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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OTO ANALYTICS, LLC, Petitioner, v. BENWORTH CAPITAL PARTNERS LLC, Respondent.	Case No. 3:24-cv-03975-AMO **REPLY IN SUPPORT OF MOTION TO CONFIRM ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT** Hearing Date: January 9, 2025 Time: 2:00 p.m. Courtroom: 10, 19th Floor Judge: Hon. Araceli Martínez-Olguín

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Petitioner Womply respectfully submits this reply in support of its Motion to Confirm Arbitration Award and for Entry of Judgment ("Motion" or "Mot."; ECF No. 41) and in response to Respondent Benworth's Opposition to Womply's Motion to Confirm Arbitration Award and for Entry of Judgment ("Opposition" or "Opp."; ECF No. 52.).[1]

INTRODUCTION

This case arises out of a contract dispute between two private parties and a resulting arbitration award holding that Benworth must pay Womply the fees it agreed to pay for using Womply's services. In the Arbitration, Benworth argued that the contractual fees somehow violate federal regulations and so Benworth should be relieved of its obligation to pay them, but the Arbitrator rejected those arguments after years of litigation. Now, as part of its ongoing effort to avoid paying for Womply's services, Benworth asks this Court not to confirm the Final Award because, it claims, the Arbitrator manifestly disregarded the law, the Final Award is irrational and violates public policy, and the Arbitrator refused to indefinitely stay the Arbitration. Benworth fails to satisfy its high burden of establishing that any of these bases for vacatur exist.

The Federal Arbitration Act ("FAA") mandates that an arbitrator's factual findings and legal conclusions are not subject to reconsideration by a court. In a desperate effort to convince this Court to convert this summary proceeding into a full-blown appeal, Benworth attempts to elevate the underlying fee dispute between private contracting parties to a matter of national significance that may "jeopardize" the PPP. That is nonsense. Benworth does not (and cannot) explain how confirming the Final Award would jeopardize the PPP; the last PPP loan was made more than three years ago. Benworth admits that it made more than ***$680 million*** in Lender Processing Fees alone from using Womply's technology services, and the Final Award concerns how much of that money Benworth is obligated to share with Womply pursuant to its Agreements. Moreover, as the Arbitrator found, the purpose of the SBA regulations that Benworth claims the Arbitrator manifestly disregarded is to protect ***borrowers*** (Final Award ("FA") at 45–46), not to allow lenders to breach their contractual commitments.

[1] Capitalized terms not otherwise defined herein have the same meaning as in Womply's Motion.

Unfortunately, confirmation of the Final Award likely will not end this years-long dispute. Womply and the Federal Reserve Bank of San Francisco, also a Benworth creditor, have sued Benworth, its principal Bernardo Navarro, and his wife in federal court in Puerto Rico alleging that they fraudulently transferred more than $170 million to a Puerto Rico affiliate owned by Mr. and Mrs. Navarro to avoid paying Womply and the Federal Reserve Bank. *Oto Analytics, LLC v. Benworth Capital Partners PR LLC, et al.*, No. 3:23-cv-01034, ECF Nos. 1, 146 (D.P.R.). Nevertheless, after more than three years of vigorous litigation, it is time for at least this part of the parties' dispute to come to an end and for the Final Award to be confirmed.

ARGUMENT

I. BENWORTH FAILS TO ESTABLISH THAT THE ARBITRATOR EXCEEDED HIS POWERS.

Benworth has not established that the Arbitrator exceeded his power by manifestly disregarding the law or issuing a completely irrational award. Manifest disregard of the law is a "high standard." *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1240 (9th Cir. 2022) (cleaned up). 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 v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009) (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 v. D.R. Horton, Inc.*, 505 F.3d 874, 879–80 (9th Cir. 2007) (emphasis in original) (cleaned up).

The completely irrational standard also "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 (cleaned up). Courts do not "decide the rightness or wrongness of the arbitrators' contract interpretation," nor do they consider whether "findings of fact are correct or internally consistent;" 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 (cleaned up).

Benworth appears to believe that its burden here is somehow less, and that the Court may perform a more probing review of the Final Award than is otherwise permitted by the FAA, because the SBA regulations it (incorrectly) alleges the Arbitrator disregarded were incorporated by reference into the parties' Agreements. Indeed, Benworth spills considerable ink emphasizing that the SBA regulations were not merely a "backdrop" to the parties' Agreements but were actual contractual terms. (*See, e.g.*, Opp. at 4–5, 13–15, 18, 21–24.) But Benworth is wrong both on the facts and the law. The choice-of-law provisions of the Agreements merely acknowledge that the Agreements are subject to SBA regulations. (Referral Agreement § 9); they do not purport to incorporate them into the Agreements by reference to give the parties private rights of action for their violation. *See Serv. Emps. Int'l Union, Loc. 99 v. Options—A Child Care & Hum. Servs. Agency*, 200 Cal. App. 4th 869, 879 n.6 (2011) (explaining that incorporating a statute or regulation into a contract permits a contractual party the right to bring a claim for breach based on a violation of the statute or regulation) (cleaned up).

Even if the regulations Benworth (incorrectly) claims the Arbitrator "manifestly disregarded" were made terms of the Agreements, Benworth does not (and cannot) cite any authority suggesting that its burden is lessened or that the Court's review of the Final Award is expanded under the FAA. As Benworth would have it, any arbitrator's decision regarding a regulation incorporated by reference into an agreement would not be afforded the deference mandated by the FAA, but instead would be subject to a heightened review. There is no authority supporting that position. To the contrary, an arbitral award interpreting contract provisions will be confirmed so long as the arbitrator "even arguably construed or applied the contract." *HayDay*, 55 F.4th at 1241 (cleaned up). That standard is easily established here.

As the Ninth Circuit has explained, "[t]he risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law, or may make errors with respect to the evidence on which they base their rulings, is ***a risk that every party to arbitration assumes***, and such legal and factual errors lie far outside the category of conduct embraced by [the FAA]." *Bosack*, 586 F.3d at 1107 (emphasis added) (cleaned up). While the Arbitrator here did not make any errors of law or fact, and did not disregard the regulations Benworth cited, the Court's limited review of the Final Award is not any different if the regulations at issue are incorporated by reference into the Agreements.

A. The Arbitrator's Finding That The Agent Fee Cap Did Not Apply To Womply's Technology Fees Is Not Irreconcilable With Undisputed Facts.

Benworth argues that the Arbitrator manifestly disregarded the law because his determination that the Agent Fee Cap did not apply to Womply's Technology Fees is "irreconcilable with undisputed facts." (Opp. at 5–11.) Benworth mischaracterizes the record.

The Agent Fee Cap limits 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." 86 Fed. Reg. 3692, 3709 (Jan. 14, 2021). The Arbitrator concluded that the CARES Act—which created the PPP and established the Agent Fee Cap—made clear that the Agent Fee Cap applies only to services provided to ***borrowers***; Benworth did not dispute this. (FA at 34–35.) Thus, it is undisputed that fees owed to Womply for providing assistance to Benworth—***a lender***—were not subject to the Agent Fee Cap. (*Id.*)

In its Opposition, Benworth claims that Womply's Technology Fees are subject to the Agent Fee Cap because it is "undisputed" that Womply's technology services "assist[ed] in either referring or preparing PPP loan applications" to Benworth. (Opp. at 9–10 (quotation omitted).) But, as it did in the Arbitration, Benworth conflates Womply's various services and fails to distinguish—as the Arbitrator properly did—between the different fees Benworth agreed to pay for different services. (FA at 36 ("[W]hile Benworth tries to conflate Womply's referral services, API Services and Technology Services, the parties clearly perceived those services to be different at time of contracting since they were enumerated separately in different contracts and each services had a different formula for fees.").)

As the Arbitrator recognized, Benworth compensated Womply for services that could be construed as assisting borrowers and referring PPP loan applications by paying Womply its 1%

Referral Fee. (*Id.* at 20, 33.) It is undisputed that the Referral Fee ***complies with*** the Agent Fee Cap, because it is "[o]ne (1) percent for loans of not more than $350,000." 86 Fed. Reg. at 3709. What was in dispute, however, was whether the ***separate*** Technology Fee that Benworth agreed to pay Womply ***also*** was subject to the Agent Fee Cap. (FA at 33–34.) The Arbitrator found that it was not, because the Technology Fee compensated Womply for services that primarily benefitted ***Benworth***. (*Id.* at 37 ("[T]he substance of Womply's Technology Services was, in fact, different from Womply's referral services, and more specifically, the evidence proved that the Technology Services served the purpose of benefitting Benworth in accomplishing its underwriting functions . . . ."); *see also id.* at 38 ("All the services directly benefited Benworth and allowed it to process and make over 300,000 loans. These services were distinct from and had nothing to do with assisting a potential borrower in completing an application.").) The Arbitrator's determination was based on (among other evidence) testimony from Benworth's own CEO. (*Id.* at 37 (citing testimony from Bernardo Navarro).) The Arbitrator also found that Benworth must have believed that Womply's technology services were for Benworth's benefit given that "it agreed to pay a hefty percentage of its loan processing proceeds from the SBA to Womply for every Womply-referred loan that was approved and funded using Womply's technology." (*Id.* at 39.) This Court may not reconsider this factual finding. *HayDay*, 55 F.4th at 1241 ("We also must accept the arbitrator's findings of fact.").

Benworth's heavy reliance on *American Postal Workers Union AFL-CIO v. U.S. Postal Service*, 682 F.2d 1280 (9th Cir. 1982), is misplaced. That case concerned an arbitral award requiring the U.S. Postal Service to reinstate a former employee who admitted to striking against the government, despite a clear federal statute providing that "a worker may not hold a government position if the individual has participated in a strike against the government." *Am. Postal*, 682 F.2d at 1283. Importantly—and unlike in this case—the Ninth Circuit noted that "[t]he facts of th[e] case are undisputed," and "[t]herefore, we need not decide what deference should be given to the arbitrator's findings of fact." *Id.* The court further observed that "[i]t is clear that the arbitrator accepted as true [the employee's] uncontroverted testimony of his involvement in the strike," but "the arbitrator awarded [the employee] reinstatement" anyway.

Id. at 1283–84. In holding that the arbitrator manifestly disregarded the law, the Ninth Circuit emphasized that the arbitral award did not merely resolve a dispute between two private parties: "It also requires an adjudication of the coverage and application of a federal law passed by Congress to insure a stable work force for the government and agencies of the United States." *Id.* at 1285. In sum, there was no serious dispute that the arbitrator's award required the Postal Service to commit an illegal act in violation of a federal statute designed to maintain the stability of the federal government and, for that reason, the Ninth Circuit vacated the decision.

In its Opposition, Benworth tries to fit the square peg of the Final Award into the round hole of *American Postal*. (Opp. at 10–11.) Unlike in *American Postal*, the facts of this case were vigorously disputed and the subject of substantial testimonial and documentary evidence, particularly the facts related to the nature of the services for which Womply received its Technology Fees. (FA at 4–8, 24–29, 68–69.) The Arbitrator did not accept Benworth's argument that the Technology Fee compensated Womply for providing assistance to applicants to prepare PPP loan applications or for referrals to Benworth. (*Id.* at 34–41.) And that is a factual determination that must be afforded substantial deference by this Court. *See HayDay*, 55 F.4th at 1241. Otherwise, this Court would have to consider the entire record concerning this issue, and not just the evidence that Benworth cherry-picked to support its arguments here. That level of review is prohibited by the FAA. *Glob. Indus. Inv. Ltd. v. 1955 Cap. Fund I GP LLC*, 2022 WL 4371505, at *6 (N.D. Cal. Sept. 21, 2022) ("Respondents' argument that *de novo* review is appropriate would also upend the FAA, 'which enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award.'") (quoting *Bosack*, 586 F.3d at 1102).

In addition, unlike the clear risk to the federal government posed by the relief granted in *American Postal*, Benworth offers no explanation for why enforcing the Final Award would "jeopardize a federal loan program." (Opp. at 2.) It has been more than three years since the last PPP loan was made, and the SBA regulations that Benworth claims the Arbitrator disregarded were intended to protect borrowers and not lenders. (FA at 45–46.) Contrary to what Benworth would have this Court find, there is no national interest in allowing Benworth to avoid its contractual commitment to pay Womply for the services it used to successfully process and fund PPP loans.

Finally, Benworth's claim that the Arbitrator relied on "extrinsic evidence" and some of the terms of the Agreements to disregard the Agent Fee Cap is misleading. (Opp. at 11.) 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 The Law In Finding That Womply Was Not An LSP.

In the Arbitration, Benworth made the facially absurd argument that, despite using Womply's services to process and fund more than 300,000 PPP loans, for which Benworth received more than $680 million from the federal government, Benworth should not have to pay Womply ***any*** fees under SBA rules.[2] Benworth relied on a provision in the SBA's Standard Operating Procedure 50 10 6 ("SOP"),[3] which states that "[a]n LSP may only receive compensation from the 7(a) Lender for services provided under an SBA-reviewed LSP Agreement." (SOP at 185.) SBA regulations define an LSP (short for Lender Service Provider) 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 the lender." 12 C.F.R. § 103.1(d) (emphasis added). In its Agreements with Womply, Benworth expressly agreed that "Womply is not a . . . lender service provider as defined by the SBA." (FA at 19.)

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[2] The parties vigorously disputed who would have been responsible for submitting the Agreements to the SBA if Womply were an LSP. Womply argued that Benworth understood it would have been responsible for submitting the Agreements because (among other reasons) Benworth previously submitted an LSP agreement it had with an LSP called Lendio. (FA at 17.)

[3] 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." (SOP at 7.) The PPP was one of the SBA's loan programs implemented pursuant to Section 7(a) of the United States Small Business Act. 85 Fed. Reg. 20,811 (Apr. 15, 2020).

Despite this, Benworth asked the Arbitrator to conclude that Womply was in fact an LSP and therefore could not receive ***any*** compensation from Benworth because the Agreements with Womply were never submitted to the SBA. (*Id.* at 30–31.) The Arbitrator rejected that argument, primarily because—as the parties had expressly agreed—he found that Womply did not fit within the SBA's definition of an LSP. (*Id.* at 41–47.) Even if this Court disagrees with the Arbitrator's interpretation, it is not subject to review under the FAA. *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").

Benworth's attempts to articulate a basis to vacate the Final Award are unavailing.

First, the Arbitrator's interpretation of the term "originating" in the regulatory definition of an LSP is not reviewable by the Court. *See id.*; *Bosack*, 586 F.3d at 1104. Benworth does not (because it cannot) argue that the Arbitrator manifestly disregarded any applicable law when interpreting SBA regulations. Instead, Benworth claims that the Arbitrator refused to consider a single, non-public email Benworth received from the SBA (Opp. at 14), but that email is not law nor does it even purport to inform the definition of "originating" in the definition of an LSP. Moreover, Benworth submits no evidence establishing that the Arbitrator even knew that email existed, let alone believed it should have the force of law.

In addition, Benworth misconstrues a statement made by Womply's counsel during closing arguments to suggest that Womply agreed with Benworth's view that "originating" should mean simply "collecting borrower information." (*Id.*) That is wrong. Womply's counsel was referring to the distinction between "referring" loans and "originating" loans, which Benworth had conflated, and Womply's counsel later clarified during closing arguments that "originating" effectively meant performing "underwriting." (Declaration of Alexander L. Cheney ("Cheney Decl.") Ex. 1 at 1750:1–12.)

Based on the SBA regulation defining an LSP, the Arbitrator concluded that "the most logical definition of originating is underwriting and approving a loan and submitting it to the SBA for final approval." (FA at 42.) As the Arbitrator found, it was Benworth and not Womply that performed these functions. (*Id.* at 42–43.) This is consistent with the parties' Agreements, which state that Benworth would pay Womply fees "for each loan ***originated by Lender***." (Referral Agreement § 2.2 (emphasis added); *see also* Order Form § 2.1 (providing that "Client [Benworth] shall pay Womply the technology fees described below for each loan ***originated by Client*** . . . .") (emphasis added); FA at 42.) In any event, even if the Arbitrator's interpretation of SBA regulations differed in some way from what Womply advocated for (it did not), that does not make the Arbitrator's decision subject to vacatur under the FAA.

Benworth's claim that the Arbitrator's definition is "implausible" because it "directly conflicts with the terms of the Agreements" (Opp. at 14) does not support vacatur either. Benworth places undo weight on its argument that the Agreements incorporated the SOP by reference, and therefore they are "terms of the Agreements." As discussed above, that is wrong as a factual matter; it also is irrelevant. Benworth does not establish that the Arbitrator's definition of "originating" is inconsistent with the SOP. Thus, whether the Agreements are subject to the SOP or whether the provisions of the SOP are actual terms of the Agreements, the result is the same: the Arbitrator did not manifestly disregard the law in determining that Womply did not originate loans for Benworth, nor is that decision "irrational."

Second, in challenging the Arbitrator's finding that Womply did not underwrite loans, Benworth asks this Court to forge new law and then vacate the Final Award for not applying it. 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 applies to all SBA 7(a) loan programs—should be interpreted to mean the unique underwriting requirements specific to the PPP, which were significantly less stringent than for the SBA's other loan programs. (Opp. Ex. 15 at 11.) In other words, Benworth asked the Arbitrator to assume that, by lowering the underwriting requirements for the PPP, the SBA intended to ***expand*** (for the PPP only) the LSP definition to include third-party service providers that would not normally qualify as LSPs in other SBA loan programs. But there is no authority 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 capable of being manifestly disregarded. *Riley v. QuantumScape Corp.*, 2023 WL 1475092, at *15 (N.D. Cal. Feb. 2, 2023). And, even if the Court were to agree with Benworth, that is not a basis to vacate the Final Award. *See Wulfe v. Valero Refining Co.—Cal.*, 687 F. App'x 646, 648 (9th Cir. 2017) ("That the arbitrator failed to correctly predict future judicial decisions does not mean she acted in 'manifest disregard' of existing law.") (cleaned up).

While Benworth argues that some of Womply's technology services could be used to underwrite loans (Opp. at 15), that is not inconsistent with the Final Award. The Arbitrator expressly found 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.) Considering whether the Arbitrator made factual or legal errors in finding Womply did not underwrite loans 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).

Third, Benworth's argument that the Arbitrator refused to apply an example of an LSP contained in the SOP (Opp. at 17–19) also fails. The SOP states that the SBA may consider an entity to be an LSP if it (among other things) "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 at 184.) The Arbitrator did not disregard this example. Instead, the Arbitrator found that Benworth's interpretation of it was "absurd" because it would mean that "virtually every individual or entity involved in the program would be considered an LSP." (FA at 44.) In any event, this one example in a nearly 600-page SBA publication is 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 at 884 (holding that "the arbitrators could not manifestly disregard the law because no binding precedent existed"). Indeed, Benworth itself argued in the Arbitration that "[a]gency guidance documents like the SBA SOPs, [] generally do not carry the force of law" (Cheney Decl. Ex. 2 at 17), and we are not aware of any case law even referencing the SBA's examples of LSPs in the SOP.

Benworth relies on *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162 (9th Cir. 2019), which supports confirmation of the Final Award. There, a prime contractor on a project for the U.S. Army Corps of Engineers awarded two subcontracts to Aspic Engineering and Construction Company ("Aspic"), an Afghan company. *Aspic*, 913 F.3d at 1164. The subcontracts incorporated by reference several Federal Acquisition Regulation ("FAR") clauses, and there was no dispute that Aspic failed to comply with those clauses. *Id.* at 1164, 1167–68. Nevertheless, the arbitrator refused to enforce them because, in his view, "normal business practices and customs of subcontractors in Afghanistan were more 'primitive' than those of U.S. subcontractors," and "it was not reasonable to expect that Afghanistan subcontractors would be able to conform to the strict and detailed requirements of general contractors on U.S. Federal projects." *Id.* at 1167–68. The Ninth Circuit explained that the arbitrator could have properly concluded, based on the past practices of the prime contractor and Aspic, that the parties did not intend that Aspic be held to the strict requirements of the FAR clauses. *Id.* ("This finding alone—if based on past practice—would be insufficient for us to vacate an arbitral award."); *see also id.* at 1167 ("An arbitrator may interpret the contract 'in light of . . . indications of the parties' intentions' . . . ."). However, because the arbitrator instead based his decision "upon his rationalization that to enforce the FAR clauses on Aspic would be unjust," the Ninth Circuit vacated the award. *Id.* at 1168.

Here, the Arbitrator did not refuse to apply the SOP in order to reach a result that it thought was fair to Womply. Instead, the Arbitrator determined that Womply was not an LSP based on evidence regarding Womply's services, the Agreements, the parties' past practices, and the applicable law, not "his own rough sense of justice." Indeed, the Arbitrator expressly stated that his finding that Womply was not an LSP was based in part on past practice and the intent of the parties: (i) the parties' Agreements explicitly state that Womply was not an LSP, (ii) Benworth's CEO represented to the SBA that "Womply is not an LSP," (iii) Benworth first claimed that Womply was an LSP ***after*** Womply commenced the Arbitration, and (iv) if Benworth believed Womply was an LSP, it knew how to enter into an LSP agreement and submit it to the SBA, as it previously had done in connection with its retention of an LSP called Lendio. (FA at 44–45.) These are the types of factual findings that the *Aspic* court held an arbitrator could rely on to interpret a contract and that would not justify vacating an award. *See* 913 F.3d at 1167–68.

C. The Final Award Grants Relief Consistent With The Agreements.

Benworth argues that the Final Award is irrational because it awards Womply fees that Benworth claims violate SBA regulations, which Benworth contends are incorporated by reference into the Agreements. (Opp. at 1–2, 21–24.) This argument is a rehash of Benworth's arguments that the Arbitrator manifestly disregarded the Agent Fee Cap and the SOP concerning LSPs. Therefore, for the reasons discussed above, this argument also fails. (*See supra* Part I.B.)

In addition, Benworth's reliance on *Oto Analytics, Inc. v. Capital Plus Financial, LLC* is misplaced. Benworth quotes *Capital Plus* as stating that agents other than LSPs must "submit Form 159"—a type of compensation agreement—"to the SBA," and that "courts uniformly hold" that a failure to submit Form 159 "precludes any recovery of SBA fees." (Opp. at 21 (quoting 2022 WL 1488441 *6 (N.D. Tex. May 11, 2022).) But Benworth does not allege that the Arbitrator understood this requirement and failed to apply it here, which would be required to establish a manifest disregard of the law. *HayDay*, 55 F.4th at 1241. In fact, Benworth did not even mention Form 159 in its pre-hearing brief or its post-hearing brief in the Arbitration, nor is it referenced anywhere in the Final Award.

Moreover, Benworth misreads *Capital Plus*. In saying what courts "uniformly hold," the *Capital Plus* court cited to one case: *Daniel T.A. Cotts PLLC v. Am. Bank, N.A.*, 2021 WL 2196636, at *4 (S.D. Tex. 2021). That case involved an agent who alleged that it was entitled to fees from a lender for helping an applicant prepare a PPP loan application, despite the agent having no contractual relationship whatsoever with the lender. *Id.* at *3 (explaining that the plaintiff alleged he was entitled to fees from the lender "regardless of any compensation agreement"). In holding that the agent does not have a statutory right to fees, and that a lender is not obligated to pay an agent fees absent a contractual commitment, the court noted that "numerous courts across the nation" had reached similar conclusions. *Id.* at *4. It then cited several cases similarly rejecting the argument that the PPP gave agents a statutory right to fees even absent any contractual relationship. *Id.* Neither the *American Bank* case or any of the cases it cites involved a lender who, like Benworth, argued that it is not required to pay fees it agreed to pay pursuant to a contract. Accordingly, *Capital Plus* does not help Benworth's cause here.

II. THE FINAL AWARD DOES NOT VIOLATE PUBLIC POLICY.

Benworth's policy argument fails because it is based on the same faulty arguments about the Agent Fee Cap and SOP that Womply disposes of above. *See DeMartini v. Johns*, 693 F. App'x 534, 537 (9th Cir. 2017) (refusing to vacate award on public policy grounds where doing so "would require the Court to revisit the arbitrator's findings of fact and conclusions of law").

III. THE ARBITRATOR REASONABLY DECLINED TO STAY THE ARBITRATION.

"Arbitrators are granted broad discretion and deference in their determinations of procedural adjournment requests." *Cristo v. Charles Schwab Corp.*, 2021 WL 6051825, at *11 (S.D. Cal. 2021) (cleaned up). While "[t]he ***arbitrary*** denial of a reasonable request for a postponement may serve as grounds for vacating an arbitration award," under Benworth's own authority (Opp. at 24–25), courts are "reluctant" to interfere "if there exists a ***reasonable*** basis for the arbitrators' decision not to grant a continuance." *Naing Int'l Enters., Ltd. v. Ellsworth Assocs., Inc.*, 961 F. Supp. 1, 3 (D.D.C. 1997) (emphasis added).

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. (Mot. at 8.) 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 each time for lack of support. (*Id.*)

The *Naing* case on which Benworth heavily relies is both instructive and materially different than this case. *Naing* involved an arbitration between merger counterparties Naing

International Enterprises, Inc. ("NIE") and Ellsworth Associates, Inc. ("EAI") and concerned NIE's representations that it was "a small disadvantaged business eligible for participation in the SBA's Section 8(a) Program." 961 F. Supp. at 2. Less than two months before the hearing, the SBA's Inspector General issued a report stating that it believed that NIE "should not have been admitted into the 8(a) program" and recommending that the SBA "terminate NIE from the 8(a) program." "Importantly, the report set a deadline of May 10, 1996"—less than ***one month*** after the scheduled arbitration hearing—"for the SBA to act on the report." *Id.* at 4. EAI's motions for a continuance based on the report were denied. *Id.* On June 5, 1996, the arbitration panel issued an award in NIE's favor. *Id.* at 2.

The *Naing* court vacated the award under exceptional circumstances not present here. The court found that NIE failed to disclose to the arbitration panel that it was in "active discussions" with the SBA about its "possible voluntary withdrawal" from the SBA's Section 8(a) program. *Id.* at 5. In fact, on July 19, 1996, a month after the panel issued an award in NIE's favor, NIE "did voluntarily withdraw from the program." *Id.* The court held that "an impartial arbiter might conclude" that NIE voluntarily withdrew "to avoid the stigma of being involuntarily terminated from the program." *Id.* Obviously concerned that NIE concealed from the panel that it would imminently withdraw, the Ninth Circuit held that, "[o]n this record, the arbitration proceeding should be re-opened so that the arbitration panel can consider these facts not previously disclosed to it." *Id.* Thus, in order to allow the panel to consider previously concealed evidence, the Ninth Circuit held that the panel should have given itself more time to hear from the SBA when the SBA was expected to take action just one month after the hearing. *Id.* at 4.

The record in *Naing* bears no resemblance to the facts of this case. Unlike in *Naing*, the Arbitrator was not presented with persuasive evidence concerning the relevance or timing of the SBA's investigation. Benworth cites to a single email string involving an attorney at the SBA to argue that the investigation was pertinent to the Final Award. (Opp. at 25.) In that email, a Benworth attorney asks an SBA attorney to disclose confidential information about the timing and substance of the SBA's purported investigation into Womply. The SBA attorney obliges, and claims that the SBA is investigating "the fees that Womply charged and its representations as to their nature and what services Womply rendered to earn them . . . ."[4] (Opp. Ex. 21 at Ex. A at 1.) However, the email did not clearly state when that supposed determination would be made or how it could bear on Benworth and Womply's private contract dispute. Instead, it claimed that the SBA had "a target date of December [2023] to complete [its] investigation as to Womply. Although [it] cannot guarantee that is when [it] will conclude [its] investigation." (*Id.*) In an order dated September 27, 2023, the Arbitrator rejected Benworth's motion to stay, explaining that the informal email from an SBA attorney 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." (Mot. Ex. 13.) However, he made clear that Benworth could renew its motion to stay if "the SBA provide[d] further information or clarification concerning its investigation." (*Id.*) It has been almost one year since the Arbitrator issued this ruling, and Benworth never came forward with such information or clarification.

In addition, unlike in *Naing*, the Arbitrator's decision not to stay the Arbitration did not preclude Benworth from submitting any pertinent evidence. Despite Benworth's repeated assertions that the SBA would make a relevant determination imminently, it still has not done so. In any event, even if the SBA ***had*** made some determination after the Final Award that led Benworth to believe it had contractual rights against Womply, the Arbitrator's refusal to stay the Arbitration did not foreclose Benworth from seeking to enforce any such rights in a new action.

Under these circumstances, the Arbitrator's decision not to stay the Arbitration was reasonable and not a basis to vacate the award. *See Fordjou v. Wash. Mut. Bank*, 2010 WL 2529093, at *5 (N.D. Cal. June 18, 2010) (finding arbitrator's decision not to stay was reasonable and confirming award).

CONCLUSION

Womply respectfully requests that the Court grant Womply's Motion.

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[4] It is unclear why an SBA lawyer would disclose confidential information regarding a supposedly ongoing SBA investigation. Womply raised concerns about this and other questionable communications between Benworth and the SBA in its briefing to the Arbitrator. (*See, e.g.*, Cheney Decl. Ex. 3.)

Respectfully submitted,

Dated: September 13, 2024

WILLKIE FARR & GALLAGHER LLP

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 13, 2024, the foregoing document was filed with the Clerk of the Court using CM/ECF, which sent notices to all parties receiving notifications through the CM/ECF system.

Dated: September 13, 2024

By: */s/ Alexander L. Cheney*

Attorney for Petitioner Oto Analytics, LLC