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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BENWORTH CAPITAL PARTNERS, LLC, Petitioner, v. OTO ANALYTICS, LLC f/k/a OTO ANALYTICS, INC. d/b/a WOMPLY, Respondent.	Case No. 3:24-cv-4840-AMO **REPLY IN SUPPORT OF PETITION TO VACATE FINAL ARBITRATION AWARD** Hon. Araceli Martínez-Olguín

INTRODUCTION

Benworth's Petition to Vacate Final Arbitration Award (ECF No. 1) (the "Petition") details three grounds for this Court to vacate the Final Award: (1) the Arbitrator exceeded his powers by refusing to apply the plain language of the controlling SBA Regulations, which are incorporated into and express terms of the Agreements, to the undisputed, legally dispositive facts; (2) the Final Award compels Benworth to violate explicit, well defined federal public policy; and (3) the Arbitrator is guilty of misconduct in refusing to postpone the proceedings until the SBA completes its investigation of Womply.[1] Womply's Opposition to the Petition (ECF No. 25) (the "Opposition" or "Opp.") fails to rehabilitate the Final Award.

Womply primarily mischaracterizes Benworth's arguments to cabin this Court's review of the Final Award. Under Ninth Circuit precedent, however, this Court owes no deference to the Arbitrator's conclusions where he strayed from the limitations imposed by the Agreements. Nor must this Court defer to an award that disregards federal regulations the parties incorporated into their agreements and agreed to be bound by. Beyond that, all of Womply's arguments ignore not only its own undisputed evidence and arguments, but also the Arbitrator's findings and prior statements.

For these reasons, as detailed below and in the Petition, the Court should vacate the Final Award.

ARGUMENT

I. THE ARBITRATOR EXCEEDED HIS POWERS.

A. This Court Is Not Bound By The Arbitrator's Conclusions.

Throughout its Opposition, Womply asserts that Benworth's arguments on the Arbitrator exceeding his powers are beyond this Court's scope of review because they supposedly seek *de novo* review of the factual findings and legal interpretations in the Final Award. Not so. Womply not only mischaracterizes Benworth's arguments, but also the Ninth Circuit precedent supporting them. When viewed objectively, the Petition states challenges to an arbitrator's powers that warrant closer review.

An arbitrator exceeds his powers when he strays from the limitations imposed by the parties. *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 830 (9th Cir. 1995) ("Thus, when the arbitrators

[1] All capitalized terms have the same meaning as in the Petition.

strayed from the limitations imposed by the parties, they exceeded their powers."). The Petition establishes that the Agreements limited the Arbitrator's powers in three ways. The Arbitrator was required (1) to apply California law and "SBA Regulations" (as that term is defined in the Agreements); (2) to give controlling effect to "SBA Regulations," notwithstanding any provision of the Agreements or California law to the contrary; and (3) to treat the "SBA Regulations" as express terms of the Agreements. (Petition at 27-28.)[2]

Benworth's vacatur arguments are all founded on the Arbitrator straying from these three limitations. For example, the Arbitrator violated the first limitation when he outright refused to apply the SOPs' examples of lender services providers to Womply's conduct. (*See id*. at Part I.B.3.)[3] With respect to applying the Agent Fee Cap and concluding Womply is not a lender service provider, the Arbitrator strayed from the second limitation by giving controlling effect to conflicting terms in the Agreements instead of the plain language of SBA Regulations. (*See id*. at Parts I.A.3.iii; I.B.4.) In concluding that he would still award Womply additional fees even if Womply is a lender service provider, the Arbitrator elevated conflicting California law over the controlling SBA Regulations in violation of the second limitation. And the Arbitrator generally strayed from the third limitation by not treating the SBA Regulations as express terms of the Parties' bargain. Under these circumstances, "'where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end,' and jurisdictional challenges focusing on whether an award is grounded in a contract are considered *de novo*." *Thomas Kinkade Co. v. Hazlewood*, 2007 WL 9812853, at *7 (N.D. Cal. June 6, 2007) (quoting *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (9th Cir. 1989)).

This Court is also not required to enforce an award that is "legally irreconcilable with the undisputed facts." *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1133 (9th Cir. 2003). "[B]ecause facts and law are often intertwined, an arbitrator's failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard for the law." *Id*. In such cases, "the arbitrator's

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[2] Womply disputes only the third limitation on the Arbitrator's powers, but that argument fails for the reasons described below. *See infra*, Part I.B.

[3] The SOPs that the Arbitrator ignored are "SBA Regulations" as the Parties contractually defined that term. (*See* Petition, pp. 27-28, n.5.)

conclusions would not be entitled to the deference ordinarily accorded and would not bind this court." *Am. Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280, 1285 (9th Cir. 1982). Such is the case here. Notably, Womply does not dispute that the foregoing remains valid and binding Ninth Circuit precedent.

Moreover, "[a]lthough an arbitrator has great freedom in determining an award, he may not 'dispense his own brand of industrial justice.'" *Pac. Motor Trucking Co. v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th Cir. 1983) ("Because the award conflicts ***directly with the contract***, the court properly vacated the award." (emphasis added)). For example, an arbitrator has no power to disregard federal regulations incorporated into a contract "to achieve a desired result." *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1167-68 (9th Cir. 2019). Indeed, the Ninth Circuit draws a distinction between arbitrations that merely determine "the competing interests of two opposing parties" from those that also "require[] an adjudication of the coverage and application of a federal law passed by Congress . . . ." *Am. Postal* 682 F.2d at 1285. Where an arbitrator's decision conflicts with federal law, it cannot stand: "***We cannot empower the arbitrator to nullify the mandates of Congress*** . . . ." *Id.* (emphasis added).

Benworth's arguments on why the Arbitrator exceeded his powers all fall within the above-described exceptions to the general deference ordinally accorded arbitral awards. Benworth is not asking the Court to re-weigh the evidence, but instead to apply the plain meaning of the Agreements to the undisputed facts, which the Arbitrator failed to do. This Court has the authority to do just that.

B. The "SBA Regulations" Are Express Terms Of The Agreements.

The Arbitrator was required to treat the SBA Regulations, including the SOPs, as actual terms of the Parties' bargain because they were expressly incorporated into the Agreements. Womply disputes this, citing the choice-of-law provision stating "that the Agreements were governed by California law and 'subject to all Applicable Laws, including SBA Regulations[,]'" which Womply concedes include the SOPs. (Opp. at 20.) Womply claims this did not make the SOPs a contract provision, "just as it did not render every decision published in California's 174 years of jurisprudence into a contractual provision." (*Id.*) Womply also claims that, in any event, this Court is still not permitted to review the Arbitrator's interpretation of the SOPs. (*Id.*) Womply is wrong on both accounts.

First, the SBA Regulations, including the SOPs, are contract provisions that were incorporated into the Agreements. "Under California law, the terms of an extrinsic document may be incorporated by reference in a contract if: '(1) the reference is clear and unequivocal, (2) the reference is called to the attention of the other party and he consents thereto, and (3) the terms of the incorporated document are known or easily available to the contracting parties.'" *Fowler v. Wells Fargo Bank, N.A.*, 2017 WL 3977385, at *3 (N.D. Cal. Sept. 11, 2017) (quoting *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 713 (Cal. Ct. App. 2009)). "This may include specific statutes or regulations." *Id*.

The Agreements reflect that the Parties clearly intended to incorporate the SBA Regulations as contractual provisions. The choice-of-law clause specifically identifies the SBA Regulations. (App. 3984, § 9.) Womply not only drafted the Agreements, thereby manifesting its consent to be bound by the SBA Regulations, but also expressly committed to "exercise all best efforts to comply with all regulatory requirements of the PPP" (App. 3982) and agreed to return any fees that the SBA "determines were not in compliance with applicable SBA and/or PPP Loan Program Requirements" (App. 3983, § 2.3). Finally, the SBA Regulations are known to the Parties and publicly available to them. Thus, unlike Womply's amorphous reference to "California's 174 years of jurisprudence," the Parties specifically identified and agreed to be bound by the SBA Regulations governing the PPP.

Second, treating the SBA Regulations as express terms of the Agreements carries legal significance. "When language of a statute or regulations is incorporated in a contract, such language establishes contractual rights and obligations apart from its legal identity as part of a statute or regulation." *Serv. Emps. Int'l Union, Loc. 99 v. Options—A Child Care & Hum. Servs. Agency*, 200 Cal. App. 4th 869, 879 n.6 (2011); *see also 300 DeHaro St. Invs. v. Dep't of Hous. & Cmty. Dev.*, 161 Cal. App. 4th 1240, 1256 (2008) ("When statutory language is included in a contract, it assumes a new legal identity: that of contractual language."). Although a court may not review erroneous legal interpretations, it is not so constrained when reviewing implausible interpretations of a contract. Courts only "enforce an arbitration award if it represents a plausible interpretation of the contract in the context of the parties' conduct" and an "award that conflicts directly with the contract cannot be a 'plausible interpretation.'" *Pac. Motor Trucking*, 702 F.2d at 177.

Here, Benworth demonstrates that the Final Award directly conflicts with the Agreements and that, therefore, the Arbitrator's interpretations of the SBA Regulations (including the SOPs) are implausible. Under these circumstances, the Court is neither bound by, nor required to, defer to the Arbitrator's implausible interpretations. *See supra* Part I.A.

C. The Agent Fee Cap Applies To The Technology Fees.

The Agent Fee Cap limited the "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)" to "[o]ne (1) percent for loans of not more than $350,000[.]" Paycheck Protection Program as Amended by Economic Aid Act, 86 Fed. Reg. 3709, (Jan. 14, 2021). In the Petition, Benworth walked the Court through each PPP loan application requirement and surveyed the undisputed facts showing that the Technology Services were each used to prepare the PPP loan application and to determine which lender to refer an applicant to, if at all. (Petition, Parts I.A.1-2.) Womply does not argue that Benworth misstated the requirements for a PPP loan application. Nor does Womply dispute or otherwise challenge the facts Benworth relied on regarding the nature of the Technology Services.

Womply instead argues that the Arbitrator correctly concluded that the Agent Fee Cap applies only to fees for services an agent provided to a borrower and that Benworth received a benefit from the Technology Services. (Opp. 11-12.) But the plain language of the Agent Fee Cap contains no such limitation concerning who received or benefitted from the services. Beyond that, whether the Technology Services also provided a benefit to Benworth is irrelevant. Of course, Benworth received a benefit in the form of not having to prepare the application itself. That does not change the fact that, as Womply's CEO testified, [redacted] and thus assisted the borrower in applying for a PPP loan. (App. 3996-97, ¶¶ 18-19.) In fact, the Arbitrator defined "Technology Services" with reference to the definition set forth in the Agent Agreement. (Final Award at 4, n.3.) And the Agent Agreement expressly listed "providing loan applicants" with Womply's technology platform as one of the Technology Services. (*Id*. at 18.)

The Opposition's remaining arguments fare no better. Womply, like the Arbitrator, raises a variety of arguments that purportedly show that applying the Agent Fee Cap to the Technology Fees would conflict with other provisions of the Agreements and California law. (*See* Opp., Part I.A.)

However, the Arbitrator's contractual mandate was to give controlling effect to the SBA Regulations, including the Agent Fee Cap, even where they conflict with other terms of the Agreements or California law. (App. 3984, § 9.) The Arbitrator was thus without the power to give controlling effect to terms of the Agreements or California law that conflict with applying the Agent Fee Cap to the Technology Fees.

Finally, Womply argues that the Arbitrator correctly applied *OTO Analytics, Inc. v. Capital Plus Financial, LLC*, 2022 WL 1488441 (N.D. Tex. May 11, 2022) and, even if he did not, that decision is not a binding precedent, so the Arbitrator could manifestly disregard it. (Opp. at 14-15.) On the latter, during the Arbitration, Womply convinced the Arbitrator that *Capital Plus* was a decision he was bound by (App. 459:15-460:5), so Womply should not be permitted to disclaim the precedential value of *Capital Plus* here. In any event, as explained in the Petition, the Arbitrator disregarded the legal determinations made by the *Capital Plus* court that were harmful to Womply. (Petition, Part I.A.3.i.) For example, the Arbitrator blithely ignored *Capital Plus*'s legal analysis that broadly defined the term "preparing" in reference to PPP loans under the SBA Regulations that adopted the Agent Fee Cap. *Capital Plus*, 2022 WL 1488441 at *6 (holding that to "prepare" means to "make ready"); *see also id*. (explaining that Womply "made ready" PPP loan applications for approval by a lender "by verifying information to prevent fraud").

At bottom, the Arbitrator failed to apply the plain meaning of the Agent Fee Cap to the undisputed, legally dispositive facts, resulting in an irrational award that does not draw its essence from the Agreements and manifestly disregards the law.

D. The Final Award Establishes That Womply Acted As A Lender Service Provider.

As established in the Petition, the only conclusion which the facts of this case can support is that Womply acted as a lender service provider. (Petition, Part I.B.) The Arbitrator nonetheless reached the opposite conclusion for four reasons, each of which was debunked in the Petition. (*See id*.) Womply's efforts to revive the Arbitrator's reasoning fail. Only Womply's arguments concerning underwriting and the SOPs merit a response, however.[4]

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[4] Womply also attempted to justify the Arbitrator's implausible definition of "originating" but did not meaningfully respond to the issues raised in the Petition. (*Compare* Petition, Part I.B.1 *with* Opp., Part I.B.1.) In addition, Womply claims that the Arbitrator properly relied on conflicting terms of the

Underwriting. Womply makes two arguments to support the Arbitrator's conclusion that it did not engage in underwriting. Neither has merit. First, Womply attempts to downplay the effect of the Arbitrator's conclusion that "Womply's technology to some extent electronically performed" the functions of underwriting a PPP loan by juxtaposing it with the Final Award's statement that "Womply provided Benworth with technology that to some extent automated and assisted Benworth" with underwriting functions. (Opp. at 18.) Womply then compares its technology to lawyers using Westlaw: "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." (*Id.*) Womply is comparing apples to oranges.

Westlaw is a passive technology platform in which an individual would have to input information into Westlaw, obtain search results, and then analyze them. Womply was no Westlaw. Womply utilized various services, including Lexis Nexis, to request verifying information from applicants, verified that information, and then sent only those applicants who met the requirements for PPP and who were validated as legitimate borrowers to lenders like Benworth. The two companies could not be more different, and Womply's attempt to argue that Westlaw would check the same boxes as its technology is manifestly untrue.

Womply also argues that the SBA could not have intended for the PPP-specific underwriting rules to apply to the SOPs' examples of lender service providers that include the term underwriting. But Womply offers no support for that argument. Nor could it. The Arbitrator specifically concluded that the SOPs contain "policies and procedures ***governing the PPP***." (Final Award at 9. (emphasis added)) And the limited requirements for underwriting a PPP loan were contained in the Interim Final Rule, which "***supersede[d] any conflicting Loan Program Requirement*** (as defined in 13 CFR 120.10)." (App. 3851 (emphasis added).) Congress and the SBA thus clearly intended for the PPP-specific underwriting rules to apply to the SOPs' examples of lender service providers. This represents another inartful attempt by Womply to convince the Court—as it did the Arbitrator—to ignore the plain meaning of the contract it wrote, signed, and agreed to be bound by.

Agreements and the Parties' course of performance. (*See* Opp., Part I.B.4.) Once again, Womply overlooks that the SBA Regulations, including the SOPs, take precedence over all else.

The SOPs. Womply next asserts that the Arbitrator did not disregard the SOPs, he just interpreted them in a way that rendered them inapplicable to Womply. (Opp. at 19.) Womply also argues that the Arbitrator could not have manifestly disregarded the law because the SOPs do not carry the force of law and, even if they were terms of the Agreements, this Court may not review the Arbitrator's interpretation of the SOPs. (*Id*. at 20.) Womply is wrong again.

When federal regulations or even definitions from trade rules are incorporated into a contract, those regulations and definitions form a part of the contract and govern the parties' relationship. For example, the Ninth Circuit has affirmed the vacatur of an award where the arbitrator disregarded the trade rules in the parties' contract and those trade rules included definitions for commonly used terms. *See Coast Trading Co. v. Pac. Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982). By way of further example, in *Aspic*, the Ninth Circuit affirmed the vacatur of an award where the arbitrator refused to strictly enforce the regulatory requirements incorporated into the parties' agreement because doing so "would result in a forfeiture and unfairness" to the less sophisticated party. *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1168 (9th Cir. 2019).

The same reasoning in *Coast Trading* and *Aspic* applies here. The Arbitrator disregarded the SOPs to achieve a desired result. The SOPs contain a provision on compensating lender service providers (which, again, the Parties expressly incorporated into their Agreements): "An LSP may only receive compensation from the 7(a) Lender for services provided under an SBA-reviewed LSP Agreement." (App. 3442.) Prior to issuing the Interim Award, the Arbitrator announced his interpretation of the provision: [redacted] (App. 2801:12-18.) But the Arbitrator believed that enforcing this provision "would result in a disproportionately harsh penalty" to Womply. (App. 3158.) So, the Arbitrator concocted an array of implausible justifications to conclude that Womply was not a lender service provider subject to the SOPs' condition precedent to compensation. But, as explained in the Petition, none of those justifications are grounded in the controlling terms of the Agreements.

Simply put, Womply meets the SOPs' examples of what the SBA considers to be a lender service provider. Had the Arbitrator strictly construed the SOPs, as he pledged to do, it would be inescapable that Womply qualifies as a lender service provider. This Court is not bound by the Arbitrator's contrary conclusions.

E. The Final Award Grants Relief Not Permitted by the Agreements.

Benworth argued that the Final Award grants relief not permitted by the Agreements because SBA Regulations (which, again, are express terms of the Agreements) do not permit an agent to collect fees from a lender under compensation agreements that were not submitted to or approved by the SBA. (Petition, Part I.C.) It is undisputed that the Agreements were not submitted to or approved by the SBA. Yet, the Arbitrator awarded Womply additional fees under the Agreements. Despite responding to all other Sections of the Petition, Womply has no response at all to this specific argument. For this reason alone, the Court should vacate the Final Award. *See Wise v. MAXIMUS Fed. Servs., Inc.*, 445 F. Supp. 3d 170, 199 (N.D. Cal. 2020) (holding that a party waived its opposition to an argument by not addressing it in a response).

II. THE FINAL AWARD VIOLATES EXPLICIT, WELL-DEFINED PUBLIC POLICY.

Benworth identified two explicit, well-defined public policies that militate against the relief ordered by the Final Award. The first is an SBA Regulation that requires Agents, including lender service providers, to provide compensation agreements to the SBA for its review. 13 C.F.R. 103.5(a) ("Any Applicant, Agent, or Packager must execute and provide to SBA a compensation agreement, and any Lender Service Provider must execute and provide to SBA a Lender Service Provider agreement."). Courts "uniformly hold" that the failure to comply with this regulation "precludes any recovery of SBA fees." *Capital Plus*, 2022 WL 1488441 at *7 (collecting cases). Womply has no response to its failure to comply with this regulation and vacatur of the Final Award is warranted on this basis alone. *See Wise*, 445 F. Supp. 3d at 199 (holding that a party waived its opposition to an argument by not addressing it in a response).

The next policy is grounded in the SOPs' provision on how lender service providers may be compensated: "An LSP may only receive compensation from the 7(a) Lender for services provided under an SBA-reviewed LSP Agreement." (App. 3442.) Womply claims this is not a well-defined public policy that prohibits compensating a lender service provider, relying on the Arbitrator's reasoning that this provision protects borrowers and does not say an agreement is illegal or invalid if not submitted to the

SBA. (Opp. at 22-23.) Notwithstanding, the Arbitrator agreed this policy is explicit and well-defined: [redacted] (App. 2801:12-18.) And the Arbitrator expressly characterized the SOPs as a document containing "policies and procedures ***governing the PPP***." (Final Award at 9 (emphasis added).) Thus, the SOPs' policy on not compensating lender service providers without an agreement submitted to the SBA controls. If confirmed, the Final Award requires Benworth to violate SBA Regulations.

III. THE ARBITRATOR SHOULD HAVE POSTPONED THE PROCEEDINGS.

Finally, Benworth argued that the Arbitrator was guilty of misconduct in refusing to postpone the Final Award pending the completion of the SBA's investigation into Womply because it foreclosed Benworth from presenting pertinent and material evidence. (Petition, Part III.) Benworth primarily relied on *Naing International Enterprises., Ltd. v. Ellsworth Associates., Inc.*, 961 F. Supp. 1, 3 (D.D.C. 1997), where the court vacated an award because the arbitrator did not grant a continuance pending a completion of the SBA's investigation into one of the parties. Womply counters that *Naing* is distinguishable, and the Arbitrator reasonably declined to postpone the proceedings because the SBA has not yet completed its investigation. (Opp. at 23-24.)

However, as *Naing* observed, "neither this Court nor the arbitration panel can allow the pursuit of an expedient adjudication to outweigh its obligation to ensure a just and fair one." 961 F. Supp. at 5-6. Here, the Arbitrator allowed expediency to outweigh his obligation to ensure a fundamentally fair hearing. Despite acknowledging the materiality of the results of the SBA's investigation to the issues in the Arbitration and the prospect that those results could render his award "advisory," the Arbitrator refused to defer his ruling until the SBA completed its investigation of Womply. In so doing, the Arbitrator not only foreclosed Benworth from presenting pertinent evidence and material, but the Arbitrator also usurped the role of the SBA and granted himself the authority to make final policy decisions about one of the most unprecedented government relief programs in American history.

CONCLUSION

For these reasons, and those detailed in the Petition, the Court should vacate the Final Award.

Dated: September 9, 2024.

Respectfully submitted,

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