EXHIBIT 2

JAMS ARBITRATION
JAMS REF. NO. 1210038203

Oto Analytics, Inc. d/b/a Womply,

Claimant/Counter-Respondent,

v.

Benworth Capital Partners, LLC,

Respondent/Counter-Claimant.
_______________________________________/

BENWORTH'S MOTION TO DISQUALIFY
WILLIAM M. MANGER, JR., AS WOMPLY'S EXPERT
WITNESS OR, IN THE ALTERNATIVE, TO STRIKE HIS OPINIONS

Respondent/Counter-Claimant Benworth Capital Partners, LLC ("Benworth") moves to disqualify William M. Manger, Jr., from serving as an expert witness for Claimant/Counter-Respondent Oto Analytics, Inc. d/b/a Womply ("Womply") or, in the alternative, to strike his opinions. In support thereof, Benworth states:

INTRODUCTION

Womply's claims against Benworth are contract disputes. The parties entered into a series of contracts that incorporate the rules and regulations of the U.S. Small Business Administration (the "SBA") as express terms of those agreements. The agreements also specify that SBA regulations govern over conflicting law, including California law applicable to the agreements.

The SBA adopted new regulations to implement the Paycheck Protection Program ("PPP") during the COVID-19 pandemic. One of the PPP regulations capped at 1% the SBA lender fees that PPP lenders (like Benworth) making loans not exceeding $350,000 may share with its agents.

Benworth and Womply dispute whether Womply is an agent under the SBA regulations.

Multiple SBA regulations characterize Womply as an agent. Womply contends that under a non-PPP-related SBA guidance document it is, instead, a "technology service provider." In any event, and as it pertains to the present motion, the SBA guidance expressly states that even technology service providers are "agents" if they perform underwriting.

SBA rules define what "underwriting" is under the PPP. The parties agree that the definition of underwriting is substantially different under the PPP than under traditional SBA lending programs authorized by Section 7(a) of the Small Business Act. Through its rulemaking authority, however, the SBA provided that its PPP regulations would supersede any other conflicting SBA rules or regulations. Womply has proffered William J. Manger, Jr.—a former senior SBA official—to, among other things, express an opinion that conflicts with those (and other) SBA regulations, which the parties agree control and govern the contracts between Benworth and Womply. For instance, although the PPP rules specify that they supersede conflicting SBA rules, Manger proposes to tell this tribunal to ignore SBA rules and apply a definition of underwriting that is different from the one found in the governing PPP regulations. These opinions are inadmissible under California law.

This tribunal should disqualify Manger and strike his opinions. As detailed below, SBA regulations expressly prohibit Manger from serving as an expert for Womply. Even if his opinions could be considered, they are unhelpful. For one, the parol evidence rule bars parties from offering evidence outside the contract to contradict its express terms. Nor may Manger, who was one of many government officials who participated in drafting SBA regulations, offer an expert opinion on his (or others') subjective intent in adopting regulations. The express terms of the provisions apply. The parties agreed for you, the Arbitrator, to interpret the parties' agreements—not Manger. And if Womply believed the agreements favored its position, it would not have hired someone to tell you what they mean.

BACKGROUND

Congress established the PPP to offer government-backed loans to small businesses during the COVID-19 pandemic. The SBA guarantees SBA-approved loans. If a borrower defaults, the SBA pays the defaulted loan amount to the lender. But thousands of small, minority-owned businesses struggled to find banks that would approve their applications for PPP loans. The SBA sought to remedy that inequity during the second round of PPP funding.

Benworth is a minority-owned SBA-approved PPP lender. As a lender to low- and middle-income borrowers, Benworth was an ideal lender for the SBA under the PPP program. SBA lenders like Benworth must comply with SBA regulations. These regulations define the criteria SBA lenders must use to, for instance, review applications and fund loans. But SBA lenders have ongoing obligations, including servicing the loans throughout their life and assisting the SBA in any investigation of loans or borrowers. As a part of the program, the SBA compensates lenders by paying lender fees. But the SBA restricts how those fees may be shared. *See infra* at pp. 6-9 (describing the PPP regulations at issue).

A. Benworth Engages Womply In Connection With The Paycheck Protection Program

In February 2021, during the second round of PPP funding, Benworth and Womply entered into an agreement for Womply to refer PPP loan applications to Benworth that had been prepared using Womply's Fast Lane platform. *See* Agent Agreement (attached as **Exhibit A** to Appendix in Support of Benworth's Motion to Disqualify William M. Manger, Jr., as Womply's Expert Witness or, in the Alternative, to Strike His Opinions ("Appendix")). The Fast Lane platform was available online and allowed borrowers to complete SBA loan applications by answering question prompts and uploading or attaching documents. Womply's Fast Lane platform would then import the responses into a loan application and verify the borrower's representations through the use of third-party service providers. *See, e.g.*, Transcript of Deposition of Toby Scammell ("Scammell Dep. Tr.") at 57:9-13, 121:25 – 122:13, 215:5-9 (Sept. 10, 2022) (attached as **Appendix Exhibit B**).

The February 2021 Womply agreement with Benworth defined Womply as an "Agent." Agent Agreement at p. 1. It provided that "Agent [i.e., Womply] shall provide Lender [i.e., Benworth] with . . . services . . . relating to the packaging and processing of PPP loan applications . . . ." *Id.* at p. 2, § 5.

The agreement says Womply will provide both "Processing Services" and "Technology Services." As to Processing Services, Womply agreed to the following:

- "Assisting each loan applicant in responding to questions about its eligibility under the PPP," *id.* at p. 2, § 5(a)(ii);
- "Providing loan applicants"—i.e., not providing Benworth—"a technology platform that offers the Technology Services (defined below)," *id.* at p. 2, § 5(a)(ii);
- "Coordinating the collection ***and review*** of required due diligence documentation under the PPP . . . including documentation necessary for Lender to comply with application KYC/AML/BSA Laws," *id.* p. 2, § 5(a)(iii) (emphasis added);
- "Communicating with loan applicants regarding loan applications process and status, including without limitation SBA rejections, and responding to loan applicant questions in connection therewith," *id.* at p. 2, § 5(a)(v); and
- "Assisting Lender with the preparation ***and submission*** to the SBA of any reporting or documentation with respect to Included Loans, as required by SBA Regulations," *id.* at p. 2, § 5(a)(vii) (emphasis added).

As to Technology Services, Womply agreed to "make available to Lender and loan applicants a technology platform," *id.* at p. 3, § 5(b), that conducted the following services (among others):

- "Providing loan applicants"—again, not Benworth—"a technology platform into which loan applicants can input information necessary to complete its applicable borrower application form for the PPP," *id.* at p. 3, § 5(b)(i);

- "Ensuring the collection of all certifications, documentation and other information necessary to complete the borrower application form and such other forms or documents as the SBA may require in connection with the origination of Loans under the PPP," *id.* at p. 3, § 5(b)(ii); and

- "Submitting on Lender's behalf each borrower application through the SBA Paycheck Protection Program, or such other online platform as the SBA may designate for transmitting data to the SBA[,]" *id.* at p. 4, § 5(b)(x).

The agreement provides for Womply to be paid both "agent fees" and "technology fees." *See id.* at pp. 4-5, § 6(a)-(b). This agreement, like the others entered into by the parties, expressly adopted SBA regulations. *Id.* at p. 10, § 18.

Approximately two months later, in April 2021, Womply provided Benworth with a series of agreements to replace the February 2021 agreement. These new agreements required Benworth to pay Womply referral fees, API (application program interface) fees, and technology fees. *See* Amended and Restated PPP Loan Referral Agreement ("Referral Agreement") (attached as **Appendix Exhibit C**); Womply Developer Order Form ("Order Form") (attached as **Appendix Exhibit D**). Womply also added language reciting that it "was not a lender service provider." Referral Agreement at § 1.3; Order Form at § 1.3. The agreements, however, remained subject to SBA regulations. Referral Agreement at § 9; Order Form at § 4. Indeed, Womply continued to provide the exact same services—through the Fast Lane platform—under the new agreements that it did under the initial agreement despite language in the new, operative documents providing that Benworth had the "ultimate" (but not the ***sole***) responsibility for underwriting. *See* Transcript of Deposition of Cory Capoccia ("Capoccia Dep. Tr.") at 167:16 – 168:8 (Sept. 21, 2022) (attached as **Appendix Exhibit E**); Referral Agreement at p. 1. The agreements were fully integrated. *E.g.*, Referral Agreement at § 16.

B. Womply's New Fee Schedules Exceed The Lender Fees SBA Provided

Womply has acknowledged to this Arbitrator that its fee regime was flawed. It now says it will not seek fees that it previously claimed under the April 2021 agreements in instances where Benworth would have to pay Womply a greater share of lender fees than Benworth received from the SBA. *See* Womply's Letter to Arbitrator at 4 n.2 (Dec. 21, 2022). Womply recognizes that such a fee structure would conflict with the goals of the PPP program.

Similarly, under certain instances, Womply's agreements required Benworth to pay it all of the SBA lender fees Benworth received. *See* Transcript of Deposition of Mildred J. Avila at 69:25 – 70:2-10 (Sept. 14, 2022) (attached as **Appendix Exhibit F**). Womply demanded a payment structure that would lead Benworth to pay Womply more than 90% of the SBA lender fees Benworth received despite Benworth's ongoing loan servicing responsibilities and obligations to the SBA. *See infra* at pp. 7, 10 (discussing Congressional Report).

Womply's fee structure threatened Benworth's ability to continue participating in the PPP. The smaller the value of the loan, the greater proportion of SBA fees Benworth had to pay Womply under the new fee structure. *See, e.g.*, Transcript of Deposition of Bernardo Navarro ("Navarro Dep. Tr.") at 119:8 – 120:17, 126:4 – 127:13 (Oct. 26, 2022) (attached as **Appendix Exhibit G**). Excessive agent fees could discourage lenders like Benworth from funding the smaller loans that were critical to the PPP's success, and that prompted Congress to implement a second round of PPP funding. Indeed, Womply's expert (Manger) conceded that the refusal of SBA lenders (like Benworth) to fund SBA-approved loans—regardless of their size—is not authorized and could result in penalties, such as suspending the lender from the SBA program. *See* Transcript of Deposition of William Manger, Jr. ("Manger Dep. Tr.") at 104:2 – 106:8 (Jan. 6, 2023) (attached as **Appendix Exhibit H**).

C. The SBA Adopts An Interim Final Rule For The PPP That Caps Agent Fees At 1% For Loans Not Exceeding $350,000

In April 2020, pursuant to rulemaking authority delegated to it by Congress in the

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), the SBA adopted an Interim Final Rule to implement the PPP. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (Apr. 15, 2020) (the "Interim Final Rule").[1] The Interim Final Rule expressly "***supersede[d] any conflicting Loan Program Requirement***." *Id.* at 20812 (emphasis added). Benworth's principal acknowledged that he was not initially aware that the Womply agreements were at odds with the SBA regulations the parties incorporated into their agreements. *See* Navarro Dep. Tr. at 95:13-18.

Normally, under SBA regulations and Standard Operating Procedures, "lender underwriting and lending criteria are focused on a borrower's creditworthiness and ability to repay the loan with earnings from their business." Select Subcommittee on the Coronavirus Crisis, *"We Are Not The Fraud Police": How Fintechs Facilitated Fraud In The Paycheck Protection Program* at 8-9 (Dec. 2022) (hereinafter, the "Congressional Report"); *see* Small Business Administration, Office of Capital Access, *Lender and Development Company Loan Programs* at 246-56 (Oct. 1, 2020) (hereinafter, "SOP 50 10 6" or the "SOPs"). But as the U.S. House of Representatives' Select Subcommittee on the Coronavirus Crisis (the "Select Subcommittee") found, "[g]iven the unique emergency nature of the PPP, the underwriting requirements for PPP loans differed greatly from those of traditional 7(a) loan programs." Congressional Report at 8.

The Interim Final Rule required limited underwriting for PPP loans. 83 Fed. Reg. at 20815.

---

1 The SBA adopted additional interim final rules in January 2021, after Congress extended the PPP and authorized second draws under the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. But those additional rules did not materially alter the provisions at issue here, so Benworth refers to the 2020 Interim Final Rule for simplicity. *See* Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 86 Fed. Reg. 3692 (Jan. 14, 2021); Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, 86 Fed. Reg. 3712 (Jan. 14, 2021). Unless otherwise noted, all citations are to the 2020 Interim Final Rule.

The table below shows the PPP underwriting requirements alongside the services Womply performed through its Fast Lane platform:

Underwriting Requirements	Did Womply Provide That Service?	Source Of Authority
Confirm receipt of borrower certifications, 83 Fed. Reg. at 20815 (art. III.3.b.i.).	✔	Scammell Dep. Tr. at 122:19 – 123:15.
Confirm receipt of information demonstrating a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020, 83 Fed. Reg. at 20815 (art. III.3.ii.).	✔	Scammell Dep. Tr. at 121:25 – 122:13, 215:5-9.
Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application, 83 Fed. Reg. at 20815 (art. III.3.b.iii.).	✔	Scammell Dep. Tr. at 90:15 – 91:15; *see also* 85 Fed. Reg. at 20812-13 (detailing the calculation of the maximum PPP loans based on annual payroll).
Establish an anti-money laundering (AML) compliance program, 83 Fed. Reg. at 20815 (art. III.3.b.iv.II.).	✔	Capoccia Dep. Tr. at 138:1-17, 167:16 – 168:6.
Establish a customer identification program, including identifying and verifying borrowers' identities, 83 Fed. Reg. at 20815 (art. III.3.b.iv.II.).	✔	Scammell Dep. Tr. at 57:9-13.

The Interim Final Rule provides that "[e]ach lender's underwriting obligation under the PPP is limited to the items listed above [i.e., in article III.3.b.] and reviewing the 'Paycheck Protection Application Form.'" 85 Fed. Reg. at 20815. Womply thus performed all the required underwriting functions for PPP loans.

The Interim Final Rule also set limits on agent fees. Under the rule, "[a]gent fees will be paid by the lender out of the fees the lender receives from SBA." 85 Fed. Reg. at 20816. It further provides:

> Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. 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) may not exceed . . . [o]ne (1) percent for loans of not more than $350,000. . . .

Id. The 1% fee cap for agents is not in dispute. These limits apply regardless of the underwriting or other services the agent provides. *See id.*

D. The Parties Dispute Whether Womply Is an "Agent" Under SBA Regulations

Under the plain language of the SBA regulations, Womply is an "Agent." "Agent means an authorized representative, including a[] . . . lender service provider, or any other person representing an Applicant or Participant by conducting business with SBA." 13 C.F.R. § 103.1(a) (2021). Conducting business with the SBA includes acting as lender service provider, as well as "[p]reparing or submitting on behalf of an applicant an application for financial assistance of any kind" and "[p]reparing or processing on behalf of a lender or a participant in any of SBA's programs an application for federal financial assistance . . . ." *Id.* § 103.1(b)(1), (2), (4).

The SBA also clarified the meaning of "lender service provider." *Id.* § 103.1(d). The SBA adopted specific guidance for agents who are lender service providers. *See, e.g.*, SOPs at p. 185. The SBA SOPs offer a non-exhaustive list of lender service providers, such as:

> i. An individual or entity engaged by a 7(a) Lender to provide services for the purposes of obtaining Federal financial assistance that include 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. This includes Agents who:
>
> a) Perform any pre-qualification review based on SBA's eligibility and credit criteria . . . prior to submitting the Applicant's information to the 7(a) Lender; or
>
> b) Provide to the 7(a) Lender an underwritten application, whether through ***the use of technology or otherwise***.
>
> ii. Entities providing technology services to a 7(a) Lender that ***include underwriting***.
>
> iii. An individual or entity generates a significant number of 7(a) Lender's loan originations. As a general rule, SBA considers a "significant number"

> to be two-thirds (66%) or more of the 7(a) Lender's loan originations for the prior 12 months.

SOPs at p. 185 (emphasis added); *see also, e.g.*, 85 Fed. Reg. at 20816 (art. III.4.a.) ("Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans . . . ."); 86 Fed. Reg. 3692, 3709 (art. III.D.1.) (Jan. 14, 2021 Interim Final Rule) (same).

Womply squarely fits within each category of lender service provider. *Compare* SOPs at p. 185 (setting forth non-exhaustive list of lender service provider functions), *with supra* p. 8 (chart detailing underwriting services Womply provided). Moreover, far beyond two-thirds, Womply generated more than 95% of Benworth's loans—a significant number of loans, as Womply's expert conceded. *See, e.g.*, Manger Dep. Tr. at 210:15-21, 211:23 – 212:9, 213:3-9.

The Select Subcommittee's report independently provides additional support for concluding that Womply was a lender service provider. Applying the SBA's rules and definition of "agent," including its definition of "lender service provider," and the information provided by Womply, the Select Subcommittee concluded that Womply claimed to be a technology service provider to avoid accountability for its PPP-related actions, despite appearing to meet the definition of a lender service provider. *See* Congressional Report at 59-60. Indeed, following the Congressional Report, the SBA itself announced that it was "immediately suspend[ing] . . . Womply from working with the SBA in any capacity," and would "be investigating appropriate action against [Womply's] management, owners, and successor companies."[2]

Womply nevertheless claims it is neither a lender service provider nor any other type of

---

[2] Small Business Administration, Press Release, U.S. Small Business Administration Statement on the House Select Subcommittee on the Coronavirus Crisis Report Concerning Fraud in the Paycheck Protection Program (Dec. 8, 2022), available at https://www.sba.gov/article/2022/dec/08/us-small-business-administration-statement-house-select-subcommittee-coronavirus-crisis-report (last visited Jan. 24, 2023).

agent. Womply relies on the same provision of the SOPs discussed immediately above. The provision includes a notation that reads: "SBA does not consider entities providing technology services that ***do <u>not</u> include underwriting to be Agents***." SOPs at p. 185 (emphasis added). Attempting to fit within this language, Womply denies that it engages in underwriting. But Womply's argument is not based on the relevant definition of "underwriting" for PPP loans, as prescribed by PPP-related rules. Instead, Womply contends it is not an underwriter under traditional SBA loan programs that differ from (and pre-date) the PPP. But the SBA regulations do not say that those extensive underwriting criteria apply to the PPP. So, Womply hired Manger to say it for them.

E. Womply Submits Manger's Expert Report

William M. Manger, Jr., was a Trump administration political appointee to the SBA. *See* Expert Report of William M. Manger, Jr., Ex. A ("Manger Report") (attached as **Appendix Exhibit I**). Manger worked at the SBA for eight years, including previously with the George W. Bush administration. *Id.* Manger oversaw implementation of the PPP, including the drafting and implementation of the Interim Final Rule, as well as the SOPs. Manger Dep. Tr. at 196:22-25. He claims to have read "every word" of the nearly 600 pages comprising the SOPs. *Id.* at 164:25 – 165:1-8. But he was unable to identify any provision of the SOPs (or the interim final rules, which he also "pretty much . . . read every word" of, *id.* at 163:6-11) to support his opinions.

Most recently, Manger served as the SBA chief of staff and as associate administrator of the SBA's Office of Capital Access. Manger Report, Ex. A. Manger departed the SBA in January 2021 after President Trump left office. *See* Manger Dep. Tr. at 12:1-3. Womply hired him as its expert witness in the summer of 2022. *Id.* at 94:2-10. But Manger admitted (repeatedly) that he is not an expert on technology. *E.g.*, *id.* at 28:15 ("I'm not a tech expert."). He also testified that he was "not that familiar" with the technology services that Womply and others provided to PPP lenders. *Id.* at 28:15-22.

Manger's expert report includes a number of opinions that either (a) expressly contradict the express terms of the SBA regulations incorporated into Benworth and Womply's agreements or (b) are otherwise impermissible. Manger provides the following opinions (or variations thereon):

1. "Based on my experience at the SBA, LSP [i.e., lender service provider] fees are not capped by any SBA regulation, rule, guidance, or practice." Manger Report at ¶ 45.

2. "[I]t is my opinion that, in addition to providing Benworth with referral services, Womply provided Benworth with extensive technology services that did not constitute the type of 'assistance in preparing an application for a PPP loan (including referral to the lender)' that the SBA was regulating with the Agent Fee Cap." *Id.* at ¶ 55; *see also id.* at ¶ 57 ("Womply's platform did more than prepare and refer applications.").

3. "While Womply provided technology services that collected and confirmed certain applicant information, that does not render Womply an underwriter of PPP loans or an LSP." *Id.* at ¶ 65; *see also id.* at ¶ 64 ("[I]t is my opinion that Womply did not perform underwriting as that term is used in SOP 50 10 6.").

4. The designation as a lender service provider "would not have automatically capped Womply's fees under any SBA rule or regulation." *Id.* at ¶ 69.

5. "Benworth will not have to return Fees to the SBA and will not lose the SBA guarantee for PPP loans as long as it acted in good faith." *Id.* at p. 28 (boldface and capitalizations omitted).

Benworth moves to disqualify Manger and strike his impermissible opinions.

LEGAL STANDARD

Adjudicative bodies, such as this one, have inherent authority and broad discretion to disqualify expert witnesses. *See Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996); *Koch Refin. Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996); *Cottini v. Enloe Med. Ctr.*, 226 Cal. App. 4th 401, 425-27 (2014). To be admissible, an expert's testimony must "'rest[] on a reliable foundation and [be] relevant to the task at hand.'" *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). "'Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.'" *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013). Ultimately, expert testimony must "help the trier of fact understand highly specialized issues that are not within common experience." *Elosu*, 25 F.4th at 1026.

ARGUMENT

Benworth requests that you disqualify Manger as an expert or, alternatively, strike his impermissible opinions. You should do so for two reasons. First, SBA regulations prohibit Womply's retention of Manger. And second, Manger's opinions are impermissible under governing law and will be of no assistance to this tribunal.

I. Manger's Testimony Violates SBA Regulations

SBA regulations preclude Manger from offering expert testimony on behalf of Womply. The relevant regulation prohibits former SBA employees from representing recipients of SBA assistance within two years after leaving the SBA. The regulation provides in relevant part:

> No former employee, who occupied a position involving discretion over, or who exercised discretion with respect to, the granting or administration of SBA Assistance may occupy a position as employee, partner, agent, attorney or other representative of a concern which has received this SBA Assistance for a period of two years following the date of granting or administering such SBA Assistance if . . . ***[t]he date of granting or administering such SBA Assistance was within the period of the employee's term of employment*** . . . .

13 C.F.R. § 105.202(a)(1) (2021) (emphasis added).

The SBA defines "SBA Assistance" broadly. "SBA Assistance means financial, contractual, grant, managerial or other aid, including size determinations, section 8(a) participation, licensing, certification, and other eligibility determinations made by SBA. The term also includes an express decision to compromise or defer possible litigation or other adverse action." 13 C.F.R. § 105.201(e) (2021).

Manger is indisputably subject to this SBA regulation. By his own admission, he is a former SBA employee who, as the head of the Office of Capital Access, occupied a position involving discretion with respect to the operation and implementation of the PPP. Manger Dep. Tr. at 23:6-9 ("[A]t the end of the day the setting of policy was . . . dictated by those that headed up the various arms of the agency such as the Office of Capital Access."); *id.* at 78:7-10 ("I was the head of Capital Access and I was the one that was playing a very large role of implementing the Paycheck Protection Program at the SBA during the—the pertinent time."). And, through his retention in this arbitration, Manger is working as an agent for Womply within two years of his departure from the SBA. *See id.* 94:2-10

Womply may argue that it was not the beneficiary of the "granting ***or administering***" of SBA Assistance. 13 C.F.R. § 105.202(a)(1) (emphasis added). But it cannot plausibly be disputed that Womply received *some* SBA Assistance. The SBA announced that it was suspending Womply from working with the SBA in light of the House Select Subcommittee's Congressional Report detailing Womply's transgressions with respect to the PPP. *See supra* at pp. 7, 10. The SBA cannot suspend an entity if it had never provided SBA Assistance. Notwithstanding that, it is undisputed that Womply received approximately $2 billion in processing fees through the administration of the PPP program that Manger oversaw. *See* Congressional Report at 4-5, 45-47.[3] The Select Subcommittee's report, for instance, notes that, "by improperly categorizing itself as a 'technology service provider,' [Womply] was able to demand a payment structure that would lead to 'Benworth pay[ing] Womply more than 90% of the total fee collected' from certain PPP loans." Congressional

[3] Womply informed the Select Subcommittee that "the vast majority of its revenue—$1.9 billion in 2021—was 'PPP Technology Service Revenue' from the PPP Fast Lane." Congressional Report at 47.

Report at 60 (second alteration in original).

Womply received SBA Assistance by other means as well. SBA Assistance encompasses any aid, including contractual aid or eligibility determinations by the SBA. *See* 13 C.F.R. § 105.201(e). Womply applied to the Office of Capital Access that Manger oversaw for approval as an SBA lender during the PPP program. Scammell Dep. Tr. at 29:1-7. Thus, the SBA administered assistance to Womply by reviewing its application. Whether that application was granted is irrelevant. The SBA regulations at issue apply to the "granting ***or administering***" of SBA Assistance. 13 C.F.R. § 202(a)(1) (emphasis added). Womply also admitted that it received advice from Bill Briggs, an SBA political appointee who served as Manger's deputy. Manger Dep. 81:23 – 83:18 (testifying that Manger supervised Briggs, who worked in the Office of Capital Access; first, as Manger's senior advisor and then as one of Manger's two deputies). Womply's CEO described discussions with Bill Briggs (and others at the SBA) that began as early as December 2020 "about the role that Womply had played and the role that we wanted to play in order to get as many [PPP] loans to the most underserved . . . as we could." Scammell Dep. Tr. at 190:1 – 192:10.

Because SBA regulations prohibit Manger from working with or for Womply in this arbitration, he should be disqualified from offering any expert testimony on Womply's behalf. Manger confirmed that the SBA did not authorize his engagement with Womply—in fact, Manger did not even inquire with the SBA. *See* Manger Dep. Tr. at 97:15-19. Despite claiming to have read every word of various SBA SOPs and rules, Manger admitted he was unaware of the employment restriction contained in 13 C.F.R. § 105.202. *See* Manger Dep. Tr. 91:18-21.

II. Manger Should Not Be Permitted To Offer An Opinion That Would Contradict The Plain Terms Of The Parties' Contracts

Allowing Manger to testify would also be contrary to the parties' agreements to have any disputes governed by SBA regulations. As explained above and in the Select Subcommittee's report, SBA regulations prohibit Womply from trying to evade the agent fee cap set by the Interim Final Rule by relabeling itself as a "technology service provider" that does not engage in "underwriting." Manger's proposed opinions would contradict the parties' agreements and basic principles of administrative law. His opinions would also intrude upon the province of the Arbitrator to apply the facts to the law and draw legal conclusions regarding the meaning of the parties' contracts and SBA regulations.

A. The Parties' Agreements Incorporate And Are Governed By SBA Regulations

Benworth and Womply's agreements contain choice of law clauses that provide that SBA regulations shall govern the agreements. Referral Agreement § 9; Order Form § 4. The choice of law provision in the Referral Agreement reads in relevant part:

> This Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to the provisions of the conflict of laws thereof. This agreement is subject to all Applicable Laws, including SBA Regulations. ***In the event of any conflict between the governing law and the SBA Regulations (defined below), the SBA Regulations shall control***. "SBA Regulations" means all PPP requirements and SBA guidelines under the CARES Act, the Economic Aid Act, the PPP Flexibility Act, any rules or guidance that have been issued by the SBA implementing the PPP, including SBA regulations published at 86 Fed. Reg. 3692 (Jan. 14, 2021) and 85 Fed. Reg. 20811 (Apr. 15, 2020) and any subsequent Interim Final Rules and other guidance as may have been or may be subsequently issued by SBA or the U.S. Department of the Treasury with respect to the origination, servicing and forgiveness of loans under the PPP and Frequently Asked Questions, or any other applicable SBA loan requirements, including those codified in 13 CFR part 120, in each case as amended, supplemented or modified from time to time.

Referral Agreement § 9 (emphasis added). That clause references the interim final rules that contain the agent fee cap and the criteria for underwriting under the PPP. *Id.* (citing 86 Fed. Reg. 3692 (Jan. 14, 2021) and 85 Fed. Reg. 20811 (Apr. 15, 2020)).

Under California law, SBA regulations are as much a provision of the parties' agreements as the fee provisions. "When the language of a statute or regulation 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, Local 99 v. Options—A Child Care & Hum. Servs. Agency*, 200 Cal. App. 4th 869, 879 n.6 (2011). Here, the parties agreed that the SBA regulations "shall control" over any other governing law, whether California law or the terms of their contract providing for Womply's fees. Referral Agreement § 9; Order Form § 4.

B. Under SBA Rules And Basic Principles Of Administrative Law, The Interim Final Rules Governing PPP Loans Take Precedence Over SBA Guidance Documents Like The Standard Operating Procedures

Manger opines that the definition of "underwriting" contained in the SBA SOPs controls over similar provisions in the Interim Final Rule. Manger's opinion is improper under federal administrative law and SBA regulations, as the PPP-specific interim final rules control.

The federal Administrative Procedure Act sets forth the procedures by which administrative agencies promulgate regulations that have the force of law. *See* 5 U.S.C. § 553. Rules promulgated under the Act typically go through notice-and-comment proceedings. *See id.* § 553(b). When the PPP was established, Congress specifically delegated emergency rulemaking authority to the SBA Administrator "to issue regulations to carry out" the PPP and associated small business-related relief programs "without regard to the notice requirements under [5 U.S.C. § 553(b)]." 15 U.S.C. § 9012 & note. The SBA did just that when it adopted the Interim Final Rule that prescribed the underwriting criteria and agent fee caps governing the PPP.

Agency rules—whether or not they go through notice and comment—carry the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 227, 230-31 (2001); *Pharoahs GC, Inc. v. U.S. Small Bus. Admin.*, 990 F.3d 217, 226 (2d Cir. 2021). Agency guidance documents like the SBA SOPs, however, generally do not carry the force of law. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808-09 (D.C. Cir. 2006). Indeed, the SBA's website instructs that its guidance documents—which include its SOPs—"lack the force and effect of law" "[u]nless otherwise provided in statute, regulation, or contract/agreement."[4]

Although the SBA's SOPs are incorporated in the parties' agreements here, those SOPs do not supersede PPP-specific interim final rules. The SOPs went into effect in October 2020, months after the PPP began and the Interim Final Rule was promulgated. Nothing in the SOPs states that the underwriting criteria in the SOPs supersede the PPP-specific underwriting requirements adopted in April 2020. *See generally* SOP 50 10 6. Indeed, the PPP is mentioned on a single page in the 590-page SOPs. And that single page states that the SOPs apply to PPP loans "***to the extent that the SOP is not superseded by or in conflict with PPP-specific requirements***." *Id.* at 225 (emphasis added). Manger does not cite this page in his expert report, notwithstanding the fact that he supervised the issuance of those SOPs during his time at the SBA and purportedly read every word of them.

Were that not enough, the SBA later retained and reaffirmed the narrow, PPP-specific underwriting requirements when it issued the January 2021 Interim Final Rule. 86 Fed. Reg. at 3707-08. The January 2021 Interim Final Rule stated that "[e]ach lender's underwriting obligation under the PPP is limited to the items above [i.e., the PPP underwriting requirements] and reviewing the 'Paycheck Protection Application Form.'" *Id.* at 3708. As explained above, see *supra* at pp. 7-8, Womply performed each of these enumerated underwriting functions.

In sum, as a matter of law, the Interim Final Rule's requirements supersede and control over any conflicting (or contrary) language in the SOPs. Any attempt to supplant PPP regulations with contrary prescriptions found only in the SOPs is thus contrary to law as well as to the parties'

---

4 Small Business Administration, *SBA guidance*, available at https://www.sba.gov/about-sba/open-government/sba-guidance (last visited Jan. 25, 2023).

agreement incorporating that law. But that is precisely what Manger seeks to do.

C. Womply Cannot Offer Extrinsic Evidence—Through Manger's Opinions—That Contradicts Or Varies The Terms Of The Interim Final Rule That Are Expressly Incorporated Into the Parties' Agreements

California recognizes the parol evidence rule. *See* Cal. Code Civ. Proc. § 1856; Cal. Civ. Code § 1625. California's parol evidence rule is substantive law and applies in these arbitral proceedings. *See Reeder v. Specialized Loan Servicing, LLC*, 52 Cal. App. 5th 795, 804 (2020) ("The parol evidence rule is a rule of substantive law . . . ."); *see also Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 55 Cal.4th 1169, 1174 (2013) ("Although the parol evidence rule results in the exclusion of evidence, it is not a rule of evidence but one of substantive law."); Referral Agreement § 9 (incorporating California law); Order Form § 4 (same). "When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms." *Archer v. Coinbase, Inc.*, 53 Cal. App. 5th 266, 275 (2020) (some internal quotation marks omitted). Under California law, courts "do not consider the subjective understanding of one of the parties, but the parties' mutual, objective manifestations of assent." *Id.*; *see* Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.").

Many of Manger's opinions violate the parol evidence rule. For instance, Manger opines that lender service provider fees "are not capped by any SBA regulation, rule, guidance, or practice." Manger Report at ¶ 45. But the express and clear terms of the SBA regulations provide that lender service providers are agents. *See* 13 C.F.R. § 103.1(a). And the Interim Final Rule indisputably caps agent fees at 1% for loans of not exceeding $350,000. 85 Fed. Reg. at 20816. Besides being misleading, Manger's opinion is directly contradicts the Interim Final Rule and must be excluded. For the same reasons, Manger's opinion that a designation as a lender service provider "would not have automatically capped Womply's fees" is also improper. Manger Report at ¶ 69.

Manger opines that this tribunal should apply the traditional SBA criteria for underwriting—rather than the underwriting criteria in the PPP-specific interim final rules—in determining whether Womply engaged in underwriting that would preclude it from claiming the status of a technology service provider. *See*, *e.g.*, *id.* ¶¶ 60, 64-65. Again, such an opinion is contrary to the contract (and its incorporated provisions). The PPP requirements set forth in the Interim Final Rule "supersede any conflicting Loan Program Requirements (as defined in 13 CFR 120.10)." 85 Fed. Reg. at 20812; *see* SOP 50 10 6 at 225 (stating that the SOPs apply to PPP loans "***to the extent that the SOP is not superseded by or in conflict with PPP-specific requirements***" (emphasis added)); *see also* 13 C.F.R. § 120.10 (2021) (defining "Loan Program Requirements" to include "SBA Standard Operating Procedures (SOPs)"). As explained, *see supra* at pp. 7-8, the Interim Final Rule defines underwriting as a limited set of activities. *See* 85 Fed. Reg. at 20815. These activities differ markedly from the traditional underwriting activities associated with non-PPP loans. SOP 50 10 6 at 246-56. Accordingly, Manger's opinion that this Arbitrator should apply the definition of underwriting appearing in the SOPs, even though they conflict with the criteria in the Interim Final Rule, is prohibited under the parol evidence rule.

In essence, Manger attempts to read language out of the Interim Final Rule and the SOPs imposing program-specific rules for the PPP. But the SBA—including while Manger was an associate administrator—failed to adopt language conforming to his interpretation in the Interim Final Rule, and Womply cannot offer extrinsic evidence through Manger's testimony to achieve that result.

III. This Tribunal May Not Rely On Manger's Perspective As To What He (Or Others) Intended In Adopting SBA Regulations

Womply also relies on Manger to supplement SBA regulations with understandings that are not reflected in the text of the SBA Interim Final Rule, the SOPs, the FAQs, or anywhere else. *See, e.g.*, Manger Report at ¶ 63 (opining that "the SBA did not intend to expand the category of entities that were [lender service providers]" by adopting the Interim Final Rule); Manger Dep. Tr. at 175:14 – 176:4 (opining that Manger's present interpretation of the SOPs is coextensive with the SBA's interpretation of the SOPs at the time the SBA adopted the SOPs in October 2020).

California law does not permit such opinions. "'[I]t is well established that it is a judicial function to interpret the law.'" *Nadler v. Schwarzenegger*, 137 Cal. App. 4th 1327, 1335 (2006). "In [California], evidence that relates to the mental processes of individual legislators is 'irrelevant to the judicial task.'" *Id.* at 1336 (quoting *Cnty. of Los Angeles v. Super. Ct. of Los Angeles Cnty.*, 13 Cal.3d 726, 728 (1975)); *see id.* (stating that "'fundamental, historically enshrined legal principle[s] . . . preclude[] any judicially authorized inquiry into the subjective motives or mental processes of legislators'" (quoting *Cnty. of Los Angeles*, 13 Cal.3d at 726)).

Through his testimony and expert report, Manger offers his own spin on how SBA regulations should be understood. In addition to those interpretations being impermissible under the parol evidence rule, they are also barred. To determine what the SBA regulations—or any statutory scheme—mean, this tribunal must rely on the express and clear terms of the applicable provisions, not testimony about what drafters had subjectively intended to accomplish. *See Cnty. of Los Angeles*, 13 Cal.3d at 726-32 (holding that plaintiff could not compel testimony of members of county board of supervisors in challenge to validity of a county ordinance); *Nadler*, 137 Cal. App. 4th at 1335-37 (holding that plaintiffs challenging legislative apportionment could not compel legislative staff member to testify about legislators' subjective motivations). For this additional reason, the tribunal should strike Manger's testimony.

IV. Manger Is Not Qualified To Offer An Opinion On Whether Womply Only Offered Technology Services, Nor Would That Opinion Be Helpful To The Trier Of Fact

Other parts of Manger's testimony should be deemed inadmissible since he is not qualified to offer an expert opinion on Womply's technology services. *E.g.*, Manger Report at ¶¶ 55, 57. Such opinions amount to legal conclusions.

Manger testified at his deposition that he is not an expert in technology. *See* Manger Dep. Tr. at 28:15 ("I'm not a tech expert."). When questioned about how Womply's system worked, Manger could not provide detailed information. Instead, he conceded that he was "not that familiar" with the technology services that Womply and others provided to PPP lenders. *Id.* at 28:15-22. He is therefore not qualified to offer an opinion on whether Womply is a technology service provider or opinions as to any of the technology services that Womply provided.

Moreover, Manger's legal conclusions are not helpful. Even if Womply were a technology service provider, the ultimate question is whether Womply was performing "underwriting," as that term is defined in the Interim Final Rule. Technology service providers who act as loan underwriters are no longer solely technology service providers, instead they become subject to PPP agent fee caps because they are lender service providers or another type of agent. *See* 85 Fed. Reg. at 20816 (capping at 1% "the total amount that an agent may collect from the lender for assistance in preparing an applicating for a PPP loan" of not more than $350,000); SOP 50 10 6 at p. 185 (noting that entities providing underwriting can be considered agents). Moreover, whether the applicable underwriting criteria appear in the Interim Final Rule (or elsewhere) is a question of law. That is an issue for the arbitrator to resolve; not for Manger, who is neither qualified nor legally permitted to opine on such matters.[5] Manger's opinions are silent on the pertinent question: whether Womply performed underwriting services under the applicable criteria in the Interim Final Rule. Because expert testimony must "help the trier of fact understand highly specialized issues that are not within common experience," *Elosu*, 26 F.4th at 1026, Manger's opinions are improper. On an issue reserved to you as Arbitrator, he applies the wrong law to reach an erroneous conclusion.

V. Manger's Opinion That Benworth Will Not Have To Return Fees Should Be Stricken As It Offers No Aid to The Arbitrator

Finally, this tribunal should strike Manger's opinion as to the circumstances in which Benworth would have to refund fees to the SBA. Benworth contends Womply is not entitled to any additional fees because the 1% fee cap incorporated into their agreements plainly prohibits these additional fees. But the cap applies whether Benworth returns fees to the SBA or not. Moreover, Manger's report provides no basis for his opinion besides tracking the language of SBA regulations. Manger attempts to buttress this opinion by stating that it is "[b]ased on my experience at the SBA." Manger Report at ¶ 76. But nowhere does he identify any experiences that inform this opinion. *See Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002) (opinion should not be admitted based solely on the "'*ipse dixit* of the expert'" (quoting *Gen. Elec. Co. v.*

---

5 *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 749 (9th Cir. 2005) ("Experts may interpret and analyze factual evidence but may not testify about the law."); *see also Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) ("While expert witnesses may testify as to the ultimate matter at issue, this refers to testimony on ultimate facts; testimony on ultimate questions of law, i.e., legal opinions or conclusions, is not favored." (citation omitted)); *N.G. v. Cnty. of San Diego*, 59 Cal. App. 5th 63, 77 (2020) ("Although otherwise admissible opinion evidence is not objectionable because it embraces the ultimate issue to be decided by the trier of fact, an expert is not allowed to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence. The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." (alterations and internal quotation marks omitted)).

Joiner, 522 U.S. 136, 147 (1997))). The opinion should be stricken.

CONCLUSION

For the foregoing reasons, Manger should be disqualified from testifying as an expert witness on behalf of Womply. In the alternative, Manger's opinions should be stricken as inadmissible expert testimony.

Dated: January 25, 2023

Respectfully submitted,

By: *<u>/s/ Dwayne A. Robinson</u>*
Corali Lopez-Castro
Jorge L. Piedra
Dwayne A. Robinson
Michael R. Lorigas
KOZYAK TROPIN & THROCKMORTON LLP
2525 Ponce de Leon Boulevard, 9th Floor
Miami, FL 33134
(305) 372-1800
drobinson@kttlaw.com

Attorneys for Benworth Capital Partners, LLC