IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OTO ANALYTICS, INC. d/b/a WOMPLY, Plaintiff, v. CAPITAL PLUS FINANCIAL, LLC, CROSSROADS SYSTEMS, INC., and ERIC DONNELLY, Defendants.	§ § § § § § § § § § § § §	Civil Action No. 3:21-cv-2636-B

PLAINTIFF'S RESPONSE TO THIS COURT'S NOVEMBER 23, 2021 ORDER

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Pursuant to this Court's November 23, 2021 Order ("Order;" ECF No. 7), Plaintiff Oto Analytics, Inc. d/b/a Womply ("Womply") respectfully submits this response ("Response"), together with its proposed amended complaint (the "Amended Complaint" or "Am. Compl."), to Defendants' subject-matter jurisdiction arguments, as set forth in Defendants' Notice of Removal ("Notice;" ECF No. 1).

PRELIMINARY STATEMENT

A central issue for this Court to resolve in this litigation is whether federal rules and regulations promulgated by the United States Small Business Administration ("SBA") prohibit Womply from receiving the technology fees it earned for providing technology services to lender Capital Plus Financial, LLC ("Capital Plus") and its lender service provider BA Fin Orion, LLC d/b/a Blueacorn ("Blueacorn") in connection with the Paycheck Protection Program ("PPP"). Womply provided its technology services and earned its technology fees pursuant to the Womply Developer Order Form between Womply and Blueacorn, dated May 10, 2021 (the "Order Form;" Am. Compl. Ex. 4; Notice Ex. E.) Separately, Womply earned referral fees for referring PPP loan applications to Blueacorn, which referred the applications to Capital Plus for origination. Womply provided these referral services and earned its referral fees pursuant to the separate PPP Loan Referral Agreement between Womply and Blueacorn, dated May 10, 2021 (the "Referral Agreement;" Am. Compl. Ex. 3; Notice Ex. E; together with the Order Form, the "Agreements"). There does not appear to be any dispute among the parties that Womply's referral fees are consistent with SBA regulations.

Capital Plus funded more than 86,000 Womply-referred PPP loans to small businesses, for which it received approximately $187 million in "processing fees" from the SBA plus interest on the loans. In addition to using Womply's PPP applicant referral services, both Capital Plus and Blueacorn used Womply's technology services to, among other things, review loan applications,

organize and verify borrower information, communicate with the SBA and borrowers, fund PPP loans, and perform other PPP loan portfolio management functions. Yet Capital Plus and Blueacorn refuse to pay Womply for either its referral or technology services. Womply therefore commenced litigation in Texas state court against Capital Plus, its parent Company Crossroads Systems, Inc., and the former CEO of Capital Plus, Eric Donnelly (collectively, the "Capital Plus Defendants") and asserted claims for, among other things, tortious interference with contract and fraudulent inducement. (*See* Plaintiff's Original Petition ("Pet."), ECF No. 1-4.)

The Capital Plus Defendants removed this action to this Court on the ground that Womply's claims raise a federal question—namely, whether the technology fees Womply earned for providing its technology services exceed limits set forth in a rule promulgated by the SBA. (Notice ¶ 4.) The rule states:

> 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.

85 Fed. Reg. 20,811, 20,816 (Apr. 15, 2020); 86 Fed. Reg. 3,692, 3,709 (Jan. 14, 2021) (the "Agent Fee Cap").

In response, this Court directed Womply to submit briefing to "specifically address (1) Defendants' contention that construction of the PPP regulations and governing statutes will be dispositive of an essential element of Womply's state-law claims," and "(2) whether Womply is an 'agent' within the definition of 13 C.F.R. § 103.1(a)." (Order at 3.)

This Court Has Federal-Question Jurisdiction Over This Action. In the Amended Complaint, Womply seeks a declaration that the SBA Agent Fee Cap does not apply to fees earned for providing technology services, including the fees Womply earned for providing technology services to Capital Plus and Blueacorn. A declaration of Womply's "rights and liabilities" under

"a federal [rule]" "'necessarily present[s] a federal question.'" *TNA Ent., LLC v. Ashenoff*, 2009 WL 748236, at *2 (N.D. Tex. Mar. 20, 2009) (Boyle, J.) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 19 (1983)) (denying motion to dismiss for lack of subject-matter jurisdiction). Even as originally pled, this Court has subject matter jurisdiction because Womply's state-law claims raise an issue of federal law. An essential element of each of Womply's claims for tortious interference and fraudulent inducement is the existence of a valid contract. Addressing these claims requires resolving the parties' dispute about the validity of the Agreements under federal SBA rules and regulations, which has substantial implications for federal lending programs. "Supreme Court precedent is clear that a case arises under federal law where 'the vindication of a right under state law necessarily turn[s] on some construction of federal law.'" *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 721 (5th Cir. 2017) (quoting *Franchise*, 463 U.S. at 9).

Womply Is Not An "Agent" Under 13 C.F.R. § 103.1(a). The SBA defines an "agent" to mean an "authorized representative" of an "Applicant or Participant" or an entity "representing an Applicant or Participant by conducting business with SBA." 13 C.F.R. § 103.1(a). Womply is not and was not an authorized representative of any Applicant or Participant, including Capital Plus. Nor does Womply "conduct[] business with the SBA" on behalf of any Applicant or Participant. Womply (i) referred PPP loan applications from borrowers, who submitted their own information to Womply, to Blueacorn under the Referral Agreements, which referred them to Capital Plus for funding, and (ii) provided Capital Plus and Blueacorn with access to its technology platform under the Order Form, which enabled them to efficiently and cost-effectively process, manage, and track all Womply-referred PPP loans. What is more, the SBA has expressly announced—in a Standard Operating Procedure issued ***after*** the Agent Fee Cap rule on which

Capital Plus purports to rely—that providing technology services to a lender does not make the provider an "agent": "***SBA does not consider entities providing technology services that do not include underwriting to be Agents.***" SBA Standard Operating Procedure (SOP) 50 10 6, effective October 1, 2020 (the "SBA SOP") (emphasis added). Womply has not provided underwriting services to Capital Plus or any other lender. Accordingly, Womply's provision of technology services to Capital Plus and Blueacorn did not make Womply an "agent."

Importantly, an "Agent" is not the same thing as a "Referral Agent" under SBA regulations. The SBA defines a "Referral Agent" as "a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant." 13 C.F.R. § 103.1(f). Womply's ***referral*** of prospective PPP loan applicants to Capital Plus, through Blueacorn as an intermediary, arguably falls within that definition. But the Agent Fee Cap rule upon which Capital Plus relies does not reference the defined term "Referral Agent," nor does it limit all fees that an "Agent" may collect. Rather, it limits "[t]he 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)***." 86 Fed Reg. at 3,709 (emphasis added). But even assuming the reference to "referral" encompasses Womply's actions in referring loans to Capital Plus, it is undisputed that the referral fees Womply earned for referral services under the Referral Agreement were within the Agent Fee Cap.

BACKGROUND

In response to the COVID-19 pandemic, Congress enacted the PPP to authorize banks and other lenders to make federally guaranteed and potentially forgivable loans to businesses, which required connecting more than 10 million PPP loan borrowers with approximately 5,500 national and local lenders. (Am. Compl. ¶¶ 1, 26, 35.) Despite lenders receiving lucrative processing fees and interest for providing government-guaranteed loans under the PPP, many small businesses found it difficult to find a lender willing to provide them with a PPP loan. (*Id.* ¶¶ 2, 34, 39.)

Processing, managing, and tracking PPP loan applications was burdensome and complicated, and many lenders were unable or unwilling to devote the required resources to funding small SBA loans. (*Id.*) They instead focused on funding larger PPP loans in order to maximize the processing fees and interest they would collect. (*Id.*) Womply addressed this problem by releasing a web-based technology platform (the "Technology Platform") that resulted in hundreds of thousands of borrowers receiving small PPP loans. (*Id.* ¶¶ 3, 40–43; Pet. ¶ 2.)

Womply's Technology Platform provided two distinct categories of services to lenders. First, it provided lenders with PPP loan application referral services. The Technology Platform contained a borrower-facing webpage that enabled potential PPP borrowers to submit their own information, which Womply referred to its lender partners. Second, it provided lenders with valuable technology services. The Technology Platform contained a separate lender-facing portal through which its lender partners, among other things, reviewed applications to determine whether applicants qualified for PPP loans and whether to fund the loans, submitted applications to the SBA for approval, funded PPP loans, communicated with the SBA and applicants, and performed other PPP loan portfolio management functions. (Am. Compl. ¶¶ 3, 40–43; Pet. ¶ 26.) Womply's lender partners also received numerous other technology services that were integrated in the Technology Platform, including borrower information verification services, from third party technology companies such as Twilio, Kickbox, Custmer.io, Salesforce, WordPress, Simple Texting, Drift, Teslar Software, Plaid, Amazon Web Services, Guideline, FreshAddress, Inscribe, Slack, Mindee, Ocrolus, DocuSign, and LexisNexis. (Am. Compl. ¶¶ 41, 64, 67.) With access to all of these services in one Technology Platform, lenders that contracted with Womply had to do little more than make underwriting decisions, determine whether to send loan applications to the SBA, and fund the loans that the SBA approved, which made it economically feasible for lenders

to provide and manage loans to the smallest businesses during the COVID-19 pandemic. (*Id.* ¶ 43.)

More than a dozen lenders contracted with Womply for its referral services and access to the Technology Platform and its integrated technology services. (*Id.* ¶ 3; Pet. ¶¶ 2, 26.) Those lenders are not large institutions or household names but, largely because of the services in Womply's Technology Platform, Womply's lender partners nonetheless provided more than 1.4 million PPP loans totaling more than $20 billion in principal amount to small businesses across the country. (Am. Compl. ¶¶ 2–3.) By one estimate, more than 7% of all PPP loans funded in 2021 were funded and managed using Womply's Technology Platform.[1]

One of the lenders that used Womply's referral services and Technology Platform is Defendant Capital Plus. (*Id.* ¶¶ 55, 72, 154, 158; Pet. ¶¶ 2–3.) Womply provided Capital Plus with referral services pursuant to the Referral Agreement and access to its Technology Platform pursuant to the Order Form. Under the Referral Agreement, Womply is entitled to referral fees of 1% of the principal amount of each Womply-referred PPP loan that Capital Plus funds (the "Referral Fees"). Under the Order Form, Womply is entitled to separate technology fees for providing Capital Plus and Blueacorn with access to the Technology Platform and technology services (the "Technology Fees").

Using Womply's Technology Platform and technology services, Capital Plus funded more than 86,000 PPP loans—totaling more than $950 million in principal amount—for which Capital Plus received approximately $187 million in fees from the SBA plus interest on the loans. (Am. Compl. ¶¶ 5–6, 72, 76; Pet. ¶¶ 1, 34.) Womply is entitled to more than $9 million in Referral Fees

[1] *See* Stacy Cowley & Ella Koeze, *How Two Start-Ups Reaped Billions in Fees on Small Business Relief Loans*, N.Y. Times (June 27, 2021), https://www.nytimes.com/2021/06/27/business/ppp-relief-loans-blueacorn-womply.html

for its referral services under the Referral Agreement, and more than $67 million in Technology Fees for the use of its Technology Platform under the Order Form. (Am. Compl.¶¶ 6, 79; Pet. ¶¶ 41, 50.) But Capital Plus and Blueacorn have refused to pay Womply any fees for any of Womply's services. (Am. Compl. ¶¶ 5–7, 77–79, 88–93, 128, 161; Pet. 4–6, 46.) Capital Plus contends that SBA regulations prohibit Womply from collecting more than 1% of the principal amount of the PPP loans Capital Plus funded and managed using the Technology Platform. (Am. Compl. ¶¶ 7, 68; Notice ¶¶ 28, 44.) In other words, Capital Plus contends that Womply may collect only its Referral Fees, but not its Technology Fees (although neither Capital Plus nor Blueacorn actually paid Womply any Referral Fees). (Am. Compl. ¶¶ 6–7; Notice ¶¶ 28, 44.)

The SBA rule that Capital Plus invokes in an attempt to deprive Womply of the fees it earned states that 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." 85 Fed. Reg. at 20,816; 86 Fed. Reg. at 3,709. This rule does not apply to Womply's Technology Fees because, *inter alia*, neither Blueacorn nor Womply is an SBA-regulated lender, so the SBA Agent Fee Cap does not apply to the Agreements between Blueacorn and Womply, and the Agent Fee Cap applies only to fees for loan application preparation and referral services, not to fees for separate technology services. (Am. Compl. ¶ 68.) It is undisputed that Womply's Referral Fees comply with this rule. (*Id.* ¶¶ 6–7; Pet. ¶ 31.) Yet Capital Plus and Blueacorn refuse to pay Womply ***both*** the Technology Fees and the Referral Fees. (Am. Compl. ¶¶ 6–7; Pet. ¶¶ 4–6, 46.) Capital Plus's attempt to invoke this rule for the first time in its Notice—more than a year after the SBA first issued it and months after Blueacorn and Womply entered into the Agreements—is a blatant money grab now that the PPP program has ended and Capital Plus has lost its main source of revenue. (Am. Compl. ¶¶ 44–54.)

Accordingly, through this lawsuit, Womply seeks (i) a declaratory judgment that SBA rules capping fees for PPP loan application preparation and referral services do not apply to fees for technology services, including the Technology Fees charged by Womply; (ii) money damages, including contractual fees and punitive damages; (iii) equitable relief, including disgorgement and/or constructive trust; and (iv) reasonable attorneys' fees and costs. (*Id.* ¶ 10.)

ARGUMENT

I. THIS COURT HAS FEDERAL-QUESTION JURISDICTION OVER THIS ACTION.

This Court has "federal[-]question jurisdiction over any civil action that arises under the federal constitution, statutes, or treatises." *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 721 (5th Cir. 2017) (internal quotation marks omitted); *see* 28 U.S.C. § 1331. Here, this Court has federal-question jurisdiction over (i) Womply's declaratory judgment claim regarding the interpretation of federal SBA rules (*infra* Section I.A), and (ii) Womply's state-law claims, which necessarily require interpreting federal SBA rules (*infra* Section I.B).

A. This Court Has Jurisdiction Over Womply's Declaratory Judgment Claim.

"The Declaratory Judgment Act authorizes federal courts to 'declare the rights and other legal relations of any interested party seeking such a declaration.'" *TNA Ent., LLC v. Ashenoff*, 2009 WL 748236, at *2 (N.D. Tex. Mar. 20, 2009) (Boyle, J.) (quoting 28 U.S.C. § 2201(a)).

Capital Plus asserts that Womply's Technology Fees violate the SBA's Agent Fee Cap and is therefore withholding payment from Blueacorn, which in turn is withholding payment from Womply. (*See* Notice ¶¶ 28, 44.) Accordingly, Womply is seeking a declaration from this Court that SBA rules capping fees to "agents" do not apply to fees for technology services, including the Technology Fees Blueacorn agreed to pay Womply for access to its Technology Platform. (*See* Am. Compl. ¶¶ 116–20.) "Federal courts have regularly taken original jurisdiction over

declaratory judgment suit" where, as here, "that suit would necessarily present a federal question." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 19 (1983); *see, e.g.*, *Noatex Corp. v. King Constr. of Houston LLC*, 74 F. Supp. 3d 764, 773 (N.D. Miss. 2014) (analyzing subject-matter jurisdiction *sua sponte* and finding that the court "may exercise federal question jurisdiction over the declaratory judgment action").[2]

This Court's decision in *TNA* is instructive. "TNA and Ashenonff entered into an agreement" that included "a waiver, releasing TNA of liability for claims 'that arise from or relate in any way'" to the agreement. 2009 WL 748236, at *1. "Ashenoff threatened to sue under 42 U.S.C. § 1981," and, "[i]n response to Ashenoff's demand, TNA filed suit, seeking declarations pursuant to the Declaratory Judgment Act[] regarding, *inter alia*, its rights and liabilities under 42 U.S.C. § 1981 as well as breach of contract damages." *Id.* (citations omitted). This Court denied Ashenoff's "motion to dismiss for lack of subject matter jurisdiction," because "TNA, in addition to averring a cause of action for breach of contract, seeks numerous declarations as to its rights and liabilities under 42 U.S.C. § 1981—a federal statute." *Id.* at *2. Similarly here, Capital Plus has challenged the validity of Womply's Agreements with Blueacorn under federal SBA rules, and Womply seeks an affirmative declaration interpreting these federal rules in addition to its contractual claims. Thus, just as in *TNA*, this Court has subject-matter jurisdiction over Womply's declaratory judgment claim.

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[2] *See also Samuel C. Johnson 1988 Tr. v. Bayfield Cnty., Wis.*, 649 F.3d 799, 801 (7th Cir. 2011) (Posner, J.) (holding that state law quiet-title action "arise[s] under federal law . . . . because a suit to quiet title is functionally a form of declaratory-judgment action"); *Columbia Gas Transmission Corp. v. Drain*, 237 F.3d 366, 370–71 (4th Cir. 2001) (holding that "the district court possessed subject matter jurisdiction pursuant to § 1331," because plaintiff "seeks declaratory relief on a matter . . . arising under federal law").

B. This Court Has Jurisdiction Over Womply's State-Law Claims.

Even if Womply had not moved to file an Amended Complaint asserting a declaratory judgment claim, this Court would have subject matter jurisdiction over Womply's state-law claims. "Supreme Court precedent is clear that a case arises under federal law where 'the vindication of a right under state law necessarily turn[s] on some construction of federal law.'" *Bd. of Comm'rs*, 850 F.3d at 723 (quoting *Franchise*, 463 U.S. at 9). "The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). A federal court has jurisdiction over a state-law claim "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 313–14). All four requirements are satisfied here.

1. Womply's Claims Necessarily Require Interpretation of Federal SBA Rules.

To prevail on its state-law claims against Capital Plus, Womply must show that it entered into a valid contract with Blueacorn, which "will necessarily require application of" federal SBA rules to the Agreements. *Gunn*, 568 U.S. at 259. For example, Womply alleges that Capital Plus tortiously interfered with its Agreements with Blueacorn. (Am. Compl. ¶¶ 121–30; Pet. ¶¶ 73–78.) Under Texas law, this requires, *inter alia*, "the existence of a valid contract subject to interference." *Cmty. Health Sys. Prof.'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 689 (Tex. 2017). Womply also alleges that Capital Plus and Blueacorn fraudulently induced Womply to enter into the Agreements. (Am. Compl. ¶¶ 131–39; Pet. ¶¶ 66–72.) A claim "for fraudulent inducement" likewise requires "the existence of a valid contract." *Wilmot v. Bouknight*, 466 S.W.3d 219, 231–32 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Because the validity of the Agreements

turns on whether they comply with federal SBA rules, "resolution of a federal [] question is 'necessary' to [Womply's] case." *Gunn*, 568 U.S. at 259.

2. Womply and Capital Plus Actually Dispute the Interpretation of SBA Rules.

"The federal issue is also 'actually disputed' here—indeed, on the merits, it is the central point of dispute." *Id.* Capital Plus argues that "the Womply–Blueacorn contracts as written violate federal law because the provided fee structure would exceed a clear regulatory cap." (Notice ¶ 28; *see id.* ¶ 44 ("The underlying contract that plaintiff claims was fraudulently induced and/or tortiously interfered with is illegal under federal law, which caps the fees payable to an entity like Womply.").) Womply argues that the SBA's Agent Fee Cap does not apply to the Technology Fees under the Agreements because (i) neither Womply nor Blueacorn is a SBA-regulated lender, (ii) the technology services Womply provided to Blueacorn and Capital Plus, and for which Womply earned its Technology Fees, are not loan application preparation and referral services, (iii) Womply was not Capital Plus's or any applicant's "agent" as that term is defined by the SBA, and (iv) the SBA is aware that Womply collects fees in excess of the SBA Agent Fee Cap and it has not suggested that Womply's fees violate any SBA rules. (Am. Compl. ¶ 68.) "This is just the sort of dispute respecting the effect of federal law that [the Supreme Court] envisioned." *Gunn*, 568 U.S. at 259 (internal quotation marks and alterations omitted).

3. The Interpretation of SBA Rules Affects Billions of Dollars of Federal Money under the PPP.

"The substantiality inquiry" looks to "the importance of the issue to the federal system as a whole." *Bd. of Comm'rs*, 850 F.3d at 723 (quoting *Gunn*, 568 U.S. at 260). "The Supreme Court has suggested that an issue can be important for many reasons: because state adjudication would undermine the development of a uniform body of federal law; because the case presents a nearly pure issue of law that would have applications to other federal cases; or because resolution of the

issue has broad significance for the federal government." *Id.* at 724 (internal quotation marks and alterations omitted). All of these reasons are present here.

First, this action is of substantial interest to the federal government. This action concerns fees for more than 86,000 federally guaranteed PPP loans, which total more than $950 million. (Am. Compl. ¶ 72; Pet. ¶¶ 1, 3, 6, 34.) The SBA has paid Capital Plus approximately $187 million in fees for funding these loans, and Capital Plus is receiving risk-free interest on these loans because of the federal government's guarantee. (Am. Compl. ¶¶ 5–6, 76; Original Pet. ¶¶ 1, 38.) The SBA also has an ongoing interest in these loans, which it is reviewing for potential forgiveness under the terms of the PPP and accompanying SBA rules and regulations. (Am. Compl. ¶¶ 1, 26, 51; Pet. ¶ 24.)

Second, the SBA rules at issue in this action "regulate issues of national concern" such that this "case affects an entire industry." *Bd. of Commr's*, 850 F.3d at 724 (internal quotation marks omitted). Congress authorized hundreds of billions of dollars for PPP loans to help businesses and employees through the COVID-19 pandemic. (Am. Compl. ¶¶ 1, 26, 35.) The SBA promulgated rules and regulations governing PPP lenders' payments to "agents" and, separately, PPP lenders' payments to technology service providers. (*Id.* ¶¶ 27–33, 36.) In reliance on these rules, PPP lenders paid technology service providers billions of dollars of fees. (*Id.* ¶¶ 5, 47; Notice ¶ 38.) Federal jurisdiction lies where, as here, the interpretation of SBA rules "affects an entire industry rather than a few parties." *Bd. of Comm'rs*, 850 F.3d at 724 (internal quotation marks omitted).

Third, this "case presents 'a nearly pure issue of law'" regarding the interpretation of SBA rules. *Id.* (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006)).

Finally, federal jurisdiction over interpretation of SBA rules avoids the risk that PPP loan fees will vary by state, and thus promotes "the development of a uniform body of federal law." *Id.* (quoting *Gunn*, 568 U.S. at 361) (alteration omitted).

4. A Federal Court Interpreting Federal Rules Governing a Federal Program Is Consistent with the Federal-State Balance Approved by Congress.

This action concerns the interpretation of federal SBA rules governing the implementation of the federal PPP program. The implementation of a federal loan forgiveness program has not "traditionally been the domain of state law," *id.* (quoting *Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008)), so federal jurisdiction "would not materially affect, or threaten to affect, the normal currents of litigation," *id.* at 725 (quoting *Grable*, 545 at 319). To the contrary, "the scope and limitations of a complex federal regulatory framework are at stake in this case, and disposition of the question whether that framework may give rise to state law claims as an initial matter will ultimately have implications for the federal docket one way or the other." *Id.*[3]

II. WOMPLY IS NOT AN "AGENT" UNDER 13 C.F.R. § 103.1(a).

The SBA defines an "agent" as "an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an Applicant or Participant by conducting business with the SBA." 13 C.F.R. § 103.1(a). The SBA defines "conduct business" with the SBA to mean:

> (1) Preparing or submitting on behalf of an applicant an application for financial assistance of any kind, assistance from the Investment Division of SBA, or assistance in procurement and technical matters;
>
> (2) Preparing or processing on behalf of a lender or a participant in any of SBA's programs an application for federal financial assistance;

[3] This Court can also exercise supplemental jurisdiction over Womply's state-law claims. 28 U.S.C. § 1367.

> (3) Participating with or communicating in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf;
>
> (4) Acting as a lender service provider; and
>
> (5) Such other activity as SBA reasonably shall determine.

Id. § 103.1(b).

Womply is not an "agent" under 13 C.F.R. § 103.1(a). Womply is not and never has been an "authorized representative" of an "Applicant or Participant." *Id.* § 103.1(a). Nor did Womply "conduct business with SBA," "[p]articipat[e] with or communicat[e] in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf," "act[] as a lender service provider," or "prepar[e] . . . on behalf of an applicant an application for financial assistance." *Id.* § 103.1(b).

Instead, Womply is a technology company that made a Technology Platform available to PPP lenders, and those lenders—including Capital Plus—used the Technology Platform to process, fund, and track PPP loans and to manage their PPP loan portfolio. The SBA has made clear that technology companies like Womply are not "agents" when providing technology services. The SBA "provide[d] specific guidance on the fees a 7(a) Lender or its Associates may collect from an Applicant or Borrower in connection with an SBA-guaranteed loan," and explicitly stated that "SBA does not consider entities providing technology services that do not include underwriting to be Agents." SBA SOP at 176, 179, 185, 194. Womply did not provide Capital Plus—or any other lender—with underwriting services. (*See* Order Form §§ 1.1, 2.2; Referral Agreement § 1.1; *see also* Referral Agreement at 1 ("Blueacorn and Womply specifically acknowledge that any third-party lender retains ultimate responsibility for all loan decisions, ***including . . . underwriting*** . . . .) (emphasis added).)

In addition, the examples of "technology services fees" provided by the SBA are strikingly similar to the Technology Fees that Womply earned for providing Capital Plus with access to the Technology Platform. Those examples include "[t]he costs or fees for software or technology used in connection with preparing SBA loan documents . . . or closing the SBA-guaranteed loan," "[a]cquisition costs or fees for licensing software or software platforms to 7(a) Lenders solely for the purpose of performing administrative functions (not including any underwriting functions), such as generating SBA-required forms," and "[f]ees associated with entities that develop systems or lending platforms to automate the 7(a) Lender's internal loan decision making process." SBA SOP at 179.

As explained in the Amended Complaint, federal regulations do not put a cap on the amount of technology services fees that a PPP lender may pay a technology service provider like Womply. Instead, the SBA allows lenders to freely contract with technology service providers for technology services, but directs that "[f]ees associated with technology services (whether developed internally ***or purchased from a third party***) . . . may not be passed on to the Borrower or paid for out of SBA-guaranteed loan proceeds." *Id.* (emphasis added).

Capital Plus's conclusory assertion that Womply was "acting as an 'agent' for purposes of PPP" (Notice ¶ 22) ignores the services Womply provided and is contrary to the plain language of the Agreements. In providing referral services and separate technology services to lenders, Womply did not "help[] all the borrowers complete their applications," or "collect[] supporting information." (*Id.*) The borrowers provided their own information through Womply's website, and the Referral Agreement states, in all caps, that "WOMPLY MAKES NO REPRESENTATIONS OR WARRANTIES ABOUT, AND HEREBY DISCLAIMS ALL RESPONSIBILITY FOR THE ACCURACY OR COMPLETENESS OF ANY AND ALL

APPLICATION INFORMATION PROVIDED BY AN APPLICANT . . . .” (Referral Agreement § 1.2.)

Womply may have acted as a “Referral Agent” to the extent it referred PPP loan applicants to Capital Plus and other PPP lenders. The SBA separately defines a “Referral Agent” to mean “a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant.” 13 C.F.R. § 103.1(f). SBA rules do not mention the defined term “Referral Agent” in connection with the Agent Fee Cap. But, even assuming the cap applies to fees lenders pay to Referral Agents, Womply’s fees for referring applicants to Capital Plus are consistent with SBA rules. Under the Referral Agreement, Womply earned a Referral Fee of 1% of the outstanding balance of each Womply-referred loan at the time of loan disbursement, which is the amount allowed under the Agent Fee Cap. (Referral Agreement § 2.2.)

CONCLUSION

For the foregoing reasons, Womply respectfully submits that this Court has subject-matter jurisdiction over this action and that Womply is not an “agent” under SBA regulations.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served on the following counsel of record, this 22nd day of December 2021, by using the electronic case filing system of the United States District Court for the District of Texas:

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