because "there existed a reasonable basis for the arbitrator's denial of plaintiff's request").

Here, unlike in *Naing*, there was no evidence of a pending SBA recommendation, no fixed date for SBA action, and the Arbitrator did not issue the Final Award until more than a year after Benworth first claimed the SBA was on the precipice of making a determination about Womply's fees that Benworth said would impact the outcome of the case. The Arbitrator also explained his basis for denying Benworth's repeated requests to delay the Arbitration proceedings in a September 27, 2023 order, which found that Benworth's purported evidence of an imminent SBA determination "was somewhat vague and general and did not provide sufficient information to determine the extent to which the SBA investigation overlaps or bears upon the issues raised in this Arbitration." (Pet. App'x 2894.) The Arbitrator invited Benworth to produce concrete evidence that the SBA was actually and imminently issuing a decision, but it never did. (*Id.*)

Benworth also claims that "the Arbitrator refused to allow the SBA to testify, through Ms. Seaborn, absent Benworth complying with conditions it could not meet, including retaining Ms. Seaborn as an expert witness and making her available for a two-hour deposition." (Pet. at 64.) As Benworth admits, the Arbitrator did not, in fact, refuse to allow Ms. Seaborn to testify.

The Arbitrator merely imposed reasonable conditions for Benworth to call an expert witness in a manner that would avoid unfair surprise. Most importantly, as was the case in the Arbitration, Benworth fails to cite any evidence in its Petition that Ms. Seaborn actually intended to testify (or that the SBA would permit her to do so), so there is no basis for Benworth to argue that it was prejudiced by the conditions imposed by the Arbitrator.

Finally, although Benworth does not claim it justifies vacatur, Benworth asserts in passing that the Arbitrator "refused to consider the Congressional Report" that it claims "completely corroborated Benworth's position on whether Womply was a lender service provider." (Pet. at 64.) That is wrong. The Arbitrator invited Benworth to submit a motion arguing that it should be submitted into evidence. (Ex. 3 (Order No. 6) at 1.) Benworth did just that and Womply opposed. (*Id.* at 2.) After full briefing, the Arbitrator issued a seven-page order holding that "[t]he existence of the report is in the record, but the content of the report is 'rank hearsay' and does not fall within any of the hearsay exceptions asserted by Benworth." (*Id.* at 7.) Thus, the Arbitrator "considered" the report, but Benworth again disagrees with the result.

The Arbitrator's reasonable rejection of Benworth's repeated requests for a continuance and imposition of conditions for Benworth to bring an undisclosed expert witness to the Arbitration hearing are not grounds for vacatur of the Final Award. *See Milliner v. Bock*, 2020 WL 3103788, at *4–5 (N.D. Cal. 2020) (refusing to vacate arbitration award where arbitrator denied motion to postpone the arbitration hearing upon reasonable bases).

CONCLUSION

Womply respectfully requests that the Court deny Benworth's Petition.

Respectfully submitted,

Dated: August 26, 2024

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