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., ERIC DONNELLY, BA FIN ORION, LLC d/b/a BLUEACORN, and BARRY CALHOUN Defendants.	§ § § § § § § § § § § §	Civil Action No. 3:21-cv-2636-B

PLAINTIFF'S BRIEF IN OPPOSITION TO CAPITAL PLUS'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT[1]

Capital Plus does not dispute that Womply is owed tens of millions of dollars that were to be paid from loan processing fees Capital Plus received under the Paycheck Protection Program. Capital Plus asserts that it is entitled to keep all that money for itself, and there is nothing Womply or this Court can do about it. Capital Plus is wrong, and its Motion to Dismiss should be denied.

In May 2021, Capital Plus and Blueacorn induced Womply to enter into two separate contracts for two separate services: (i) Womply's referral of PPP loan applicants to Blueacorn and, in turn, to Capital Plus; and (ii) access to Womply's Technology Platform, including its Portfolio Management System, through which Blueacorn and Capital Plus were able to review, approve, and manage more than 86,000 small-dollar PPP loans referred by Womply. Although the individual loans were small, the fees reaped by Capital Plus from these loans were large: Capital Plus received more than $186 million in fees from the federal government, plus millions more in essentially risk-free interest. ***It is undisputed that Womply was contractually entitled to receive payment for its referral and technology services out of those fees received by Capital Plus.***

But Capital Plus has decided, with Blueacorn's apparent support and encouragement, that it would prefer to keep all of the money for itself. Capital Plus has therefore refused to pay Womply *or* Blueacorn, which failure Blueacorn claims prevents it from paying Womply. For all Capital Plus's misdirection and belatedly devised legal theories, its position is straightforward: It claims to have "absolute immunity from any responsibility for fees" (Mot. at 20) and can therefore reap a more than $76 million windfall, while "Womply is simply left without any recourse against Capital Plus" (*id.* at 2). Capital Plus's assertion fails on numerous, independent grounds.

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[1] Capitalized terms not otherwise defined herein have the same meaning as in the Amended Complaint ("Am. Compl."; ECF No. 20). All internal quotations, citations, alterations, and capitalization are omitted unless otherwise indicated.

The crux of Capital Plus's argument is that the Agreements between Blueacorn and Womply violate SBA rules and regulations capping certain types of fees for PPP loans. As a threshold matter, however, as a general rule "only parties to a contract can raise an assertion of illegality," *In re Vallecito Gas, L.L.C.*, 771 F.3d 929, 934 (5th Cir. 2014), and Capital Plus concedes that it is not a party to the Agreements between Blueacorn and Womply (Mot. at 2, 19). Accordingly, Capital Plus's assertions about the fees agreed upon in Agreements ***between Womply and Blueacorn*** do not entitle Capital Plus to refuse to pay fees to Blueacorn. Tellingly, Blueacorn does not challenge the fees set forth in the Agreements. Respectfully, that should be the end of Capital Plus's contrivance that its hands (with which it is gripping the $76 million Womply is owed) are tied by SBA rules and regulations.

Even if Capital Plus were allowed to question the fees charged in other parties' contracts, its argument cannot succeed—particularly not on a motion to dismiss. For starters, Womply is not an "Agent" under SBA regulations and thus not subject to the Agent Fee Cap. To contend otherwise, Capital Plus claims that Womply "represented" applicants and Blueacorn, and "conducted business with the SBA" by preparing applications for applicants, processing the applications for Blueacorn, and submitting the applications to Blueacorn for funding by Capital Plus. (Mot. at 13–15.) But these invented facts appear nowhere in the Amended Complaint and are not supported by the Agreements. To the contrary, as the Amended Complaint alleges and the Agreements confirm, Womply was retained by Blueacorn as an independent contractor to provide Capital Plus and Blueacorn with access to Womply's Technology Platform. The platform allowed *applicants* (not Womply) to submit their own information through Womply's website, and it allowed *Capital Plus and Blueacorn* (not Womply) to process applications and submit applications they decided to fund to the SBA. It also allowed *Capital Plus and Blueacorn* to track and manage

the Womply-referred PPP loans that Capital Plus funded. Womply did not conduct any business with the SBA, let alone function as an "authorized representative" of any applicant or Blueacorn.

Even if Womply were acting as an Agent in some capacity (which it was not), Womply's Technology Fees are not subject to the Agent Fee Cap. As the Amended Complaint and the Agreements clearly state, the Technology Fees do not compensate Womply for providing "assistance in preparing an application for a PPP loan" or for referring applicants to Capital Plus—by its terms, those are the only types of fees to which the Agent Fee Cap applies. Indeed, Capital Plus does not dispute the Referral Fees (to which the cap *would* apply if Womply were an Agent), yet Capital Plus has refused to pay even those amounts. Capital Plus asks this Court to infer that the Referral Fees and Technology Fees compensate Womply for the same "bundle of services," and that all of those services constitute "assistance in preparing an application." (Mot. at 18, 22–23.) But that inference is not supported by the allegations in the Amended Complaint nor is it consistent with the plain meaning of the Agreements—to say nothing of the facts that discovery will conclusively establish in due course.

Capital Plus errs in asserting that it enjoys "absolute immunity" for its misconduct based on a statutory provision stating that lenders are "responsible for paying fees to an agent for services" only if the lender "directly contracts with the agent." (Mot. at 20.) That requirement does not purport to immunize Capital Plus from claims of fraud, tortious interference, or other torts. Capital Plus also wrongly claims that SBA regulations require submission of the Agreements between Womply and Blueacorn. But if that were true, it would be *Capital Plus's* responsibility as the lender to submit the Agreements to the SBA. Capital Plus's failure to do so cannot render the Agreements unenforceable; to the contrary, it confirms yet again that Capital Plus never considered Womply an Agent until Capital Plus saw economic (and litigation) opportunity in

devising this theory. Capital Plus's half-hearted claims that Womply does not adequately plead negligent misrepresentation, promissory estoppel, and breach of oral contract also fail.

BACKGROUND

The PPP extended emergency credit to businesses hit hard by the COVID-19 pandemic. Processing, managing, and tracking PPP loan applications, however, was burdensome and complicated, and many lenders were unable or unwilling to devote the required resources to funding relatively modest SBA loans. (Am. Compl. ¶¶ 2, 34, 39.) In 2020, Womply created a free website through which potential PPP borrowers could enter their own information to seek PPP loans; Womply would refer that information to lenders for review and funding. (*Id.* ¶¶ 3, 39.)

Handling the huge volume of small-dollar PPP requests presented an enormous logistical challenge, which many lenders were not prepared to meet. (*Id.*) In February 2021, Womply launched a Technology Platform that provided a borrower-facing internet portal, called "PPP Fast Lane," through which PPP loan applicants could enter their information and upload documents for free. (*Id.* ¶ 40.) Critically, the Technology Platform also provided a lender-facing portal that gave lenders the tools to process, manage, and track PPP loans, *and* incorporated numerous integrated technology services that allowed lenders to collect, verify, and analyze the information and documentation provided by applicants and to manage their PPP loan portfolios. (*Id.* ¶¶ 3, 40–42.) Womply spent more than $268 million creating the Technology Platform. (*Id.* ¶ 66.)

In early May 2021, Blueacorn proposed a business arrangement to Womply. (*Id.* ¶ 55.) Blueacorn is a "lender service provider," which means it "carries out lender functions," including "originating, disbursing, serving, or liquidating" loans. 13 C.F.R. § 103.1(d). Blueacorn serviced just two lenders, one of which was Capital Plus. (Am. Compl. ¶ 9.) Blueacorn proposed that Womply would contract with Blueacorn to (i) refer Fast Lane loans to Blueacorn/Capital Plus; and (ii) provide both Blueacorn and Capital Plus with access to Womply's Technology Platform. (*Id.*

¶ 55.) In return, Womply would receive certain fees from Blueacorn—a 1% referral fee for each applicant whose loan was successfully funded by Capital Plus, and a per-loan Technology Fee for each such loan that Blueacorn and Capital Plus reviewed, approved, funded, and managed through Womply's Technology Platform. (*Id.* ¶¶ 55, 63, 65.) Those fees were to be paid from a portion of the lender processing fees Capital Plus would receive from the SBA for funding these loans; the fees were not charged to borrowers. On May 19, 2021, Womply and Blueacorn documented those essential terms, among others, by signing two separate agreements: (i) the PPP Loan Referral Agreement; and (ii) the Womply Developer Order Form. (*Id.* ¶¶ 59, 61 Exs. 3–4.)[2] Womply executed those Agreements in reliance on representations by Blueacorn's CEO and Capital Plus's CEO that fees Capital Plus received from the SBA for funding Womply-referred PPP loans would be directly deposited into a joint account at Evolve Bank & Trust held by Capital Plus and Blueacorn, and that Womply would have visibility into the joint account. (*Id.* ¶ 58.)

Blueacorn acknowledges that "after applying Blueacorn's own evaluation criteria, [it] was able to help approximately 86,000 small businesses obtain loans from co-defendant Capital Plus." (ECF No. 31 ("BA Mot.") at 1.)[3] Those loans totaled more than $950 million in principal amount. (Am. Compl. ¶ 72.) Womply also provided both Blueacorn and Capital Plus with direct access to Womply's Technology Platform and technology services, which they relied upon to process the applications, submit them to the SBA, and facilitate funding. (*Id.* ¶¶ 5, 67, 154, 166.) Among other benefits, Capital Plus received $186,882,948 in fees from the SBA, plus an essentially risk-free 65 basis-point interest rate spread on the loans. (*Id.* ¶¶ 5–6, 51, 72, 76.) On July 26, 2021, Capital

[2] Though formally executed on May 19, 2021, both Agreements were dated as of May 10, 2021. The Agreements' terms are discussed in detail below in the Argument section. (*See infra* 8–18.)

[3] This Court can consider Blueacorn's statements and admissions in "public court filings" in deciding this Motion. *Wang v. Prudential Ins. Co.*, 439 F. App'x 359, 363 (5th Cir. 2011).

Plus's parent corporation paid its shareholders, including Defendant Donnelly, a "special dividend" of approximately $238.9 million, which included these fees and interest. (*Id.* ¶¶ 52, 113.)

Blueacorn acknowledges that "Capital Plus undisputedly owes Blueacorn fees in connection with those loans." (BA Mot. at 1.) Womply is currently owed $76,724,482.67 for the services it provided to Blueacorn and Capital Plus under the Agreements, plus more than $7.6 million in financing charges that continue to accrue, but Womply has not received any payments from Blueacorn or Capital Plus. (Am. Compl. ¶¶ 79, 96, 192.) What is more, Capital Plus and Blueacorn are conspiring to deprive Womply of its fees. (*Id*. ¶¶ 8–9, 94–100.)

ARGUMENT

This Court "must accept all well-pleaded facts alleged in the complaint as true and must construe the allegations in the light that is most favorable to the plaintiff." *Joe Hand Promotions, Inc. v. Martin*, 2019 WL 111209, at *1 (N.D. Tex. Jan. 4, 2019) (Boyle, J.).

I. CAPITAL PLUS'S BELATED ATTEMPTS TO CHALLENGE THE TECHNOLOGY FEES ARE MERITLESS.

A. Capital Plus Cannot Dispute The Agreements' Compliance With SBA Rules And Regulations.

Until this litigation, Capital Plus never professed any concern about the Technology Fees or Referral Fees owed to Womply under the Agreements with Blueacorn. Capital Plus happily availed itself of Womply's referrals and Technology Platform to review, fund, and manage more than 86,000 PPP loans for which Capital Plus received more than $186 million in fees. Equally telling are Capital Plus's admissions that it did not raise any concern regarding Womply's fees to the SBA (Mot. at 21), and Capital Plus's inability to dispute that it has paid *other* service providers technology fees greater than 1% on other PPP loans (Am. Compl. ¶ 152; ECF No. 60 at 4). For its part, Blueacorn does not challenge the propriety of the disputed fees; to the contrary, Blueacorn asserts that "Capital Plus undisputedly owes Blueacorn fees in connection with [the Womply-

referred] loans." (BA Mot. at 1.) Capital Plus's *post hoc* legal challenge is a transparent attempt to keep for itself more than $76 million in fees.

Capital Plus's theory, however, fails out of the gate because Capital Plus is not a party to the Agreements. The general rule is that "only parties to a contract can raise an assertion of illegality." *Vallecito Gas*, 771 F.3d at 934. In *Vellecito Gas*, a party sought to void "royalty interests [] to a lease" based on a statutory provision, which the Fifth Circuit held "bears similarities to an illegality defense in contract law." *Id.* at 931, 934. After surveying nearly a century of similar cases, the Court held that "a third party . . . cannot assert a statute . . . to void the overriding royalty interests." *Id.* at 934–35 (collecting cases). Capital Plus's own authority (ECF No. 1 ¶ 27) considered a challenge to the legality of a contract in a fraudulent inducement claim raised ***by a party*** to the contract. *See Villanueva v. Gonzalez*, 123 S.W.3d 461, 488 (Tex. App.—San Antonio 2003, no pet.). Moreover, Capital Plus does not (and cannot) claim that contracting for the Technology Services was itself "illegal"; it merely disputes the quantum of fees.

In any event, Capital Plus admits that it is attempting to raise an "affirmative defense" (Mot. at 13, 20) for which it bears the burden of proof. Fed. R. Civ. 8(c). "Affirmative defenses are generally not appropriate grounds on which to dismiss a complaint under a Rule 12(b)(6) motion . . . ." *United States ex rel. Parikh v. Citizens Med. Ctr.*, 977 F. Supp. 2d 654, 668–69 (S.D. Tex. 2013). That rule is particularly pertinent here because contracts are presumed to be legal. *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 485 (Tex. 2016); *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 350 (9th Cir. 2014). Even if Capital Plus can eventually contest the legality of the Womply-Blueacorn Agreements (and even assuming that assertion had merit (*but see infra* at 8–24)), that argument would be subject to numerous exceptions

requiring factual development—*e.g.*, whether allowing Capital Plus to reap a windfall (on top of its already massive fees) based on a fee cap meant to protect *borrowers* would "serve public policy," which necessarily "depends upon the peculiar facts and the equities of the case." *Packard v. OCA, Inc.*, 624 F.3d 726, 730 (5th Cir. 2010).

B. The Amended Complaint Clearly (And Correctly) Alleges That Womply Did Not Act As An "Agent" Under SBA Regulations.

All of Capital Plus's arguments relating to the SBA fee cap proceed from the false premise that Womply was acting as an "Agent" under the SBA regulations. SBA regulations define "Agent" to mean "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 SBA." 13 C.F.R. § 103.1(a). Thus, an "Agent" is one who conducts business with the SBA as an authorized representative of an Applicant (*i.e.*, a borrower) or a Participant (*i.e.*, a lender).

Capital Plus concedes that "conducting business with the SBA" is a key requirement of qualifying as an "Agent." (*See* Mot. at 1 ("There are two components to determining 'agent' status: (1) the person acts in a representative capacity for 'Applicants' or 'Participants' in SBA programs; ***and*** (2) the person 'conduct[s] business with the SBA.'"); *id.* at 17 ("The regulatory definition of 'Agent' turns on whether an entity conduct[s] business with SBA.").) Capital Plus also concedes, as it must, that Womply alleges in the Amended Complaint that it did not act as an Agent because it did not conduct business with the SBA as a representative of any Applicant or Participant. (Am. Compl. ¶ 68(d); Mot. at 14.) Capital Plus nonetheless contends that, on the face of the Amended Complaint, Womply must be deemed an Agent. That is wrong.

SBA regulations define "conducting business with the SBA" to mean, among other things, "[p]reparing or submitting on behalf of an applicant an application for financial assistance," or

"[p]reparing or processing on behalf of a lender or a participant in any of SBA's programs an application for Federal financial assistance." 13 C.F.R. § 103.1(b)(1)–(2). The Amended Complaint alleges that "borrowers" (not Womply) would "submit" their own information through Womply's borrower-facing Fast Lane portal, and that Womply collected that information and referred it to Blueacorn, which served as a Lender Service Provider ("LSP") to Capital Plus. (Am. Compl. ¶¶ 3, 40.) The Amended Complaint further alleges that "the Technology Platform . . . allowed *lenders*"—*i.e.*, Capital Plus (with the help of its LSP, Blueacorn)—"to review, manage, and *submit* PPP loan applicants to the SBA." (*Id.* ¶ 41; *see also id.* ¶ 67 ("The technology services Womply provided to Blueacorn and Capital Plus through the Technology Platform include: . . . [t]he lender-facing portal that allows lenders to receive referrals from Womply, and review, *process*, manage, and track all PPP loan applications and loans.").) The Amended Complaint also clearly alleges that "Womply ***did not*** . . . submit loan applications to the SBA." (*Id.* ¶ 42.) In fact, Womply did not have access to the SBA's electronic system for submitting PPP loan applications, which was available only to lenders and their LSPs, and therefore could not have submitted loan applications to the SBA.[4]

These allegations are consistent with the Order Form, which provides that Womply agreed to provide Blueacorn with the PPP Portfolio Management System (*i.e.*, the lender-facing portal), and various integrated services that the lenders could use to verify borrowers' information ("Tax Documents, Bank Data, Identity, Account Verification"). (Order Form at 1.) That contract further provides that Blueacorn would access the Technology Platform so that Blueacorn—not Womply—could "process[] Referrals." (*Id.* § 1.1 (providing that Blueacorn could use borrower "information and data provided via [Womply's] Service . . . for the purpose of processing Referrals").)

[4] *See* https://proxy.www.sba.gov/content/e-tran.

In response, Capital Plus mischaracterizes the Agreements, distorts the plain meaning of SBA regulations, and invents facts entirely untethered to the Amended Complaint (or reality).

1. Womply Did Not Conduct Business With The SBA As An Authorized Representative Of An Applicant Or Participant.

First, even assuming that prospective PPP applicants "endowed Womply with significant authority to represent them in dealing with SBA *lenders*," as Capital Plus contends (Mot. at 14), that does not establish that Womply was authorized to "conduct business with *the SBA*." Referring applicants to lenders, (purportedly) holding a contract right to "veto" certain loan applicants, and claiming "ownership" of documents does not constitute "conducting business with the SBA."

Second, Capital Plus incorrectly claims that the phrase "any other person representing an Applicant or Participant" constitutes a *broader* category of Agents—distinct from an "authorized representative"—to include "anyone acting in even an informal representative capacity." (Mot. at 15.) By using the word "other" before "person representing," the text makes clear that the phrase a "person representing an Applicant or Participant" is one of the illustrative examples that *define* what makes someone an "authorized representative." Capital Plus's reading would rewrite the text as follows: "Agent means an authorized representative, including an attorney, accountant, consultant, packager, **OR** lender service provider, or any other person representing an Applicant or Participant by conducting business with the SBA." That is not what the regulation says. In addition, if the final clause of the definition meant "anyone acting even in an informal capacity," as Capital Plus claims, the words "authorized representative" and the enumerated categories that follow would be surplusage, violating settled canons of statutory and regulatory interpretation. *See, e.g.*, *United States v. Fafalios*, 817 F.3d 155, 159 (5th Cir. 2016).

Third, Capital Plus's claim that Womply "represented" Blueacorn (Mot. at 15) is contradicted by the plain language of the Agreements, both of which expressly state that:

> This Agreement is not intended to establish any partnership, joint venture, employment, or other relationship between the parties except that of independent contractors. ***Neither party has, or may represent that it has, any authority under or as a result of this Agreement to act on behalf of the other party in any way***.

(Referral Agreement § 11; Order Form § 11.) Capital Plus omits any mention of this provision.

Fourth, the Amended Complaint expressly alleges that Womply did not prepare applications on behalf of borrowers. (Am. Compl. ¶ 42.) Capital Plus argues that Womply assisted borrowers "in compiling the needed documentation—such as making sure the applicant submitted the correct tax returns—and by checking the information supplied" (Mot. at 15), but that is not what the Agreements say. Rather, the Agreements provide that, as a service to Blueacorn, Womply would use technology to verify ***information*** that applicants provided when they prepared their applications as a "fraud check" and to verify that applicant-provided documents were "legitimate." (Referral Agreement Ex. A at 2.) That does not constitute "preparing" an application.

Fifth, "forwarding" applications to Blueacorn "with the intent to have such application[s] funded by the SBA"[5] does not constitute "submitting on behalf of an applicant an application for a PPP loan." (Mot. at 15.) As the Amended Complaint alleges, "Womply did not . . . submit loan applications to the SBA." (Am. Compl. ¶ 42.) Rather, the Technology Platform allowed Blueacorn and Capital Plus to do that using their own accounts with the SBA. (*Id.* ¶¶ 41, 67(d).) The Agreements are in accord. (*See* Referral Agreement § 2.3 (setting the deadline for payment of Womply's fees at five days "after Blueacorn receives its fees from the lender that submitted the Referred Loan to the . . . SBA"); Order Form § 3.5 (same deadline for Technology Fees).)

Sixth, Capital Plus cannot offer any support for its claim that the "multi-step process of reviewing and scrubbing applications that Womply agreed to undertake under Exhibit A [to the

[5] Private lenders fund PPP loans, not the SBA. (Am. Compl. ¶¶ 26–27.)

Referral Agreement] amounts to 'processing' applications." (Mot. at 15.) Even if Capital Plus's characterization of Womply's actions were correct (which it is not), Capital Plus cannot cite any authority for the notion that anyone who applied any "process" to a loan application would fit the definition of "conduct[ing] business with SBA." Read with even the slightest attention to context, the regulation's reference to "process[ing]" a loan application means the procedure used to determine whether to submit the loan application to the SBA and to actually fund the loan. That understanding is confirmed by SBA guidance, which refers to "lenders processing an application" when discussing loan underwriting guidelines. SOP at 247.[6] It also is consistent with other provisions of the Agreements. (*See* Order Form § 1.1 (referring to *Blueacorn* using borrower information and data "for the purpose of processing Referrals"); *id.* § 6.2 (referring to "third-party lenders to which the Referred Loans are sent for processing"); Referral Agreement § 5.2 (same).)[7]

2. Womply Did Not Engage In Underwriting.

The SBA guidance states that the "SBA does not consider entities providing technology services that do not include underwriting to be Agents." SOP at 179. And the Amended Complaint expressly alleges that "Womply did not provide underwriting services." (Am. Compl. ¶¶ 42, 68(d).) Moreover, the parties "specifically acknowledge[d]" in the Agreements that the "lender"—*i.e.*, *Capital Plus, not Womply*—would "retain[] ultimate responsibility for all loan decisions, including . . . *underwriting*." (Referral Agreement at 1.)

Contrary to Capital Plus's assertions (*see* Mot. at 4–5), Womply's collection and verification of applicant identity, tax, and bank information does not constitute "underwriting."

[6] *Available at* https://www.sba.gov/document/sop-50-10-lender-development-company-loan-programs-0.

[7] Even if Capital Plus's understanding of "process" were legally tenable, Womply's actions with PPP loan applications would be an issue of fact that cannot be resolved at the pleading stage. Discovery will show that Capital Plus and Blueacorn provided instructions regarding what rules to apply and analysis to conduct, which were merely implemented through Womply's technology.

The SBA defines "underwriting" as the process of determining a borrower's creditworthiness for a loan, including a screen for a FICO Small Business Scoring Service Score, a credit analysis, and an evaluation of certain equity requirements. SOP at 247–56 (providing "underwriting" requirements for loans of $350,000 or less). Because the PPP was designed to get loans to businesses quickly in response to the COVID-19 pandemic, and those loans were guaranteed and potentially forgivable by the federal government, applicants' creditworthiness was not a consideration. It does not follow, however, that the SBA implicitly *expanded* the meaning of "underwriting" in its guidance about technology service providers to reach mere receipt and confirmation of an applicant's identifying information. To the contrary, the SBA incorporated by reference the SOP into its PPP loan rules, and required PPP lenders to "review[] the payroll documentation submitted with the borrower's application" to confirm "that a borrower was . . . eligible" for a PPP loan. 86 Fed. Reg. 3,692, 3,698, 3,707–08 & n.36 (Jan. 14, 2021). Capital Plus does not point to any evidence that the SBA intended such a sweeping change to the types of technology service providers that the SBA considers Agents.

Moreover, Capital Plus's reinterpretation of "underwriting" would lead to absurd results. For example, one of the "steps" that Capital Plus contends constitutes "underwriting" is to "confirm the applicant's identity." (Mot. at 6–7.) Lenders often engage third-party technology companies to complete that task, just as Womply relied on third-party technology companies, such as Persona and LexisNexis, to provide that service to Blueacorn, Capital Plus, and other lenders through the Technology Platform. (*Id.*) Under Capital Plus's interpretation, however, Persona and LexisNexis would be engaged in "underwriting" just by confirming the identity of an applicant, rendering them not just Agents, but LSPs required to comply with numerous SBA requirements. *See, e.g.*, SOP at 179 ("Entities providing technology services that include underwriting are

considered to be LSPs and must be providing their services to the 7(a) Lender under an SBA-reviewed LSP Agreement."); *id.* at 185 (identifying as an example of an LSP "[e]ntities providing technology services to a 7(a) Lender that include underwriting"). Capital Plus does not cite any authority suggesting that the SBA intended the definition of LSP to extend so broadly to capture third-party technology companies that assist lenders to verify the identity of an applicant.

Capital Plus also suggests that Womply helped determine whether an applicant qualified for a PPP loan. (Mot. at 16–17.) But the Amended Complaint expressly alleges that "Womply was ***not*** responsible for determining whether applicants qualified for PPP loans." (Am. Compl. ¶ 42.)

The Agreements confirm that Womply did not contract to perform "underwriting." To the contrary, the Referral Agreement plainly says that "*Blueacorn* desires to engage in the marketing, *initial underwriting*, and submission to third-party lenders of loans." (Referral Agreement at 1.) Capital Plus contends that Womply "acknowledge[d] and agree[d] that Blueacorn will not conduct an independent review of the [R]eferred [L]oans . . . prior to submission to a third party lender." (Mot. at 7, 15). It does not follow, however, that Womply must have been engaged in "underwriting" (*id.*), particularly considering the Agreements' express disclaimer of such responsibility (*see supra* at 11 (citing Referral Agreement § 11; Order Form § 11)).

Capital Plus's logical leap is especially unwarranted given Blueacorn's acknowledgement that it "appl[ied] Blueacorn's own evaluation criteria" to the applications received from Womply. (BA Mot. at 1.) That concession is hardly surprising, because Blueacorn is Capital Plus's LSP (Am. Compl. ¶¶ 5, 46), and underwriting is one of the responsibilities that qualifies an entity as an LSP under SBA regulations. SOP at 179, 185. Similarly, Capital Plus misreads Womply's representation in the Referral Agreement that "the information accompanying any referral complies with the regulatory guidance from the SBA." (Referral Agreement § 1.2; Mot. at 17.)

This does not mean, as Capital Plus contends, that "Womply represents for each loan it refers that, based on the information provided, the applicant meets the SBA eligibility guidance for PPP loans." (Mot. at 7.) Womply represented only that the information "accompanying" the referral was the type of information that SBA regulations require a lender to evaluate.

Capital Plus's last-ditch attempt to overcome the SBA's explicit guidance in the SOP regarding technology service providers is to claim that the SOP is invalid. Capital Plus asserts that "[t]he regulatory definition of 'conduct business with SBA' does not turn on whether the services—*e.g.*, processing, preparing, or submitting applications—are performed by humans or machines," and therefore the guidance conflicts with the SBA's regulatory definition of "Agent." (Mot. at 17.) But as discussed above, Womply did not process, prepare, or submit applications—either with "humans or machines"—nor was it an authorized representative of applicants or Blueacorn. Instead, Womply provided technology that allowed *applicants* to submit information and *Blueacorn* and *Capital Plus* to process and submit applications. The SBA's guidance in the SOP acknowledges that applicants, lenders, and LSPs may use third-party technology companies like Womply to facilitate these tasks without transforming the technology provider into an Agent, just as Google would not be an Agent if it facilitated the submission of an application through a Google Form document. Nor, in any event, does the SBA's guidance state that it turns on whether humans or machines are involved in performing the services. And that distinction would make little sense, because all technology services involve humans performing tasks at some level.

C. Even If Womply Acted As An "Agent" In Providing Technology Services, Womply's Technology Fees Do Not Violate The SBA Fee Cap.

Even if Capital Plus could succeed in making Womply an "Agent" under the SBA regulations, the Agent Fee Cap does not bar the Technology Fees. The SBA rule provides that "[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) may not exceed[] [o]ne (1) percent for loans of not more than $350,000." 86 Fed. Reg. at 3,709. Capital Plus does not dispute that Womply's Referral Fee of 1% of a PPP loan, which compensated Womply for application collection and referral services, did not violate the rule (although Capital Plus has failed to pay even those amounts). Capital Plus's attempts to subject the Technology Fees to the Agent Fee Cap rely on tortured readings of SBA rules and regulations, as well as the Agreements.

1. The Technology Fees Do Not Compensate Womply For Assistance With Preparing PPP Loan Applications Or Referrals.

The Order Form states that Womply is entitled to a Technology Fee for providing a "PPP Portfolio Management System" (Order Form at 1), which:

> helped lenders collect, verify, and understand the documentation and information provided by applicants, and the services included, among other things, multilingual translations, bank data collection and analysis, tax document collection and analysis, identity verification, bank account analysis, borrower status updates, borrower support, bank account and deposit management, cybersecurity protection, and logging, reporting, and capacity management tools. The Technology Platform also allowed lenders to review, manage, and submit PPP loan applications to the SBA, track the status of the applications, resubmit applications if necessary, fund PPP loans, and track all funding activities.

(Am. Compl. ¶ 41.) Capital Plus does not (and cannot) argue that these services constitute "assistance in preparing an application for a PPP loan (including referral to the lender)." Tellingly, the words "PPP Portfolio Management System" do not appear anywhere in Capital Plus's Motion.

In addition, the services Womply agreed to perform before referring an applicant to Blueacorn, listed on Exhibit A to the Referral Agreement, are not "preparing an application" or "referral" of an applicant to a lender. These services include verifying emails and phone numbers; validating personal information; checking "Business Activity (as defined by Blue Acorn)"; obtaining approval of an application from the third-party Know Your Customer ("KYC") vendor Persona; manually reviewing "selfies & IDs" to check for "animations, deep fakes, and other info"

that may be approved by Persona but declined by "Womply's KYC team"; providing a "KYC data" summary in a "KYC Details pdf"; summarizing "bank data" in a "Bank Data pdf"; a first tax document review using a "machine-learning platform" to determine if documents appear "legitimate" as part of a "first fraud check"; a second tax document review where tax documents are sent "out for third party classification, verification, and data extraction," with "mathematical checks to determine if the values and calculations on the forms would be permissible for submission under IRS rules"; a third tax document review of "about 1 in 3 documents" and all "documents flagged as suspicious"; and summarizing "relevant tax documents" in a "Tax pdf." (Referral Agreement Ex. A.) These extensive services are not steps in "preparing an application for a PPP loan." (Mot. at 22.) Indeed, if all Womply did was refer PPP loan applicants, Blueacorn and Capital Plus would have needed to either perform all of these additional services themselves or (in actuality given their lack of the technological tools) retained another technology service provider to perform them. Capital Plus cannot have it both ways: it cannot claim that "Womply [] was in the business of referring PPP applicants" subject to the Agent Fee Cap but actually provided technological "verification" services (Mot. at 6–8), which means that Womply was paid Technology Fees for services outside the scope of the Agent Fee Cap.

Capital Plus's assertion is also inconsistent with SBA rules, which state that the Agent Fee Cap is "reasonable based upon the *application requirements* and the fees that lenders receive for making PPP loans." 85 Fed. Reg. 20,811, 20,816 (Apr. 15, 2020). Thus, the cap applies only to fees for the service of helping complete an application and referring it to a lender. (Am. Compl. ¶ 68(c).) Capital Plus does not address those rules at all.

Capital Plus selectively quotes from Section 1.1 of the Order Form to assert that Blueacorn used the Technology Platform "solely" for "processing Referrals." (Mot. at 11.) Section 1.1

actually states, in relevant part, that Blueacorn "has the non-exclusive right to: (i) use the Service . . . with an application owned and operated by [Blueacorn] (the 'Client Application') provided to end users (consumers or business) (the 'End Users'), and," ***separately***, "(iii) use the End User information and data provided via the Service (the 'Output') solely in the Client Application for the purpose of processing Referrals." This provision thus means that ***Blueacorn*** may use "End User information and data" to "process[] Referrals," not that ***Womply*** was providing ***only*** referrals.

Capital Plus likewise mischaracterizes the Order Form to claim that Womply charged a "distinct fee for services provided after referral." (Mot. at 23.) Section 3.2 provides that "[i]f Womply collects forgiveness information and submits such info to the SBA on behalf of the Client or the Client's lender, then the Client shall pay Womply $100 per loan." Assisting with loan forgiveness, however, is not the only post-referral services contemplated by the Order Form. The Technology Platform also allowed Capital Plus to, among other things, "submit loan applications directly to the SBA, resubmit loan applications to the SBA with corrected information, approve loans, reject loans, send adverse action notices for declined loans, monitor the status of a loan application at the SBA, and fund approved loans." (Am. Compl. ¶ 67.) Thus, Womply's services to Capital Plus and Blueacorn did not end with Womply's referral of an applicant to Blueacorn, and the inference Capital Plus seeks to draw from Section 3.2 is unwarranted.

Similarly, the bare fact that Womply and Blueacorn agreed to calculate the Technology Fees by deducting the Referral Fees does not mean that the fees compensate Womply for the same services. (Mot. at 11–12.) Nor does it mean that Womply's fees cannot be allocated to different services, as Womply and Blueacorn expressly agreed in the Agreements. (Am. Compl. ¶¶ 6, 79.)

Capital Plus's assertion that the Technology Fees are subject to the Agent Fee Cap because they represent the "total amount" Womply seeks to collect (Mot. at 23) is baseless. As Capital Plus would have it, if an Agent performed any application-preparation or referral services, then any fees it charges *for any other services* must count against the 1% cap. That contention contradicts the plain terms of the Agent Fee Cap, which limits only fees "*for assistance in preparing an application for a PPP loan (including referral to the lender)*." The Agent Fee Cap does not purport to cap the total fees earned by an Agent "that renders assistance in preparing an application."

Capital Plus's reading would also lead to absurd results. It would mean that, if Womply had provided lenders with only a PPP loan management platform, there would be no cap on Womply's fees. But Womply *would* be subject to the fee cap if it provided those services *and* application preparation/referral services. There is no textual evidence that the SBA intended such a perverse result, and common sense recognizes that a technology provider like Womply can serve in different capacities—*i.e.*, as a collector and referrer of loan applications and also as a technology service provider—and earn separate fees for each role. That is why Womply and similar companies were willing to invest massive resources to develop and market the technology platforms that were critical to the success of the PPP—as the Amended Complaint avers, Womply spent more than $260 million to develop the Technology Platform. (Am. Compl. ¶ 66.)

Finally, Capital Plus's attempts to selectively quote and misconstrue the terms of the Agreements and the SBA's rules and regulations cannot overcome the presumption under both Texas and California law that Womply and Blueacorn, as contracting parties, intended to follow the law. *See Philadelphia Indem.*, 490 S.W.3d at 485; *Rock River*, 745 F.3d at 350. That presumption applies with particular force here, where Capital Plus was aware of the financial terms

of the Agreements and participated in the negotiations with Blueacorn and Womply (Am. Compl. ¶ 58), only now to argue that they were facially unlawful all along.

2. The Agent Fee Cap Applies Only To Fees for Services That Agents Provide To Borrowers.

The history and context of the Agent Fee Cap make clear that the cap is intended to apply to fees that an Agent collects from a lender *only* for services the Agent provides *to a borrower*, and not to fees for services provided to a lender or an LSP. The original text of the Agent Fee Cap, as promulgated in the 2020 PPP Rule, provided:

> c. Who pays the fee to ***an agent who assists a borrower***?
>
> Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed: . . .

85 Fed. Reg. at 20,816. Because the Agent Fee Cap is part of the SBA's answer to the question "[w]ho pays the fee to an agent who assists a borrower," the "assistance" to which the last sentence of the above paragraph refers is "assistance" to "a borrower." This is consistent with the SBA Administrator's statutory authority to limit PPP Agent fees, which extends only to fees to "[a]n agent ***that assists an eligible recipient to prepare an application for a covered loan***." 15 U.S.C. § 636(a)(36)(P)(ii). It does not empower the SBA Administrator to limit the fees an Agent could collect for services it provided to a *lender*. That makes eminent sense, because the SBA's role is to help small businesses (*i.e.*, borrowers), including by protecting them from predatory practices.

The original text of the Agent Fee Cap was revised following the December 2020 Economic Aid to Hard-Hit Small Business, Nonprofits, and Venues Act, Pub. L. 116-260, 134 Stat. 1182 ("Economic Aid Act"). PPP lenders were facing litigation by third parties claiming that

SBA regulations *mandated* payment of referral fees for assisting borrowers in preparing applications. In response, Congress added the two bolded sentences to Section 7(a)(36)(P)(ii):

> An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator. **If an eligible recipient has knowingly retained an agent, such fees shall be paid by the eligible recipient and may not be paid out of the proceeds of a covered loan. A lender shall only be responsible for paying fees to an agent for services for which the lender directly contracts with the agent.**

15 U.S.C. § 636(a)(36)(P)(ii); Economic Aid Act § 340(b)(1), 134 Stat. at 2050. The statute thus added additional parameters around the fees for providing assistance to borrowers.

To implement the statute, the SBA added two sentences to the Agent Fee Cap:

2020 Agent Fee Cap Text	**2021 Agent Fee Cap Text**
Who pays the fee to an agent *who assists a borrower?* Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed: . . . One (1) percent for loans of not more than $350,000	Who pays the fee to an agent *who provides assistance in connection with a PPP loan?* Agent fees may not be paid out of the proceeds of a PPP loan. ***If a borrower has knowingly retained an agent, such fees will be paid by the borrower. A lender is only responsible for paying fees to an agent for services for which the lender directly contracts with the agent.*** 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: . . . One (1) percent for loans of not more than $350,000 . . . .

3. Agent Fee Cap Applies Only To Fees That An Agent Collects *From A Lender*, And Blueacorn Is Not A Lender.

In any event, the Agent Fee Cap applies only to fees that an Agent collects "from [a] lender," 86 Fed. Reg. at 3,709, but the fees disputed here are owed to Womply by Blueacorn, which is not a lender (Am. Compl. ¶ 68(a)). Capital Plus contends that the cap nonetheless applies because Womply alleges that its fees were supposed to be paid out of a joint account with Capital Plus, that Womply's fees are a percentage of the Lender Processing Fee, and that the rule is not

limited to fees paid "directly" from a lender. (Mot. at 23–24.) But it is Capital Plus that seeks to rewrite the rule's text, which addresses only fees "from a lender" not indirectly from a lender or traceable to a Lender Processing Fee. Tellingly, Capital Plus does not cite any authority for its extraordinary claim that, because Blueacorn collects fees from a lender, the SBA sought to regulate every downstream contract Blueacorn pays from proceeds it received from Capital Plus.

D. Whether Womply "Directly Contracted" With Capital Plus Is Irrelevant.

Capital Plus asserts that it has "absolute immunity from any responsibility for fees" because Womply did not "directly contract[] with Capital Plus." (Mot. at 19–20.) That is wrong.

First, Capital Plus admits that the "direct contracting" requirement applies only if "Womply was acting as an [A]gent." (*id*. at 19.) As discussed above, Womply was not acting as an Agent, particularly with respect to its provision of technology services.

Second, Capital Plus directly contracted with Blueacorn (*see* BA Mot. at 1, 3), so by Capital Plus's own logic, Capital Plus is "responsible for paying fees to" Blueacorn (Mot. at 19). Yet Capital Plus refuses to pay Blueacorn, which refuses to pay Womply until it receives payment from Capital Plus. (BA Mot. at 1, 3; Am Compl. ¶¶ 94–100.) Capital Plus cannot invoke the "direct contracting" requirement to avoid paying Blueacorn, which is contractually obligated to pay Womply. (Am Compl. ¶ 95.)

Third, Womply is seeking damages from Capital Plus for its fraudulent misrepresentations, tortious interference, and other wrongdoing, which are *not* for fees subject to the "direct contracting" requirement. Womply's tort claims against Capital Plus seek redress for breach of a duty that exists independently of any contractual obligation to pay fees. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) ("[A]n independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement."); *CoreALM, LLC v. Keen Fusion, Inc.*, 2018 WL 6072154, at *3

(Tex. App.—Austin Nov. 21, 2018, pet. denied) ("The duty not to interfere with another's contractual relationship arises out of the law and is independent of any contractual relationship . . . .").[8] Likewise, Womply's equitable claims, including that Capital Plus unjustly enriched itself by obtaining the benefits of Womply's services while refusing to pay for them, are independent of any contract. *See Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). The fact that "[t]he basic measure of actual damages" for Capital Plus's tortious interference, for example, "is the same as the measure of damages for breach of the contract interfered with," "does not mean that they may not be damages for the tort." *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990); *see also CoreALM*, 2018 WL 6072154, at *3.

Fourth, as discussed above, Congress added the "direct contracting" requirement to address fees that an agent claims for providing services to a *borrower*. Capital Plus's own authority (Mot. at 20) likewise holds that a plaintiff that "acted as an agent when it assisted . . . *applicants* in securing PPP loans" is not entitled "to a portion of the lender's fees" "without a compensation agreement." *Daniel T.A. Cotts PLLC v. Am. Bank, N.A.*, 2021 WL 2196636, at *1, *6 (S.D. Tex. Feb. 9, 2021). This authority says nothing about purported agents that assisted *lenders*.

Finally, Capital Plus concedes that Womply brings quasi-contract and oral contract claims based on its direct relationship with Capital Plus, including Capital Plus's promise "to give Womply 'visibility' in[to] a joint account" (Mot. at 19 (citing Am. Compl. ¶ 170)), which satisfies the "direct contracting" requirement. 15 U.S.C. § 636(a)(36)(P)(ii).

E. Any Purported Failure To Submit SBA Form 159 Does Not Impact Womply's Ability To Recover Damages Or Fees.

Under 13 C.F.R. § 103.5(a), the SBA "regulate[s] an Agent's fees" by reviewing "a compensation agreement" in the form of either Form 159 or an LSP agreement. (Mot. at 21.)

[8] Capital Plus agrees that Texas law governs Womply's non-contract claims. (Mot. at 24–25.)

Capital Plus's assertion that "Womply cannot recover any fees" because it did not allege that it submitted such agreements to the SBA (*id.*) has no merit.

Capital Plus admits that this requirement applies only if "Womply was acting as an [A]gent." (*Id.*) But, as discussed above, Womply was not acting as an Agent, and Capital Plus does not—and could not—assert that Womply was acting as an LSP. (*See* Referral Agreement § 1.3 (Womply is not "a lender or lender service provider as defined by the SBA"). If Capital Plus believed that Womply was an Agent, then *Capital Plus* was required to submit Form 159, not Womply. *See* Form 159 at 1 ("This Form must be completed and signed ***by: the SBA Lender***."); [9] SOP at 183 ("***[T]he Lender must identify the Agent on SBA Form 159*** . . . .").) Capital Plus's failure to do so confirms that it never thought Womply was an Agent and it devised this theory for litigation purposes. In any event, failure to submit that form results, at most, in administrative suspension of Womply conducting business with the SBA, which it was not doing regardless. 13 C.F.R. §§ 103.3, 103.4(i); SOP at 189. It does not prevent Womply from "recover[ing] any fees . . . under state-law theories" or absolve Capital Plus's tortious conduct.[10] (Mot. at 21.)

II. THE AMENDED COMPLAINT ADEQUATELY ALLEGES WOMPLY'S ADDITIONAL CLAIMS AGAINST CAPITAL PLUS.

Contrary to Capital Plus's cursory assertions, the Amended Complaint adequately alleges claims for negligent misrepresentation, promissory estoppel, and breach of contract.

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[9] The Form 159 in effect when Womply provided services to Blueacorn and Capital Plus is available at https://www.sba.gov/sites/default/files/articles/Form_159_-_FINAL_9.10.18.pdf.

[10] Capital Plus relies on inapposite cases in which the plaintiff alleged that PPP regulations mandated that a lender, which was not aware of the Agent, pay the Agent a fee for assisting borrowers. *See Daniel T.A. Cotts*, 2021 WL 2196636, at *1; *Juan Antonio Sanchez, PC v. Bank of S. Tex.*, 494 F. Supp. 3d 421, 428 (S.D. Tex. 2020). Here, by contrast, Capital Plus is seeking to avoid liability for its own fraudulent misrepresentations, tortious interference, and other wrongdoing preventing Womply from collecting fees from Blueacorn under binding Agreements.

Womply alleges that Donnelly misrepresented that, *inter alia*, "Blueacorn and Capital Plus held a Joint Account . . . into which all fees received from the SBA for PPP loans funded by Capital Plus were deposited directly" (Am. Compl. ¶ 141(a)), which "is a misstatement of existing fact, not a promise of future conduct." *Roof Sys. Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 439 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Womply also alleges "out-of-pocket damages" (Mot. at 25) of "more than $76 million" (Am. Compl. ¶ 148), which is "the difference between the value of that which [Womply] has parted with, and the value of that which [Womply] has received." *Formosa Plastics*, 960 S.W.2d at 49. Womply thus seeks "the pecuniary loss suffered" directly from the misrepresentations. *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663–64 (Tex. 1998) (quoting Restatement (Second) of Torts § 552B).

Womply alleges that Capital Plus "promised to pay Technology Fees in excess of 1%," and that Womply "relied on" that promise because Capital Plus paid "technology fees greater than 1% . . . to other service providers" (Am. Compl. ¶¶ 150–52), and therefore pleads both a "cognizable promise" and "theory of detrimental reliance" (Mot. at 25).

Capital Plus repeats the same arguments the Blueacorn Defendants raised to dismiss their breach of oral contract, which should be denied for the same reasons. (*See* ECF No. 45 at 22–23.)

CONCLUSION

For the foregoing reasons, Womply respectfully requests that this Court deny Capital Plus's Motion to Dismiss. Womply respectfully requests oral argument at the Court's convenience.

Dated: March 21, 2022

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 21st day of March 2022, by using the electronic case filing system of the United States District Court for the District of Texas:

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