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

CAPITAL PLUS' REPLY IN FURTHER SUPPORT OF THE MOTION TO DISMISS

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Womply acted as an agent by preparing and submitting applications on behalf of applicants and by preparing and processing applications on behalf of Blueacorn. As a result, Womply cannot hold Capital Plus responsible for its fees, especially since Womply failed to submit its compensation agreements to the SBA. To the extent the Court addresses the Fee Cap issue, the Technology Fee represents compensation for providing assistance preparing applications, including referrals, and thus the Cap applies. Womply also failed to plead multiple cognizable common-law claims.

ARGUMENT

1. Capital Plus's Motion to Dismiss Properly Raises Federal Legal Questions.

Womply's Opposition (ECF 61, "Opp.") claims the Motion to Dismiss should be denied because Capital Plus cannot raise the illegality of the Womply-Blueacorn contracts. First, Capital Plus's immunity argument does not turn on the legal status of Womply's contracts but rather the absence of a contract with Capital Plus. Second, Womply raised the legality of its contracts by filing a declaratory judgment action against Capital Plus. Am. Compl. ¶ 120. Third, Womply's suggestion that illegality is only relevant to Capital Plus' affirmative defense, *see* Opp. at 7, is belied by Womply's prior position on jurisdiction.[1] As Womply conceded and as the Court also found, Womply must show its contracts are valid under federal law to recover on its tortious interference and fraudulent inducement claims. Pl. Response at 3 (ECF 17); Mar. 1, 2022 Order at 3 (ECF 48); *see also* Restatement (Second) of Torts § 774 (no tortious interference with illegal contract). In seeking dismissal of Womply's claims, Capital Plus may dispute elements of those claims. *Puente v. Ridge*, 324 F. App'x 423, 428 (5th Cir. 2009).

Womply cannot invoke the public policy exception to illegality. Where two parties are *in pari delicto*, Texas law may permit an equitable recovery for an illegal benefit if the Court determines the public interest in deterring a windfall outweighs the public interest in enforcing the relevant law. *Orthodontic*

[1] The one case cited by Womply—*In re Vallecito Gas*, 771 F.3d 929 (5th Cir. 2014)—involved a title dispute where a third-party intermeddler attempted to void a sales contract between two other parties. Here, Womply seeks to impose liability on Capital Plus **based** on the contracts.

Ctrs. of Texas. v. Wetzel, 410 F. App'x 795, 800 (5th Cir. 2011). Because Womply does not allege that Capital Plus was a party to the illegal agreement, Capital Plus is not *in pari delicto* with Womply; the public policy exception cannot be invoked by a guilty party against an innocent. *Am. Nat. Ins. Co. v. Tabor*, 230 S.W. 397, 400 (Tex. 1921); *Geis v. Colina Del Rio, LP*, 362 S.W.3d 100, 109–10 (Tex. Civ. App.—San Antonio 2011, pet. denied). Moreover, Womply cannot point to a qualifying public interest to overcome illegality. Womply asserts (without authority) the public interest is not served because the Fee Cap was designed to protect borrowers. Opp. at 4. This defies logic because the cap limits the amount agents may collect from a lender, not a borrower. *See* 86 Fed. Reg. 3692, 3709 (Jan. 14, 2021).[2]

2. Womply Acted as an Agent.

Womply acted as an Agent for applicants because it acted as their representative in "preparing" or "submitting" applications on behalf of applicants. 13 C.F.R. § 103.1(b)(1). Womply does not dispute that it acted as an authorized representative of applicants, but Womply disputes that it "conduct[ed] business with the SBA" by preparing or submitting applications. Opp. at 10.

Womply prepared applications on behalf of applicants. Womply admits it made tens of thousands of referrals, which constitutes "preparing" an application as that term is used by the SBA. The language of the Fee Cap proves this. The Fee Cap applies to the act of providing assistance in "**preparing** an application for a PPP loan (**including referral** to the lender)." 86 Fed. Reg. at 3709; 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020). If referrals are included in "preparing," then an entity that engages in referrals is preparing applications. Womply also prepared applications by making the applications ready for submission to a lender for approval. Womply was not a passive technology provider. Womply worked collaboratively with the applicants to complete their applications. For example,

[2] "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** . . . ." (emphases added).

Womply agreed to "provide the Borrower with feedback about whether they provided the correct forms." Referral Agreement Ex. A. Womply concedes it "verified" information in the application but asserts "verifying" does not constitute preparing. Opp. at 11. Womply provides neither authority nor rationale for this assertion. The plain meaning of "preparing" means "to make ready." *See Preparing*, Merriam Webster, https://www.merriam-webster.com/dictionary/prepare (last visited Mar. 28, 2022). Verifying information in the applications makes the applications ready for submission and approval. Therefore, verification is part of preparing.

Womply also "submitt[ed]" applications on behalf of applicants. Womply stresses that it did not submit applications directly to the SBA. Opp. at 11. But this argument is irrelevant because applications seeking agent fees must be submitted to the lender.[3] Similarly, Section 103(b)(1) also is not limited to submission **to the SBA**. The provision covers the act of "submitting . . . an application for financial assistance" without any limitation. *Id.* Submission of an application to a lender (acting under delegated authority of the SBA) or an intermediary like an LSP (performing lender functions in the lender's stead) suffices. Womply submitted tens of thousands of applications to Blueacorn on the understanding that the applications would "all" be "pass[ed]" to Capital Plus. Am. Compl. ¶ 58(i).

In addition, Womply acted as Blueacorn's agent by "preparing or processing" applications on behalf of Blueacorn, a "participant." 13 C.F.R. § 103.1 (b)(2) ("on behalf of a lender **or** a **participant**" (emphasis added)). The boilerplate disclaimer of authority in the Womply contracts does not dispose of the issue; otherwise, an agent could avoid regulatory scrutiny merely by including such a disclaimer, whether true or not. The Womply contracts make clear that Blueacorn endowed Womply with authority to prepare or process applications on its behalf. *E.g.*, Referral Agreement § 1.2 ("Womply

[3] "This form is to be . . . **submitted to your SBA Participating Lender**." Form 2483 at 5 (emphasis original), https://www.sba.gov/sites/default/files/2021-03/BorrowerApplication2483ARPrevisions%20%28final%203-18-21%29-508.pdf (last visited Mar. 28, 2022).

acknowledges and agrees that Blueacorn will not conduct an independent review . . . prior to submission to a third party lender."). Even though Exhibit A uses the phrase "**application** review **process**," *id.* (emphasis added), Womply claims that task does not constitute **processing applications** because it did not involve underwriting. Opp. at 12. While the term "preparing or processing" **could** include "underwriting," that does not mean the former is limited to the latter. If the SBA intended the definition to be limited to "underwriting," the SBA would have used that word. In any event, Womply's services involved underwriting. *See infra* § 3. Finally, even if Blueacorn did some additional processing after Womply, that would not erase the fact that Womply processed too.

3. The Technology Services Provider Interpretation Does Not Save Womply.

Womply cannot escape the "Agent" designation by claiming to be a mere "technology services provider that does not include underwriting." Under the plain language of the regulatory definition, Womply is an agent. There is no need to consult any interpretation. Moreover, given the regulatory language, the alleged fact that Womply also provided non-underwriting technology as part of its services could not change this result. Any interpretative pronouncement that purported to do so would be invalid. Womply does not seem to dispute this.

Instead, Womply reargues that it did not "conduct business with the SBA" because it merely "facilitated" the preparation, submission, or processing of applications. Opp. at 15. To begin with, there is no basis in the regulatory definition of "conduct business with the SBA" to suggest that "facilitating" the preparation, submission, or processing of an application differs from the act itself.[4] In any event, Womply was not a mere "facilitator." Womply did not simply provide technology that Blueacorn used. Womply conducted the application review process itself, using both technology and

[4] The SBA knows how to make this distinction; for example, the Fee Cap applies to the act of providing "**assistance** preparing" an application. The SBA could have said that an entity which "assists" or "facilitates" preparing an application is not an agent; instead, the SBA placed a cap on what fees an assisting or facilitating agent could receive.

humans, **before** sending applications to Blueacorn. Referral Agreement Ex. A (the "Application Review Process" will be conducted "**prior** to Womply sending an application to Blueacorn."). Womply also engaged in referrals and even retained the right to veto certain loans. *Id.* Womply's conduct is not remotely analogous to Google licensing a software program that others used to submit an application. Putting aside the fact that Google would not be acting as anyone's "authorized representative," Google sells general-purpose software—as opposed to technology tailored to SBA loan processing, like Womply's—and lack of any active involvement in the application process would not constitute preparing, submitting or processing an application for SBA assistance. In this instance, Google would be providing technology services that did not include underwriting and thus covered by the SBA's interpretative pronouncement.

In contrast, even if Womply merely provided technology services (it provided much more, *e.g.,* Referral Agreement Ex. A ("Womply manually reviews selfies & IDs prior to funding" & "manual review" of bank information)), the actual technology provided by Womply included underwriting as that term is used for PPP loans. As demonstrated in the Opening Brief, Womply's Service performed every step in the underwriting process—*e.g.*, verifying identity; reviewing tax returns; evaluating transactions reported in bank accounts. *See* Capital Plus Br. at 6–12 (ECF 43). Moreover, unlike a general-purpose program (like Google), Womply's technology service was designed to perform these underwriting functions.

Womply argues that merely confirming identity information does not constitute underwriting. Opp. at 13. First, identity verification was just the first step in Womply's multi-step review process. Second, identity verification is part of underwriting. Womply is arguing that a service which includes only one aspect of underwriting "does not include underwriting" because it does not include every aspect of underwriting. This simply does not correspond with the language used by the SBA, nor does it make sense because it would be too easy to evade "agent" status by omitting some small

feature.[5]

4. Capital Plus Cannot Be Held "Responsible" for Womply's Fees.

Womply cannot hold Capital Plus "responsible" for its fees. The statute says a lender "shall **only** be **responsible** for paying fees to an agent" for services for which the lender "**directly contracts**." 15 U.S.C. § 636(a)(36)(P)(iii) (emphasis added). Contrary to Womply's claim, the statute is not limited to contract liability or obligations. Womply's argument defies logic since the very premise is to provide protection in the absence of a contract. Regardless of the nature of claim (tort, equity, etc.), Womply seeks to hold Capital Plus "responsible" for "fees for services" because that is the measure of damage sought. Whether Capital Plus may be liable to Blueacorn—assuming the parties have a contract that covers Womply services (which Womply does not allege)--is irrelevant to whether Womply can hold Capital Plus responsible for paying fees to Womply. Womply's assertion that the immunity only applies where the services were provided to a borrower, not a lender, is not supported by the statutory language or caselaw.[6] Congress could have said a lender "shall only be responsible for fees for services **performed for the borrower**," but it did not. Finally, Womply fails to explain how the alleged oral contract—under which Capital Plus allegedly agreed to provide "visibility" into a joint account—constitutes Capital Plus directly contracting "for services" from Womply.

[5] The mere fact that an entity provides a service including one aspect of underwriting does NOT mean such an entity is an agent or an LSP. Contrary to Womply's claim, Persona or LexisNexis would not be deemed an LSP. The SOP provision cited by Womply requires that an entity meet the "agent" definition first. SOP at 185 ("The following are examples of when SBA considers an Agent to meet the definition of an LSP."). First, there is no basis to suggest these entities act as authorized representatives. Second, these providers would argue that providing a general business identification program (without more) constitutes a "technology service that does not include underwriting" because it was not designed or tailored for making SBA loans, in contrast to Womply's "Service."

[6] Contrary to Womply's claim, *Daniel TA Cotts PLLC v. American Bank*, 2021 WL 2196636, at *4 (S.D. Tex. Feb. 9, 2021), did not address the immunity provided by 15 U.S.C. §636(a)(36)(P)(iii), presumably because the provision did not exist when the class action at issue was filed.

5. Womply's Failure to Submit the Compensation Agreements Precludes Recovery.

An Agent, who is not an LSP, is required to submit its compensation agreement to the SBA, not the lender. 13 C.F.R. § 103.5(a) ("Agent . . . must execute and provide to SBA a compensation agreement. . . ."). This regulatory obligation applies regardless of who is paying. Form 159, which is used when lender is paying, does not change the Agent's submission obligation merely because it requires **signature** by the lender and the agent (Womply deceptively omits the latter from its quotation from the form). *See* Form 159. (No inference can be drawn from Capital Plus's failure to sign—or submit--a Form 159 given that Womply never alleges it provided the agreements or disclosed their terms to Capital Plus.) Multiple courts have held that an agent who fails to submit a compensation agreement cannot recover for fees from a lender under various theories of recovery.[7] In turn, these courts have dismissed various common-law claims based in part on the failure to follow the SBA regulations. *E.g., Cotts*, 2021 WL 2196636, at *6 ("[T]he Court will not exercise its equitable powers when Plaintiff's own failure to follow procedural requirements disentitled Plaintiff to the agent fees it now seeks."). Here, the Womply's contracts are "subject to all . . . SBA Regulations," *e.g.*, Referral Agreement §9, including the requirement requiring submission to the SBA. Because Womply failed to comply with the SBA regulations, it cannot show a right to payment under its contracts. Womply, in turn, cannot recover against Capital Plus since either the damages theories depend on a right to payment under the contracts and/or the causation theories would fail if Womply's conduct was the cause of non-payment. Womply cites zero authority for its assertion that the *exclusive* remedy for a violation of SBA regulation is administrative suspension, which is contrary to the above cited cases.[8]

[7] *E.g., Radix Law PLC v. JP Morgan Chase Bank NA*, 508 F. Supp. 3d 515, 519 (D. Ariz. 2020) ("But Form 159 was not completed. Lacking that, Plaintiff is not entitled to payment of its agent fees by Defendant."); *Lopez v. Bank of America*, 505 F. Supp. 3d 961, 972 (N.D. Cal. 2020) ("But Lopez does not allege that he completed and submitted Form 159 or otherwise reached a written agreement with BANA for the payment of a fee. Thus, he is not entitled to a fee.").

[8] In a footnote, Womply claims the submission requirement does not apply where the lender knew of the agent's involvement. But courts have enforced the requirement even where the lender

6. The Fee Cap Applies to the Technology Fee.

To the extent the Court is inclined to address the Declaratory Judgment claim (which technically does not seek to recover fees from Capital Plus), the Technology Fee is subject to the Fee Cap because it represents compensation for "assistance preparing" applications "including referral." The Technology Fee represents compensation for the "Service" licensed under the Order Form. Womply does not dispute the services in Exhibit A to the Referral Agreement, which is incorporated into the Order Form, are part of the "Service." *Id.*; *see also* Capital Plus Br. at 22–23. As noted above, the "application review process" constitutes "assistance preparing" applications, s*upra* § 2, and it obviously included referrals. In response, Womply merely observes that "if all Womply did was refer" loans, Blueacorn and Capital Plus would have had to hire someone else to do the work. *Id.* at 17. This insight simply shows that if Womply did not perform these functions, someone else would have had to do it. It begs the question whether these functions constitute "assistance preparing" applications.

Womply claims that the Technology Fee compensates for services in addition to "assistance preparing applications . . . including referral"—namely access to a Technology Platform that could perform many functions. This is belied by the terms of the license here. Womply may offer such a product, but that's not what it licensed to Blueacorn. *See* Order Form § 1.2 (Blueacorn can use the "Service and Output only in compliance with (1) the rights granted hereunder."). Blueacorn was granted the right to use the Service in a Blueacorn-owned application (*e.g.*, a website) that Blueacorn could make available to potential loan applicants, "consumers or businesses." *Id.* § 1.1(i). Assuming

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undisputedly knew about the agent. *E.g., Radix Law v. Silicon Valley Bank*, 507 F. Supp. 3d 1141, 1144 (D. Ariz. 2020) ("The application was signed by one of Plaintiff's representatives, who identified himself [as] the borrower's 'Agent/Representative.'"); *Sport & Wheat v. ServisFirst Bank*, 479 F. Supp. 3d 1247, 1254 n.13 (N.D. Fl. 2020). Womply cites two opinions that mention in dicta enforcing the requirement for PPP loans prevents agents from claiming fees from a lender after the loans have been funded. *Juan Antonio Sanchez, PC v. Bank of S. Tex.*, 494 F. Supp. 3d 421, 438 (S.D. Tex. 2020); *Cotts*, 2021 WL 2196636 at *5. Even if that were a dispositive factor in determining whether the requirement applies to PPP loans (it was not), Womply's situation is hardly distinguishable, as Womply does not allege Capital Plus knew anything about the material terms of its compensation agreements.

Blueacorn had incorporated the Service into its own application,[9] the information input by applicants ("End User Information") and information output by the Service (the "Output") could be used "**solely** . . . for the purpose of processing **Referrals**." *Id.* § 1.1(ii) (emphasis added). While the first clause grants Blueacorn the right to use the service in an application, the second expressly limits any use of the Service in the application or otherwise "solely for referrals." If both the information input into the application using the Service and the output of the Service itself can be used solely for referrals, Womply does not explain how Blueacorn could use the Service for some purpose other than referrals. In short, even the technology license was limited to the activity subject to the Fee Cap.

Even if the Technology Fee were compensation for something other than assistance preparing applications including referrals (which it was not), the Fee Cap would limit Womply's fees because there is no way to disaggregate the Technology Fee into a portion that represents compensation for preparing applications including referrals and other services. As a result, the Technology Fee represents the "total" amount Womply seeks for services subject to the cap. Whether an entity could sign separate contracts for truly distinct capped and non-capped services is not before this Court.

Womply claims the Fee Cap applies only to compensation for assistance provided to borrowers, not lenders. First, this distinction makes no sense; assisting in preparing applications and referrals helps both borrower and lender. Second, nothing in the regulatory text supports this distinction. The cap applies to fees for providing "assistance in preparing an application for a PPP loan" without reference to whom the assistance was provided. Womply points to the fact that the initial version of the cap appeared under a hearing that used the phrase "who assists a borrower." This phrase, however, does not appear in the provision dealing with the cap, and conspicuously the SBA drop it from the

[9] Conspicuously, Womply does not allege that Blueacorn ever provided an application to end-users. But what was the point of licensing the "technology" if Blueacorn didn't use it? The answer is that the technology license was a fiction designed to justify circumventing the fee cap on referrals.

heading of the more recent version of the regulation. 86 Fed. Reg. at 3709. Third, Womply claims the SBA's role is to protect borrowers (not lenders) from predatory practices. But the cap only protects lenders; borrowers are liable for all fees to an agent they "knowingly retain." *Id.* Fourth, Womply notes that the regulatory language in the sentences preceding the cap changed after the December 2020 statutory change. Regardless, the cap language did not change.

Finally, the SBA knew how to use the word "directly" if it intended to limit the cap only to fees paid directly from a lender. Capital Plus Br. at 24. Womply ignores this point. The Court need not resolve this interpretative issue because here, Womply alleges the fees were to be paid directly from Capital Plus's joint bank account. The fact that Blueacorn, not Capital Plus, "owe[s]" Womply, Opp. at 21, is irrelevant; what matters is whether Womply seeks to "collect" the fees from Capital Plus.

7. The Court Should Dismiss Womply's State-Law Claims

Womply's misrepresentation claim depends on a promise to deposit fees into a joint account in the future—any other representation would have been irrelevant to Womply. *See* Am. Compl. ¶¶ 146–47. Moreover, "out-of-pocket damages" do **not** include profits for which Womply seeks recovery. *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors*, 960 S.W.2d 41, 49–50 (Tex. 1998). In addition to the same damage flaw, Womply's promissory estoppel claim fails to explain when Capital Plus made the "in excess of 1%" promise or how such an indefinite promise could state a cognizable claim. Capital Plus Br. at 30–31.[10] Nor does Womply explain how the May 11 call (the only in one which it alleges Capital Plus participated) could form an oral contract when Womply does not allege the May 11 call addressed services Womply would provide or any compensation Womply might receive.

CONCLUSION

For the reasons stated above, the Court should dismiss Womply's claims.

[10] *N. Presidio, LLC v. Lowe's Home Ctrs., LLC*, 4:19-CV-222-A, 2019 WL 3414264, *6 (N.D. Tex. July 29, 2019) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2022, a true and correct copy of the foregoing document was filed with the Court and served on all counsel of records via the Electronic Case Filing (ECF) system in the United States District Court for the Northern District of Texas.

/s/ Harry P. Susman