WILLKIE FARR & GALLAGHER LLP
Alexander L. Cheney (SBN 302157)
acheney@willkie.com
Zoe Packman (SBN 347453)
zpackman@willkie.com
333 Bush Street, 34th Floor
San Francisco, CA 94104
(415) 858-7400

Stuart R. Lombardi (admitted *pro hac vice*)
slombardi@willkie.com
787 7th Avenue
New York, NY 10019
(212) 728-8000

Joshua S. Levy (admitted *pro hac vice*)
jlevy@willkie.com
1875 K Street, N.W.
Washington, DC 20006-1238
(202) 303-1000

Attorneys for Petitioner
Oto Analytics, LLC

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

SUR-REPLY IN SUPPORT OF CROSS-PETITION TO CONFIRM ARBITRATION AWARD

Hon. Araceli Martínez-Olguín

Pursuant to this Court's November 5, 2024 Order (ECF No. 62), Petitioner Womply respectfully submits this sur-reply in further support of its Opposition to Respondent Benworth's Petition to Vacate Arbitration Award ("Opposition" or "Opp."; 3:24-cv-04840, ECF No. 25) and in response to Benworth's Reply in support of its Petition to Vacate Arbitration Award ("Reply"; 3:24-cv-04840, ECF No. 33).[1]

PROCEDURAL BACKGROUND

On June 26, 2024, Arbitrator Brainerd issued the Final Award in the JAMS arbitration captioned *Oto Analytics, Inc. d/b/a Womply v. Benworth Capital Partners LLC*, JAMS Ref. No. 1210038203. Womply filed a Petition to Confirm Arbitration Award on July 1, 2024, in the above-entitled action. (ECF No. 1.) On August 7, 2024, Benworth filed a Petition to Vacate Arbitration Award in a new action, Case No. 3:24-cv-04840. The parties briefed both petitions. On October 23, 2024, the Court consolidated the two actions and terminated all pending motions. (ECF No. 57.) Following a case management conference, and pursuant to the Court's guidance, the parties agreed to streamline the briefing on October 31, 2024. (ECF No. 61.) The parties agreed, with the Court's approval, to: (1) deem Benworth's Petition to Vacate as the operative motion in this action; (2) construe Womply's Opposition (Case No. 3:24-cv-04840, ECF No. 25) as both an Opposition to Benworth's Petition to Vacate and a Cross-Petition to Confirm Arbitration Award; (3) construe Benworth's Reply (Case No. 3:24-cv-04840, ECF No. 33) as both a Reply in support of Benworth's Petition to Vacate and a Response to Womply's Cross-Petition to Confirm; and (4) permit Womply to file this sur-reply in support of its Opposition.

ARGUMENT

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

Benworth has not met its burden of showing that the Arbitrator exceeded his powers by manifestly disregarding the law or issuing a completely irrational award. (*See* Reply at 2–4.)[2] In a tacit admission that it cannot meet these exacting standards to vacate an award under the Federal

[1] Capitalized terms not otherwise defined herein have the same meaning as in the Opposition.
[2] Pagination refers to pages in ECF.

Arbitration Act ("FAA"), Benworth argues that these standards do not apply in this case. Indeed, it claims that—unlike in every other case concerning whether to confirm or vacate an arbitration award under the FAA—"this Court owes no deference to the Arbitrator's conclusions" (*id.* at 2) because the parties specified the controlling substantive law in their choice-of-law provisions. Specifically, Benworth states that the parties' Agreements required the Arbitrator: "(1) to apply California law and 'SBA Regulations' (as that term is defined in the Agreements); (2) to give controlling effect to 'SBA Regulations,' notwithstanding any provision of the Agreements or California law to the contrary; and (3) to treat the 'SBA Regulations' as express terms of the Agreements." (*Id.* at 3.) According to Benworth, to the extent the Arbitrator "strayed from the[se] limitations" on "the Arbitrator's powers," this Court must vacate the Final Award. (*Id.* at 2–3.) Benworth's attempt to avoid the high standards for vacatur under the FAA fails.

In any arbitration involving a contract dispute, an arbitrator must determine which substantive law to apply. Whether the arbitrator determines the applicable law by reference to a choice-of-law provision, as was the case here, or a jurisdiction's choice of law rules, the arbitrator's interpretation and application of those substantive laws is not subject to judicial review under the FAA. *See Biller v. Toyota Motor Corp.*, 668 F.3d 655, 668 n.7 (9th Cir. 2012) ("[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. . . . [M]anifest disregard of the law for the purposes of the FAA occurs only where there is evidence that the Arbitrator knew the law but ignored it nonetheless."). Benworth does not cite any authority supporting its claim that this Court "owes no deference to the Arbitrator's conclusions" simply because the parties included a choice-of-law clause in their Agreements. Nor does Benworth cite any authority for its claim that an arbitrator's conclusions are owed "no deference"—or even less deference—if the contract at issue incorporates laws or regulations by reference.[3] Incorporating a law by reference simply makes the law a contract provision and gives

---

[3] The Agreements do not incorporate any laws or regulations by reference. (*See* Opp. at 24.) The choice-of-law provisions acknowledge that the Agreements are governed by California law and "subject to all Applicable Laws, including SBA Regulations" which are defined to include, among other things, "guidance" issued by the SBA. (Pet. App'x 3984 § 9.)

the parties a breach of contract claim for its violation, *see Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1269 (9th Cir. 2017), and it is well-settled that 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 an arbitrator's award to determine only "whether the award is 'irrational' with respect to the contract." *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) (cleaned up). "[T]he court must defer to the arbitrator's decision as long as the arbitrator even arguably construed or applied the contract." *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1241 (9th Cir. 2022) (quotation omitted).

In short, Benworth's claim that the Arbitrator's decisions regarding laws or regulations referred to or incorporated by reference into the Agreements should not be afforded the usual deference mandated by the FAA is contrary to well-established law.

A. The Arbitrator's Finding That The Agent Fee Cap Did Not Apply To Womply's Technology Fees Cannot Be Overturned.

As explained in the Opposition, the Arbitrator rejected Benworth's argument that Womply's Technology Fees were illegal because they exceeded a regulatory cap on fees that agents can charge for providing "assistance in preparing an application for a PPP loan (including referral to the lender)." (Opp. at 10.) In its Reply, Benworth again quibbles with (i) the Arbitrator's legal interpretation of this Agent Fee Cap as applying "only to fees for services an agent provided to a borrower" rather than a lender, and (ii) the Arbitrator's factual finding that Technology Fees compensated Womply for services that benefited Benworth as a lender. (Reply at 6.)

This Court is not permitted to reconsider the Arbitrator's interpretation of the Agent Fee Cap under the FAA. *See HayDay*, 55 F.4th at 1241 (allowing courts to decide "only whether the arbitrator's decision draws its essence from the contract, not the rightness or wrongness of the arbitrator's contract interpretation") (quotation omitted); *see also 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 any event, the Final Award expressly provides that "Benworth d[id] not dispute that . . . the 1% Agent Fee Cap applies only to fees paid to Agents for 'assist[ing] an eligible recipient'—***i.e., a borrower***—'to prepare an application for a [PPP] loan.'" (Final Award [Pet. App'x 3185] "FA" at 35 (emphasis added); *see also* Opp. at 15.) Having accepted that interpretation during the Arbitration, Benworth should not now be heard to argue that the definition manifestly disregards the law or is "irrational." In addition, the Arbitrator's interpretation of the Agent Fee Cap was not simply plucked out of the air—it was based on the legislative history of the Agent Fee Cap, which was briefed extensively in the Arbitration. (Pet. App'x 349 at 11–17.)

The Court also is precluded from second guessing the Arbitrator's factual findings concerning Womply's services. *See HayDay*, 55 F.4th at 1241 ("We also must accept the arbitrator's findings of fact."); (*see also* FA 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 . . . ."); *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.").) Even if this Court could reconsider those factual findings, the Final Award cited substantial compelling evidence that the Technology Fees compensated Womply for services that assisted Benworth's processing of applications and underwriting of loans, including testimony from Benworth's own CEO. (*Id.* at 37 (citing testimony from Bernardo Navarro); *id.* at 39 (citing Bernardo Navarro's testimony that "Womply's services 'automated' Benworth's processing of loans"); *see also id.* at 26–27 (citing testimony from Benworth's Operations Manager about the utility of Womply's Technology Services).) Benworth does not address that evidence at all in its Reply.

Benworth again invokes *Oto Analytics, Inc. v. Capital Plus Financial, LLC*, 2022 WL 1488441 (N.D. Tex. May 11, 2022), but Benworth's position is not persuasive or even consistent. In its Petition, Benworth argues that *Capital Plus* does not "carry the precedential value ascribed to it by the Arbitrator" (Pet. at 49) but, in its Reply, Benworth claims that "Womply should not be permitted to disclaim the precedential value of *Capital Plus*" (Reply at 6). Whatever Benworth's position may be, the fact remains that the Arbitrator concluded that the Technology Fees Benworth agreed to pay Womply were not subject to the Agent Fee Cap based on the evidence presented at the hearing regarding the nature of Womply's services, and not based on the *Capital Plus* decision. (*See* FA at 37–41.) In its Reply, Benworth also asserts that "the Arbitrator blithely ignored *Capital Plus*'s legal analysis that broadly defined the term 'preparing' in reference to PPP loans under the SBA Regulations" (Reply at 7), but Benworth fails to explain how. Nor can it. Indeed, the Arbitrator held that, to the extent Womply was "preparing" applications or performing any of the other tasks subject to the Agent Fee Cap, Benworth compensated Womply with separate Referral Fees, which *complied* with the Agent Fee Cap. (FA at 33–37; *see also* Opp. at 17–18 ("[T]he Referral Agreement provided that Womply would be compensated for its referral . . . with a Referral Fee of 1% of a loan's principal amount (what was subject to and consistent with the Agent Fee Cap.").) Again, the Arbitrator did not disregard the law—Benworth just disagrees with how that law was applied in this case. That is beyond the scope of this Court's review. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 641 (9th Cir. 2010) ("[T]he FAA does not sanction judicial review of the merits.") (cleaned up).

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.[4] Benworth relied on a provision in the SBA's Standard

[4] In the Arbitration, the parties vigorously disputed whether Womply or Benworth 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 to the SBA, because (among other reasons) Benworth had previously submitted to the SBA an LSP agreement it had with an LSP called Lendio. (FA at 17.)

Operating Procedure 50 10 6 ("SOP"),[5] 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). Benworth expressly agreed in its Agreements with Womply that "Womply is not a . . . lender service provider as defined by the SBA" (FA at 19) and represented to the SBA that Womply "is not an LSP" (*id.* at 44). 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—consistent with the parties' Agreements and Benworth's own contemporary representations—he determined based on the facts presented at the hearing that Womply did not fit within the SBA's definition of an LSP. (*Id.* at 41–47.)

In its Reply, Benworth simply restates the same arguments from its Petition. Those arguments fail for the same reasons Womply stated in its Opposition, including because this Court is not permitted to reconsider the Arbitrator's factual finding that Womply did not originate or underwrite loans. *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). In addition, the Arbitrator's decision that Benworth—not Womply—originated loans using Womply's technology is consistent with the express and unambiguous terms of the Agreements, and therefore cannot be "irrational." (*See* Referral Agreement [Pet. App'x 3982] § 2.2 (stating that Benworth would pay Womply fees "for each loan ***originated by Lender***" (emphasis added); Order Form [Pet. App'x

[5] 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 7(a) loan programs, which was implemented pursuant to Section 7(a) of the United States Small Business Act. Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020).

3986] § 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.)

Benworth's reliance on *Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195 (9th Cir. 1982), is misplaced. Unlike here, that case involved a contract that expressly limited the remedies available in the event of a breach, and the Ninth Circuit vacated an arbitration award that provided other remedies beyond those permitted by the contract. *Id.* at 1199.

Benworth also relies on *Aspic Engineering & Construction 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. *Id.* 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 1166–67. 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.* at 1168 ("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 SOPs in order to reach a result that it thought was fair to Womply. (*See* FA at 54 ("The Arbitrator is somewhat sympathetic to Benworth's argument . . . [but] it is not, actually, the Arbitrator's role to decide what is 'fair;' he is instead merely tasked with interpreting the contract provisions.").) Instead, the Arbitrator determined that Womply was not an LSP based on his interpretation of the Agreements, the parties' past practices, and the applicable law, not "his own rough sense of justice." (Pet. at 57.) 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 Aspic*, 913 F.3d at 1167–68.

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

In its Petition, Benworth argues that the Final Award granted relief inconsistent with the Agreements because it awarded Womply fees that violated SBA regulations. (Pet. at 68.) This was simply a rehash of its disagreement with the Arbitrator's rejection of its Agent Fee Cap and LSP arguments (*see id.* at 68–72), which Womply vehemently opposed (*see* Opp. at 15–19). Accordingly, Benworth's claim that "Womply has no response" to Benworth's argument that the Final Award grants relief not permitted by the Agreements (*see* Reply at 10) is wrong.

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 LSPs that Womply disposes of in its Opposition and 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.

In its Reply, Benworth claims that by denying its stay motions, the Arbitrator "foreclosed Benworth from presenting pertinent evidence and materials" and "usurped the role of the SBA."

(Reply at 11.) But Benworth fails to identify any evidence or materials that it was unable to present at the Arbitration. Instead, Benworth speculates that the SBA could in the future make a decision that would be relevant to the issues in the Arbitration, but Benworth cites no authority that such speculation is sufficient to vacate the Final Award. Nor did the Arbitrator usurp the role of the SBA. The Arbitrator resolved a contract dispute between the parties, and while Benworth raised arguments based on SBA regulations, it never argued that the Arbitrator did not have the authority or jurisdiction to resolve those issues.

Naing International Enterprises, Ltd. v. Ellsworth Associates, Inc., 961 F. Supp. 1 (D.D.C. 1997), on which Benworth heavily relies, is both instructive and materially different from 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." *Id.* 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 Assistant Administrator for the Division of Program Certification and Eligibility . . . initiate action to terminate NIE from the 8(a) program." *Id.* at 4. 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.* On April 11 and 15, 1996, EAI moved for a continuance based on the Inspector General's report but both requests 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 for reasons 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, shortly after the panel issued its 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 from the program "to avoid the stigma of being involuntarily terminated from the program." *Id.* Obviously concerned with NIE's concealment of relevant information from the panel, 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 arbitrator to consider previously concealed evidence, the Ninth Circuit held that the panel should have given itself more time to hear from the SBA in light of the fact that the SBA was expected to take action just one month after the arbitration hearing. *Id.* at 4.

Unlike in *Naing*, the Arbitrator was not presented with persuasive evidence concerning the scope of the SBA's investigation or when it would conclude—and in the more than 20 months since the hearing, there has been no indication that it is nearing a meaningful conclusion. The record in *Naing* bears no resemblance to the facts of this case.

CONCLUSION

Womply respectfully requests that the Court deny Benworth's Petition to Vacate and confirm the Final Award.

Respectfully submitted,

Dated: November 20, 2024

WILLKIE FARR & GALLAGHER LLP

By: */s/ Alexander L. Cheney*
Alexander L. Cheney
Stuart R. Lombardi (*pro hac vice*)
Joshua S. Levy (*pro hac vice*)
Zoe Packman

Attorneys for Petitioner
Oto Analytics, LLC