

EXHIBIT 12

JAMS ARBITRATION CASE REFERENCE NO. 1210038203

**Oto Analytics, Inc. dba Womply,
Claimant(s),**

and

**Benworth Capital Partners, LLC,
Respondent(s).**

Benworth's Order Re: Motion to Admit Congressional Staff Report.

Order No. 6

Introduction

Throughout these arbitral proceedings, Respondent/Counter-Claimant, Benworth Capital Partners LLC ("Benworth"), has sought to admit the December 2022 staff report of the U.S. House of Representatives' Select Subcommittee on the Coronavirus Crisis entitled: "*We Are Not The Fraud Police*": *How Fintechs Facilitated Fraud In The Paycheck Protection Program* (the "Congressional Report" or the "Report"). According to Benworth, "a number of findings in the Congressional Report go directly to factual issues at the heart of this arbitration, including the efforts of Claimant/Counter-Respondent, Oto Analytics, Inc. d/b/a Womply ("Womply") to evade Small Business Administration ("SBA") rules and regulations governing the Paycheck Protection Program ("PPP") and the parties' agreements." (Benworth Letter Br., 3/27/23, p.1.) Womply has continually objected to the introduction of the Congressional Report on hearsay grounds, and to date, each time that Benworth has attempted to admit the Congressional Report, the Arbitrator has sustained Womply's objections, often noting that the Congressional Report is "rank hearsay."

Based on Benworth's continuing requests to introduce the Congressional Report, the Arbitrator granted Benworth leave to file a formal motion to have the Congressional Report admitted into evidence.

Benworth submitted its Motion, via letter brief, on March 27, 2023. Benworth attached the Congressional Report to this submission.

Womply submitted its Opposition to Benworth's Motion on April 7, 2023, and on April 14, 2023, Benworth submitted its Reply.

Based upon the submissions of the parties, and after careful review and analysis of the legal precedent cited in those papers, the following order is issued on Benworth's Motion

Discussion

Benworth cites two grounds for the admission of the Congressional Report. First, Benworth seeks to admit the Report for non-hearsay purposes, that is, according to Benworth, to provide the necessary context for the reasons underlying the SBA's suspension of Womply and the investigation it is currently undertaking. Second, Benworth seeks to admit the factual findings contained in the Congressional Report since, according to Benworth, those findings are admissible under the public records exception to the rule against the admission of hearsay. The Arbitrator shall address each of these contentions below.

Admission of the Report for the non-hearsay purpose of "context"

According to Benworth, the Congressional Report is admissible to provide the factual foundation for the basis of the SBA's suspension of Womply and its investigation into Womply's compliance with SBA Loan Program Requirements. The fact that the Congressional Report was the impetus for the SBA's suspension and investigation has already been established in the record, however. (*See, e.g.*, JX 374 [December 8, 2022 letter from SBA to Mr. Scammell citing Congressional Report and its "references to Womply" as grounds for SBA's actions].) Admission of the Congressional Report is therefore not necessary to provide any further context for the SBA investigation or any other fact or event. The fact of the Report is in the record.

Supplementing its argument regarding context, Benworth also contends that the Congressional Report's findings are admissible under Federal Rule of Evidence, Rule 801(d)(2)(A) and California Evidence Code section 1200, since the Report's findings are based on communications that Womply and its officers, attorneys, and other representatives had with the Select Subcommittee. The problem with Benworth's position is twofold. First, these communications within the Report are not only hearsay in that they reflect communications by individuals to members of the Committee who then chose which selected excerpts of those communications they would include within the Report, they are also hearsay within hearsay since they reflect communications by individuals to other individuals that were then submitted to and reviewed by members of the Committee who then chose which excerpts of those communications they would include within the Report. Neither hearsay nor hearsay within hearsay is admissible in these arbitral proceedings.

Second, while it is true that, under Rule 801(d)(2)(A) and California Evidence Code section 1220, a party's own statement, if offered against that party, is not considered hearsay, Benworth is not now, nor has it ever, sought to introduce into evidence the documents underlying the Congressional Report, nor has it sought to introduce Womply's officers, attorneys, or other representatives own statements to the Congressional Select Subcommittee. Instead, Benworth is seeking to introduce the Report, which contains the Select Subcommittee's staff's selected excerpts, descriptions, and characterizations of the underlying documents and officers', attorneys', or other representatives' purported statements. Benworth has cited no statute or court decision that demonstrates that these excerpts found within the Report are the equivalent of the individuals' own statements. They do not, therefore, constitute a Rule 801(d)(2)(A) or section 1200's party admission.

Finally, Benworth contends that the Congressional Report is admissible to explain Womply's state of mind and to challenge any inconsistent statements made by Mr. Scammell during his testimony at the

hearing. Copious evidence of Womply’s state of mind has already been introduced in this arbitration, and Benworth has had ample opportunity to challenge Mr. Scammell’s purportedly inconsistent statements. In addition, the hearsay statements in the Report are not a reliable or appropriate source to explain Womply’s state of mind or to challenge inconsistent statements. These are therefore not grounds for admitting the Congressional Report.

Admission of the Report under the Public Records Exception to the hearsay rule

Rule 803(8) of the Federal Rules of Evidence – the public records exception to the hearsay rule – permits an admission of “[a] record or statement of a public office if: (A) it sets out . . . factual findings from a legally authorized investigation; and (b) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” (Fed. R. Evid. 803(8).) Factual conclusions within the “record” are also permitted so long as they are “based on a factual investigation and satisf[y] the Rule’s trustworthiness requirements.” (*Beech Aircraft Corp. v. Rainey* (1988) 488 U.S. 153, 170.) “Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof – whether narrow ‘factual’ statements or broader [factual] ‘conclusions’ – that she determines to be untrustworthy.” (*Id.* at 167.)¹

Trustworthiness is evaluated based on: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation. (*Id.*, n.11.) The party opposing the introduction of a public record bears the burden of coming forward with enough negative factors to persuade a court that a report should not be admitted. (*Sullivan v. Dollar Tree Stores, Inc.* (9th Cir. 2010) 623 F.3d 770, 778.) Here, Womply has met its burden.

¹ Even if the Report was not inadmissible on hearsay grounds, Benworth has never directed the Arbitrator to any specific “findings” within the Report that it seeks to admit, instead merely discussing “findings” in general, which is wholly unhelpful to the Arbitrator’s considerations.

First, the Select Subcommittee did not hold any hearings in connection with the Congressional Report. This weighs in favor of Womply's burden.

Second, the Congressional Report relies heavily upon statements by Benworth and Fountainhead, both of which were in active arbitration with Womply. Benworth and Fountainhead thus had a financial interest in making statements to Select Subcommittee staffers attacking Womply in the hopes that they could use the results of those statements to advance their arbitration interests. The motivations of the individuals providing information to the Select Subcommittee staffers, coupled with the fact that the Arbitrator has not been presented with any information about those staffers, particularly with regard to their skill or expertise in assessing credibility and weighing potentially biased motivations and evidence, also tips the balance in favor of Womply meeting its burden. (*See Anderson v. City of New York* (S.D.N.Y. 1987) 657 F. Supp. 1571, 1579 [excluding Congressional report as hearsay for lack of trustworthiness because Committee members may not have had "any special expertise in evaluating witnesses, especially regarding their credibility or accuracy of recall" and because witnesses "were self-interested."].)

Indeed, the Arbitrator knows nothing about the make-up of the Sub Committee and its staffers and how the Select Sub Committee and its staffers were instructed to conduct its investigation. All he knows is that,

[i]n the course of the investigation, Select Subcommittee staff reviewed more than 83,000 pages of internal documents and had multiple briefings and conversations with former fintech employees and others with knowledge of fintech activities.

The Select Subcommittee also was briefed by staff of the SBA and the SBA
OIG.

(Congressional Report, pp.16-17.) This is insufficient to instill any sense of trustworthiness in the Sub Committee's skill and expertise on these matters.

As the court explained in *Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers & Emps. Of Outside Loc. Unions & Dist. Counsel's (Iron Workers) Pension Plan* (D.D.C. 2006) 467 F.Supp.2d 91, Congressional reports are not entitled to an additional presumption of trustworthiness or reliability simply by virtue of having been produced by Congress. (*Id.* at 98.) Thus, whereas here, when presented with a Congressional Report that “lacks the ordinary indicias of reliability, is not based on the personal knowledge of the reporter, and contains the testimony of interested parties, not experts,” the Arbitrator uses his discretion and DENIES Benworth’s request to admit the Congressional Report under the Public Records Hearsay Exception. (*See Anderson, supra*, 657 F.Supp. at 1579-80.)

Benworth’s reliance on California Evidence Code section 1280 fares no better. Section 1280 states that a “writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.” (Cal.Evid.Code §1280.) Benworth contends that it has satisfied all three prongs, and specifically with the regard to the third prong of “trustworthiness,” Benworth relies on *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301 and *People v. Orey* (2021) 63 Cal.App.5th 529 for the proposition that “the trustworthiness requirement is established [because it has shown] that the written report is based upon the observations of public employees who have a duty to observe the facts and report and record them correctly.” (*See Motion*, p.9.) *Jazayeri* and *Orey* both involved documents prepared by public employees based on their own personal observations, however. (*See Jazayeri, supra*, 174 Cal.App.4th at 318 [reports not hearsay under public records exception because prepared after authors’ inspection of each chicken delivered]; *Orey, supra*, 63 Cal.App.5th at 551-52 [prison records not hearsay under public records exception because records were made by public employees in official duty of

recording statements during normal course of business].) Such is not the case here – the Select Sub Committee staffers who prepared the Congressional Report did not observe any facts; they instead based the Report on information provided by third parties. *Jazayeri* and *Orey* are therefore inapplicable to this situation.

In its Reply, Benworth cites *People v. ConAgra Grocery Prod. Co.* (2017) 17 Cal. App.5th 51. This case is inapposite, however, since it merely stands for the unremarkable and wholly distinguishable proposition that reports relied upon by experts that were not prepared by the experts themselves are admissible for the limited purpose of assisting the court in evaluating the expert's opinion. (*Id.* at 138.) The Congressional Report is not being introduced for the purpose of evaluating an expert's opinion here. *ConAgra*, therefore, does not apply herein.

In light of the above, the Arbitrator's conclusions with regard to the trustworthiness of the Congressional Report remains the same, whether based on Federal or California law.

Conclusion

Based upon the above analysis, Benworth's motion to admit the Congressional Report is DENIED. The 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.

IT IS SO ORDERED.

May 2, 2023

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Alexander L. Brainerd
Arbitrator