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Order No. 7 (Order Re Benworth's Motion to Stay) - 27 Sept 2023 (/web/20260901173357/https://jusmundi.com/en/document/decision/en-oto-analytics-d-b-a-womply-v-benworth-capital-partners-llc-order-no-7-order-re-benworths-motion-to-stay-wednesday-27th-september-2023#decision_66365)

Interim Award - 21 Dec 2023 (/web/20260901173357/https://jusmundi.com/en/document/decision/en-oto-analytics-d-b-a-womply-v-benworth-capital-partners-llc-interim-award-thursday-21st-december-2023#decision_66356)

Order No. 8 (Order Re Benworth's Motion for Reconsideration and Further Proceedings) - 20 Feb 2024 (/web/20260901173357/https://jusmundi.com/en/document/decision/en-oto-analytics-d-b-a-womply-v-benworth-capital-partners-llc-order-no-8-



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"Agreements"), which incorporated Womply's Master Development Agreement. Those Agreements superseded the earlier agreements.

[6].The Agreements provided for the following payment of fees to Womply in exchange for Benworth's receipt of Womply's services: (1) a 1% Referral Fee¹ for applicant information collection and referral services; (2) an Application Programming Interface ("API") Fee; and (3) a tier-based Technology Fee² for access to Womply's Technology Services³ and a lender-specific portal called the Teslar Portal. The Technology Fee was calculated as a percentage of the Lender Processing Fee that Benworth received for funding each PPP loan.



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[12].In its Response, Benworth also submitted various counterclaims against Womply, including claims for (1) Declaratory Relief;⁴ (2) Breach of Contract;⁵ (3) Severance and Enforcement;⁶ and (4) Money Had and Money Received.⁷ In addition to damages and declaratory relief, Benworth seeks pre- and post-judgment interest as well as attorneys' fees, costs, and expenses associated with these arbitral proceedings. Womply denied all material allegations of those counterclaims on October 15, 2021, and it raised various affirmative defenses.

[13].On January 19, 2022, the Arbitrator signed and issued the parties' Joint Stipulated Protective Order. The Arbitrator also ruled on various discovery motions as part of the pre-Hearing proceedings. In addition to ruling



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III. SUMMARY OF RELEVANT LAWS, REGULATIONS, AND RULES

[18].The Agreements at issue in this matter specifically provide that California law and the SBA regulations apply herein, and in case of conflict, the SBA regulations shall control. The relevant SBA regulations that provide the regulatory framework for this case are summarized below.

A. Overall Structure of Regulations



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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

(*Id.* (emphasis added).)

[23].The SBA also explained that the 1% Agent Fee Cap for "assistance in preparing an application for a PPP loan (including referral to the lender)" was "reasonable based upon the application requirements and the fees that lenders receive for making PPP loans." (*Id.*)

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to the lender. (See JX019 at 176-81, 195-96.) Thus, in summary, for PPP Year Two, the only Agent fees that are limited by the laws, regulations, and rules applicable to the PPP are the fees any Agent (including an LSP) collects (either from a lender or borrower) for providing a borrower with "assistance in preparing an application for a PPP loan (including referral to the lender)." (JX022 at 3, 7, 9-10.) This 1% Agent Fee Cap does not apply to any other fees an Agent collects for providing any other services—either to a borrower or a lender. (See *Oto Analytics, Inc. v. Capital Plus Fin., LLC*, 2022 WL 1488441, at *9-10 (N.D. Tex. May 11, 2022) ("The 1% Agent Fee Cap] limits the fee for 'preparing an application for a PPP loan,' but not for any other reason."). The fees an LSP or other Agent collects for providing a lender with LSP or other Agent services (including underwriting), or the fees a technology service provider collects for providing a lender with technology services, are not capped by any law, regulation, or rule.



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IV. SUMMARY OF FACTS¹⁰

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D. The Parties' Relationship and Their Contracts

[36] In February 2021, during PPP Year Two, Benworth and Womply were introduced by a mutual business connection. The two companies decided to enter into a business relationship. On February 25, 2021, Womply and Benworth entered into the Agent Agreement and Womply Developer Order Form (*i.e.*, the February Agreements). (JX035 (2/25/21 Email from B. Navarro to C. Capoccia).) Pursuant to these agreements, Womply was to refer PPP loan application packages that had been prepared using Womply's technology platform to Benworth and provide an array of technology services. (*Id.*)



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[50]. Womply's Borrower Portal also permitted applicants to provide information and upload documentation that was not necessarily required for a PPP loan application but that lenders considered in underwriting loans. For example, the Borrower Portal required borrowers to upload a photo of a government issued ID and certain tax filings. (Tr., Scammell 334:21-335:24.) Applicants were also required to take and upload a "selfie" photo and could connect their bank account to PPP Fast Lane. (Tr., Scammell, 400:3-401:13; JX 370 at JX370.11, 16-17.; Tr. 368:16369:22, 371:5-20; JX 338 at 36-44.)

[51]. Womply did not determine an applicant's eligibility for a loan, and it communicated this directly to applicants. (Tr., Scammell, 339:18-340:3, 341:21-342:20; JX123 at JX123.9 § 1.2, JX 123.14 § 1.1; JX338 ("Womply makes no



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representations regarding your eligibility or ineligibility for a PPP loan"). Applicants continued to have access to the Borrower Portal after submitting their documentation and information, which allowed them to, among other things, monitor the status of their applications and securely provide additional information to lenders. Womply did not charge applicants any fees



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information and the results of Womply's various technology services that verified and analyzed information for them. Through the Teslar Portal, lenders like Benworth could (among other things) efficiently review applicant information, generate loan documents, submit information to the SBA for approval, and initiate payment of loan proceeds. The Teslar Portal also organized all the files associated with a lender like Benworth's PPP loan portfolio.

[55].As Scammell testified at the Hearing:

Teslar by itself is just a shell. There's no data in Teslar. There's no documents in Teslar. There's no information that comes into Teslar. What Womply's technology services did ... we collected analyzed, and synthesized all of the information that was necessary so that when the loan officer logged into Teslar, they would be able to search by borrower name, pull up a record, and all of the information was there at their fingertips so they could decide [to]



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referral," that "Womply does not endorse any referral," and that Benworth "assumes sole responsibility regarding whether or not any referral is or should be sent to the SBA for review." (JX123 at JX123.9 § 1.2, JX123.14 §1.1 (emphasis omitted).) Womply also reminded Benworth that "[l]enders are responsible for doing a good faith review of the info provided by Borrowers" and that "Womply is not responsible for ... Lender failures to conduct their own good faith review." (JX085 at JX085.2.) The good faith review is the crucial underwriting step of reviewing all critical information to determine that the loan met the SBA requirements. Womply separately advised Benworth that it did "not recommend that [Benworth] have Tesla autosubmit all of [its] pending SBA Submission queue without any good faith reviews being conducted by Benworth," and that it was "very important that Benworth continue to conduct good faith review of the applications in [its] queue." (JX146 at (JX146 at JX146.1.) [REDACTED] : Womply referred approximately 365,000 PPP loans through PPP Fast Lane to Benworth,



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additional \$4,348,275 in Referral Fees. Benworth paid Womply \$59,157,250 in API fees; thus, Womply contends that it is entitled to an additional \$17,067,000 in API fees. Benworth paid Womply \$369,952,999 in Technology Fees; thus, Womply contends that it is entitled to an additional \$130,258,107 in Technology Fees. Womply also contends that it is entitled to interest and costs of collection, pursuant to section 2.4 of the Referral Agreement and section 2 of the Master Developer Agreement.

2. Benworth

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C. BREACH OF CONTRACT ELEMENTS

[69]. Under California law, to prevail on a claim for Breach of Contract, a plaintiff must prove the following: (1) the existence of a contract between the parties; (2) the plaintiffs performance or excuse for nonperformance; (3) the defendant's failure to perform (breach); and (4) resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Benworth is challenging the first, third, and fourth elements of Womply's Breach of Contract claims.



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1. Are the fees set forth in the Order Form as Technology Fee subject to the 1% Agent Fee Cap and therefore illegal, or were the parties entitled to contract for a different formula for deciding those fees?

[75]. Under the Referral Agreement, Benworth agreed to pay Womply Referral Fees subject to the 1% Agent Fee Cap for the referral of loan applications. Under the separate Order Form, Benworth also agreed to pay Womply API fees and Technology Fees not subject to the 1% cap for Womply's API Package, which included access to the Tesla



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Portal and various technology services that provided Benworth with applicant information that Womply collected and some extent verified.

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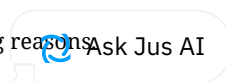
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Benworth denies having received any benefit, or it at least argues that it received only a minimal benefit, from Womply's Technology Services, and it maintains that Womply must prove which of its Technology Services, if any, assisted Benworth outside of preparation and referral of PPP applications. Specifically, setting forth an elaborate and unsubstantiated formula, Benworth argues that Womply would, at a minimum, need to establish that more than 66% of its Technology Fees were incurred for matters unrelated to preparing or referring PPP loan applications.

[81]. Benworth's position fails for the following reasons: Ask Jus AI





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services were distinct from and had nothing to do with assisting a potential borrower in completing an application.

[86].The Teslar Portal also allowed Benworth to access applicant information and the results of Womply's various technology applications and services. For example, through the Teslar Portal, Benworth could review applicant information, generate loan documents, submit information to the SBA for approval, and initiate payment of loan proceeds, *inter alia*. The Teslar Portal also organized all the files associated with a lender's PPP loan portfolio. (See, e.g., Tr., Capoccia, 568:14-571:13; 572:3-20; 573:12-574:11; JX363 at JX363.1; Tr., de la Cruz, 1489:3-1491:24, 1503:20-1504:1, 1599:7-23, 1503:20-1504:1; Tr., Scammel, 348:1-356:11, 490:22-491:19; 466:13-467:18; [REDACTED] And if



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throughout their relationship, Benworth had been calculating and paying Womply's fees based on the three distinct formulae in the parties' Agreements. Benworth therefore understood the Technology Fees, and the formula for calculating them, to be distinct from the fees and formulae for the Referral and API fees. Specifically, Benworth did not view the Technology Fees to be subject to the SBA's 1% Agent Fee Cap, at least not until the parties' relationship began to deteriorate and litigation was imminent. And even if Benworth had some undisclosed understanding of the Technology Fees earlier in the parties' relationship (although no evidence was introduced demonstrating as much), California recognizes the objective theory of contracts, under which "it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." A party's undisclosed intent or understanding is irrelevant to contract interpretation. (*Id.* at 956.)



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[95]. Benworth also contends that Womply provided technology services to Benworth that included underwriting and therefore it was an LSP. Benworth relies on the SBA SOP, which provides a non-exhaustive list of LSPs that includes: "iv. Entities providing technology services to a 7(a) Lender that include underwriting." When underwriting a PPP loan, the SBA only requires a lender to (1) review the borrower's "Paycheck Protection Application Form" and confirm receipt of the certifications contained therein, (2) "[c]onfirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020," (3) review the borrower's payroll documentation and confirm the borrower's average monthly payroll costs for the preceding year, and (4) follow applicable Bank Secrecy Act requirements. While it is true that Womply's technology to some extent electronically performed some of these



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[100].Even if Benworth had proven that Womply was an LSP, which it has not, its contention that the Agreements are therefore invalid and void because Womply did not submit them to the SBA is rejected, for the following reasons.

[101].First, Benworth has not cited any rule or regulation that states that, if an Agent fails to provide the SBA with a compensation agreement pursuant to section 103.5(a), that agreement then becomes invalid or void. Under California rules of statutory interpretation, which apply equally to regulations, the Arbitrator is "not [empowered to] insert language that is otherwise not present." The Arbitrator's "job is [merely] to interpret and apply statutes



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3. Since the 1% Agent Fee Cap does not apply to Womply's Technology Services, is Womply entitled to 70% or 80% of Benworth's lender fees based on the tierbased formula outlined in the Order form?

[106] The question remains whether Womply was entitled to 70% or 80% of Benworth's lender fees for its Technology Services based on the tier-based formula outlined in the Order Form. (See JX123 at JX123.14, §2.) The parties generally both agree that the tiers apply retroactively such that when Benworth reaches a new tier, the maximum percentage that is then applicable applies not only to loans in that tier but also to loans funded prior to



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Womply using the 80% rate, the fact is that Benworth paid all invoices after that at a rate of 70% for the Technology Fees without any objection from Womply.

[111]. Womply has asserted that Benworth's reading, and Keyes' initial interpretation should not prevail because the Order Form does not include a mechanism to "refund" fees once the highest tier is reached. (See, e.g., Tr., 856:18-22.) But as Benworth explained, there was no express mechanism in the Order Form that Womply drafted for retroactively charging higher percentages for Technology Fees associated with previously funded loans once Benworth hit higher tiers under the chart either. (Id. at 937:15-22.) And yet, that is precisely what Womply did.



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G. Damages

[124].Based on the totality of the record in this matter and the application of the plain language of the parties' Agreement, which includes the SBA's PPP rules and regulations explicitly incorporated therein, Womply has proven all the elements of its three Breach of Contract claims, and with the exception of Counterclaim I (iv), Benworth has failed to prove any of its counterclaims or affirmative defenses. Womply is therefore entitled to the following damages:

- \$4,348,275 in Referral Fees;



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and to submit a proposed procedure and schedule for resolving those issues.

[128]. On December 28, 2023, Benworth filed a Motion for Reconsideration, seeking reconsideration of most of the findings and awards set forth in the Interim Award. Womply filed a Response to Benworth's Motion for Reconsideration on January 2, 2024 and Benworth filed a Reply on January 8, 2024. On January 18, 2024, a Hearing was held by Zoom at which Benworth's Motion for Reconsideration was addressed and the procedure and schedule for resolving the remaining issues of finance charges, attorneys' fees and costs were discussed.

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[129].



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Benworth paid to Womply.¹⁷

B. Benworth's Counterclaim I

[135].The Interim Award denied all of Benworth's Counterclaims. As part of its Motion for Reconsideration, Benworth sought reconsideration of Counterclaim I (iv), which seeks a declaration concerning the delivery of



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agreements.

[139]. Relying on *Southwest Concrete Products v. Gosh Construction Corporation* (1990) 51 Cal.3d 701, Womply argues that its proposed 18% per annum interest rate is allowed because the court in *Southwest* stated that "a provision in a commercial sales contract which calls for interest of 18 percent per year on late payments" does not violate California "usury law." According to Womply, the California Supreme Court in *Southwest* rejected the argument that Benworth is making here that the contractual finance charges are capped at 10% per annum under the California Constitution and section 3289 of the California Civil Code.



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calculations of finance charges at the rate of 10% simple interest, which is the rate Benworth asserted was legally required.

[146].On the first day of the Hearing, April 8, 2024, Womply was ordered to provide Benworth with Mr. Keyes's spreadsheets containing his mathematical calculations. Womply provided the spreadsheets within an hour of the order. On April 11, 2024, Benworth used the recently-produced spreadsheets to extensively cross examine Mr. Keyes, with special emphasis on his treatment of Womply overcharges. After the Hearing, on April 17, 2024, Benworth filed its Phase II Closing Brief. At that time, it had all of Mr. Keyes's calculations of finance charges, including the supporting spreadsheets. In particular, Benworth had the Keyes calculation based upon 10% simple



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While Womply's interpretation of that language (i.e., application of an interest rate of 1.5% per month rather than 10% per annum) may have been incorrect, the fact is that Womply has given Benworth sufficient notice of its position.

[150]. No on-point or persuasive California legal authority has been cited for the proposition that Womply waived its ability to provide calculations for an alternative position with regard to interest after that alternative position was raised in Benworth's briefs by failing to provide detailed calculations for its initial position. Moreover, as discussed, *supra*, Womply did actually provide sufficiently detailed calculations.

15] Benworth's arguments are therefore rejected. Womply provided sufficient documentation to Benworth regarding its calculation of finance charges using the 10% per annum interest rate so as to provide Benworth with a full and fair opportunity to respond to Womply's request. (See JX382.) Indeed, when Benworth demanded that



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recover \$6,922,010.10 in compensable attorneys' fees and \$543,362.08 in costs. (See Keyes Decl. Exs. A, B, D.)

[154].The standard for awarding fees in California is fairly well settled. The starting point is the lodestar (hours times hourly rate) submitted by the moving party. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084.) The Court (or Arbitrator) must then separately determine whether the number of hours spent was reasonable, and then determine whether the requested hourly rate is reasonable for the community in which the matter was tried. The prevailing party bears the burden of documenting the appropriate hours expended and must submit evidence in support of those hours worked. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 433.) While contemporaneous time sheets are the best evidence of attorneys' hourly work, declarations from



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Mr. Brychel's report merely challenged Willkie Farr's descriptions of its services in its time entries as opposed to challenging the services themselves.

[158].With that in mind, the Arbitrator has thoroughly reviewed Mr. Brychel's report and carefully considered the concerns he has raised regarding the billing entries. He has also taken into account the intensity in which this heavily contested dispute has been litigated, with over a year of document discovery, seven depositions, multiple discovery disputes and conferences, a seven-day evidentiary hearing akin to a full-fledged trial, which was preceded by disputes regarding the testimony of certain witnesses that required briefing and which was followed



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[163]. Asserting that the Arbitrator "is bound by California law," Benworth also challenges Womply's requested costs for online research [(\$88,942.18), document production for KL Discovery (\$20,787.73), couriers (\$1,175.87), and postage (\$51.00) as overhead charges that are typically covered by the firm's hourly rates. Benworth cites two federal court decisions for this proposition. (See Benworth's Response to Womply's Motion for Finance Charges and Collection Costs, p. 15 [discussing and citing *Graff v. City of Tehachapi* (E.D. Cal. Sept. 15, 2016) 2016 WL 4944005, at *5 and *Carr v. Tadin, Inc.* (S.D. Cal. 2014) 51 F. Supp.3d 970, 985-86].) Neither case relies upon any California statutes or decisions. Thus, having cited no on-point California authority for this proposition, Benworth's argument is rejected.



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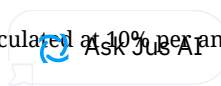
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3. Benworth's Counterclaim (iv) is GRANTED and womply is ordered to promptly transmit to Benworth copies of borrowers' loan files, or in the alternative, to reinstate Benworth's access to Womply's technology platform.

4. With respect to Womply's Claims for breach of contract, Womply is awarded the following damages:

- a. \$4,348,275 in Referral Fees;
- b. \$17,067,000 in API fees;
- c. \$64,884,617 in Technology Fees;

5. Womply is awarded Finance Charges calculated at 10% per annum simple interest which as of May 30, 2024 are \$25,363,697.68.²¹



IT IS SO ORDERED.



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