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Attorneys for Plaintiff Opportunity Financial, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

OPPORTUNITY FINANCIAL, LLC,

Plaintiff,

v.

CLOTHILDE HEWLETT, in her official capacity as Commissioner of the Department of Financial Protection and Innovation for the State of California,

Defendant,

CLOTHILDE HEWLETT, in her official capacity as Commissioner of Financial Protection and Innovation for the State of California,

Cross-Complainant,

v.

OPPORTUNITY FINANCIAL, LLC, and DOES 1-100,

Cross-Defendants.

Case No. 22STCV08163

Assigned for All Purposes to:
Hon. Timothy P. Dillon, Dept. 73

PLAINTIFF OPPORTUNITY FINANCIAL LLC'S NOTICE OF DEMURRER TO DEFENDANT AND CROSS-COMPLAINAINT'S CROSS-COMPLAINT, DEMURRER, AND MEMORANDUM OF POINTS AND AUTHORITIES

[Filed Concurrently with Declaration of Ali M. Abugheida, Request for Judicial Notice, and [Proposed] Order]

Date: July 20, 2022
Time: 8:30 a.m.
Dept: 73

Action Filed: March 7, 2022

Reservation No.: 396421095767

TO THE COURT, THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 20, 2022 at 8:30 a.m. or as soon thereafter as the matter may be heard in Department 73 of the above-entitled court, located at 711 North Hill Street, Los Angeles, California, the Demurrer of Plaintiff and Cross-Defendant Opportunity Financial, LLC ("OppFi") to the Cross-Complaint of Defendant and Cross-Complainant Clothilde Hewlett (the "Commissioner"), served and filed with this Notice, shall be heard.

This Demurrer will be made pursuant to Cal. Code of Civ. Proc. §430.10(e). This Demurrer is based on this Notice of Demurrer and Demurrer, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Ali M. Abugheida, the accompanying request for judicial notice, and all documents on file in this matter.

DATED: May 10, 2022

Respectfully submitted,

BUCKLEY LLP

By: _____

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DEMURRER TO CROSS-COMPLAINT

TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH PARTY:

OppFi demurs generally to the first cause of action of the Class Action Complaint on the following grounds:

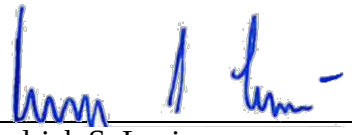
Demurrer To First Cause Of Action

The First Cause of Action for violation of the California Financing Law fails because the Cross-Complaint does not state facts sufficient to constitute a cause of action. Cal. Civ. Proc. Code § 430.10(e).

DATED: May 10, 2022

Respectfully submitted,

BUCKLEY LLP

By: 

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I. INTRODUCTION

Opportunity Financial, LLC ("OppFi") is not a bank, and it is not a lender. It does not extend credit. It does not hold security. It does not own or hold loans. Instead, it provides services to federally insured, state-chartered banks that do not have the size or capacity to operate interstate lending programs without the assistance of third-party service providers. The Commissioner of the Department of Financial Protection and Innovation ("DFPI") admits that loans made by these banks are exempt from the California Financing Law ("CFL"). As such, these banks and the loans they make are outside of the Commissioner's regulatory reach under the CFL.

Not satisfied with that result, the Commissioner has resorted to a convoluted theory in which OppFi is somehow transformed into the "true lender" on loans funded and made by FinWise Bank ("FinWise" or the "Bank"), a Utah state-chartered bank. The goal of this results-oriented theory is to enable the Commissioner to get around the exemption and regulate these Bank loans, but this gambit ultimately fails because the "true lender" theory has no basis in California law. *Beechum v. Navient Sols., Inc.*, No. 15-8239-JGB-KKx, 2016 WL 5340454, at *7 (C.D. Cal. Sept. 20, 2016) (rejecting "true lender" claim against non-bank because "two California appellate decisions hold that the Court must look only to the face of a transaction when assessing whether it falls under a statutory exemption to the usury prohibition and not look to the intent of the parties.") (citing *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1537-38 (2003) and *WRI Opportunity Loans II LLC v. Cooper*, 154 Cal. App. 4th 525, 536 (2007)).

Put simply, the Commissioner's argument that loans made by the Bank and serviced by OppFi ("Program Loans") exceed the CFL's interest rate cap fails because Program Loans are constitutionally and statutorily exempt from that cap. As the Commissioner admits, it was the Bank that extended credit on all Program Loans and it is the Bank that is the lender identified on all of the loan agreements. As a matter of California law, these facts conclusively establish that for purposes of determining the applicability of exemptions to California's intertest rate caps, the Bank is the lender. That means all Program Loans are exempt from the rate cap the Commissioner seeks to enforce. Indeed, a federal district court judge in the Northern District of California recently considered and rejected allegations that the Program Loans violated the CFL because OppFi was the "true lender," holding that the claims failed as a matter of California law. *Sims v. Opportunity Fin., LLC*, No. 20-cv-04730-PJH, 2021 WL 1391565 at *3-5 (N.D. Cal. Apr. 13, 2021). This Court should follow *Sims* and reach the same conclusion.

Moreover, the Commissioner's alternative theories of liability under the CFL all fail because they are derivative of the Commissioner's claim that OppFi is the so-called "true lender" and Program Loans are subject to the CFL's interest rate caps. Because these predicates are wrong, the Commissioner's arguments all fail. In any event, as discussed below, many of these alternative theories are insufficiently pled and fail even if Program Loans were not exempt.

For these reasons, OppFi respectfully requests that the Court sustain this Demurrer to the first cause of action with prejudice.

II. BACKGROUND

A. OppFi's Complaint Against the Commissioner

On March 7, 2022, OppFi filed a Complaint for declaratory relief against the Commissioner seeking (1) a declaration that the interest rate caps in the CFL do not apply to Program Loans and (2) an injunction restraining the Commissioner from enforcing the CFL as to those loans given its inapplicability. As explained in the Complaint, the Commissioner threatened to initiate litigation against OppFi based on its assertion that OppFI was the "true lender" on Program Loans, even though under the Program, the Bank: (i) is the lender on promissory notes for all California borrowers who obtain Program Loans (*id.* ¶ 66), (ii) only uses its own funds to extend credit (*id.* ¶ 43(b)), (iii) remains the title owner of all Program Loans (*id.* ¶ 43(c)), and (iv) retains ongoing risk of loss through its retention of a share in the receivables in Program Loans (*id.* ¶ 46).[1]

B. The Commissioner's Cross-Complaint Against OppFi

The Commissioner's Cross-Complaint against OppFi admits all of these facts, but nonetheless contends that OppFi is the "true lender" on Program Loans and, therefore, the Program Loans are subject to the CFL's interest rate caps. Thus, the Cross-Complaint presents a pure question of California law this Court can resolve at the Demurrer stage.[2]

The Cross-Complaint alleges that the Bank is the named lender on loan documentation for Program Loans (Cross-Compl. ¶ 32 ("consumer loans…are…made in the name of FinWise")), uses its own funds to extend credit to borrowers who obtain Program Loans (*Id.* ¶ 20 (admitting "FinWise funds the loan")), and retains an ongoing percentage interest in a loan's prospective profits and losses by virtue of selling "upwards of 95 percent of a loan's receivables" but retaining the remainder (*id.* ¶ 5). However, the Commissioner asserts that because OppFi "collect[s] nearly all the profits from the loans" by purchasing a majority share in the right to loan payments after origination, it "has the predominant economic interest" and is therefore the "true lender" on Program Loans. *Id.* ¶¶ 5, 18; *id.* ¶¶ 20, 22 (asserting the Bank has "minimal…exposure to risk" because it sells "upwards of 95 percent of all rights to the loan payments" to OppFi "three days after [it] funds the loan.").

This "true lender" theory is the linchpin of the Commissioner's case. The Cross-Complaint states that "[t]here is no question that OppFi, a non-bank lending company, is subject to California's

[1] This Demurrer is based entirely on the failures of the Cross-Complaint, but OppFi provides a summary of its Complaint for context.

[2] As explained in OppFi's Complaint, to the extent that the Commissioner's "true lender" theory is recognized under California law (and it is not), the CFL claim fails because it is preempted by federal law, and the Commissioner's threatened claim for violation of the CCFPL fails because it is wholly derivative of the CFL claim. OppFi does not raise these arguments in this Demurrer, but reserves the right to raise them at a later stage of the case as appropriate.

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interest rate caps while FinWise, a federally insured state-chartered bank, is not." *Id.* ¶ 5. In an effort to get around the clear exemption, and effectively legislate by enforcement, the Commissioner seeks to have the Court recharacterize who the lender is. Specifically, the Commissioner argues that notwithstanding the fact that borrowers enter into promissory notes with the Bank—the entity that uses its own funds to extend credit and remains the title owner of the loans—the Bank is merely a "straw-lender" and this Court should use its equitable powers to deem OppFi the "true lender" on Program Loans because it has the "predominant economic interest in the transaction." *Id.* ¶ 18.

Based on the foregoing allegations, the Commissioner alleges that Program Loans were made in violation of the CFL because the interest rate on Program Loans exceeds the rate allowed under the CFL. *Id.* ¶¶ 38-41.

In addition to the interest rate claim, the Commissioner alleges OppFi violated the CFL in other ways. First, the Commissioner alleges that "[b]y employing its rent-a-bank ruse to evade the CFL," OppFi violated section 22326 of the Financial Code, the so-called "anti-evasion" provision of the CFL. *Id.* ¶ 42. Second, the Commissioner alleges that "by negotiating, in California, for loans to California consumers to be purportedly be made in Utah, in order to evade and avoid the provisions of the CFL," OppFi violated section 22324 of the Financial Code, which prohibits "contract[ing] for or negotiat[ing] in this state a loan to be made outside the state for the purpose of evading or avoiding" California lending law. *Id.* ¶ 44. Third, the Commissioner alleges that Program Loans are unconscionable because the interest rate on the loans is too high. *Id.* ¶ 6, 44. Fourth, the Commissioner alleges that OppFi violated the CFL's prohibition on material misrepresentations by "advertising [Program Loans] on its website with an APR" in excess of the California statutory rate, which the Commissioner claims implied "that OppFi could lawfully make such loans in California." *Id.* ¶ 45. Fifth, the Commissioner alleges that OppFi failed to ensure borrowers had the ability to repay Program Loans, in purported violation of Cal. Code Regs., title 10, section 1452, because "a sizable percentage of its borrowers….default on their" Program Loans. *Id.* ¶ 46.

As explained in detail below, none of these arguments have any merit; the CFL claim fails as a matter of law.

III. ARGUMENT

A. Legal Standard

A demurrer must be sustained if the complaint is legally insufficient or if "the complaint itself…discloses some defense that would bar recovery." *In re Estate of Moss*, 204 Cal. App. 4th 521, 535 (2012) (quotations omitted); *Evans v. City of Berkeley*, 38 Cal. 4th 1, 21-22 (2006). In ruling on a demurrer, a court must assume that the plaintiffs' factual allegations are true, but need not accept "contentions, deductions, or conclusions of fact or law." *Moore v. Regents of Univ. of Cal.*, 51 Cal.3d 120, 125 (1990). To the contrary, "a pleading must allege facts and not conclusions, and…material facts must be alleged directly." *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal.

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App. 3d 531, 537 (1979). In addition, the court may appropriately consider matters that are subject to judicial notice. Cal. Civ. Proc. Code § 430.30.

B. The First Cause of Action for Violation of the CFL Fails

1. The CFL's Interest Rate Caps Do Not Apply to Program Loans

The Commissioner's claim that Program Loans are made in violation of the CFL's interest rate caps fails as a matter of law because Program Loans are constitutionally and statutorily exempt from California's usury laws.

(a) Program Loans Are Constitutionally and Statutorily Exempt From The CFL's Interest Rate Caps

California's usury laws regulate the charging of interest in the state. *Wishnev v. The Nw. Mut. Life Ins. Co.*, 8 Cal.5th 199, 206 (2019). Section 1 of Article XV of the California Constitution prohibits the charging of interest on a loan at a rate in excess of 10 percent. Cal. Const. art. XV, § 1. It also enumerates several classes of lenders exempt from that prohibition and makes clear that none of its interest-rate restrictions apply "to any successor in interest to any" loan made by an exempted lender. *Id.* Loans originated by state-chartered banks, such as FinWise, are exempt from the California Constitution's usury rate. *Boerner v. Colwell Co.*, 21 Cal.3d 37, 44 n.6 (1978) (explaining the Constitution "exempt[s] from its [usury] restrictions certain types of institutional lenders, including…state chartered banks"); Cal. Fin. Code § 1675 ("Any foreign (other state) state bank is exempted from the restrictions of Section 1 of Article XV of the California Constitution relating to rates of interest upon the loan or forbearance of any money . . . .").

In addition to identifying categories of exempt lenders, the California Constitution authorizes the California Legislature to create *additional* classes of lenders exempt from the maximum rate and to set alternative maximum interest rates applicable to the exempted lenders. Cal. Const. art. XV, § 1; *Wishnev*, 8 Cal.5th at 210 (explaining that in 1979, the constitution was amended to "allow the Legislature to designate **additional classes** of exempt lenders.") (emphasis added). Pursuant to its constitutional authority, the California Legislature enacted the CFL for the express purpose of creating an additional exemption to the California Constitution's interest rate cap for, among others, "finance lenders." Cal. Fin. Code § 22002. A "finance lender" includes "any person who is engaged in the business of making consumer loans or making commercial loans." *Id.* § 22009; *see id.* § 22100(a). Further, as permitted by Article XV, Section 1, the Legislature prescribed maximum interest rates with which CFL licensees must comply and established an extensive regulatory regime applicable to those lenders. *See, e.g., id.* §§ 22303-22304.5 (setting forth maximum interest rates on consumer loans). State banks, however, are explicitly exempted from the CFL's provisions. *Id.* § 22050(a) (the CFL "does not apply to any person doing business under any law of any state or of the United States relating to banks").

Here, under this authority, Program Loans are exempt from the CFL's interest rate limits on two independent levels.

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First, because Program Loans are exempt from the California Constitution's usury prohibition under the express exemptions for loans originated by state-chartered banks, the CFL—which merely creates *additional* exemptions to the Constitutional usury provision for loans not already exempted—does not apply to them as a matter of California Constitutional law. *See Wishnev*, 8 Cal. 5th at 210 (explaining that the constitutional usury provision "allow[s] the Legislature to designate additional classes of exempt lenders."); Cal. Fin. Code § 22002 (explaining the Legislature exercised this authority by enacting the CFL, which "creates a class of exempt persons pursuant to Section 1 of Article XV of the California Constitution."). In other words, because the CFL's enacting language at Financial Code section 22002 confirms that it **only creates an additional class of lenders** exempt from the Constitution's 10% interest rate cap, **it cannot apply to entities that were already exempted by the California Constitution to begin with**, such as the Bank (as a state-chartered bank) or OppLoans (as a successor-in-interest). Thus, none of the interest rate limits in the CFL apply to Program Loans. They are constitutionally exempt from the CFL's interest rate cap.

Put differently, California's constitutional interest provision creates two classes of lenders: (1) exempt lenders, who can lend at any rate; and (2) non-exempt lenders, who can only charge up to 10% interest. The CFL, by creating an exemption for "finance lenders," lifts the interest rate cap for non-exempt lenders from 10% to as much as 36%, so long as they comply with the applicable regulatory regime. By definition, this increase of the cap from 10% to 36% only impacts the non-exempt lenders actually subject to the 10% cap; it has no effect on entities (such as the Bank or OppFi) who were never subject to that cap by virtue of the constitutional exemption.

Second, even if the CFL applies, Program Loans would be exempt because the CFL itself expressly exempts state-chartered banks from all of its requirements, including the interest rate limits. *Id.* § 22050(a) (the CFL "does not apply to any person doing business under any law of any state or of the United States relating to banks"). Nor does it matter that OppFi was not the originating entity: California courts recognize that refusing to extend exemptions to the usury laws to successors-in-interest "would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance." *Strike v. Trans-W. Disc. Corp.*, 92 Cal. App. 3d 735, 745 (1979) ("[A] contract, not usurious in its inception, does not become usurious by subsequent events."); *Montgomery v. GCFS, Inc.*, 237 Cal. App. 4th 724, 732 (2015) (explaining that "[u]sury restrictions do not restrict the assignment of loans" and therefore the sale or assignment of a loan made by lender exempted under the CFL to a non-exempt lender would not alter the terms of the loan). Thus, even if the CFL applies, Program Loans are statutorily exempt.

Moreover, any attempt to evade this conclusion by asserting OppFi is the "true lender" on Program Loans has no basis in California law. The phrase appears nowhere in the CFL or any other California statute or regulation. Indeed, in passing AB 539, the law that the set interest rate cap at-issue for loans between $2,500 and $10,000, the California Senate Committee on Banking and

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Financial Institutions prepared an analysis of the implications of the law that recognized that AB 539's interest rate caps would not apply to nondepositories, like OppFi, that work with state-chartered banks like FinWise:

> …Lenders who are **legally** able to offer installment loans to Californians without having to be licensed under the CFL include state- and federally-chartered banks **and credit unions, nondepositories that partner with banks (the so-called bank partnership model, in which the nondepository markets and underwrites the loan, but a bank technically originates the loan)**, and tribal lenders…

RJN, Ex. A, at 6 (emphasis added). In this way, California is unlike other states such as Maine that have codified a predominate economic interest test for identifying the lender on a loan. *See, e.g.*, Me. Rev. Stat. tit. 9-A, § 2-702. California has no such law. Instead, the Commissioner's Cross-Complaint asks this Court to draft such a law and apply it to OppFi. This request is not only unsupported by the legislative history of any law passed in California, as discussed below, it is also contrary to well-settled California principles and, as such, fails as a matter of law.

As discussed below, California courts "may 'look only to the face of a transaction when assessing whether it falls under a statutory exemption from the usury prohibition and [may] not look to the intent of the parties.'" *Sims*, 2021 WL 1391565, at *4 (quoting *Beechum v. Navient Sols., Inc.*, No. 15-8239-JGB-KKx, 2016 WL 5340454, at *7 (C.D. Cal. Sept. 20, 2016). "[T]his rule of construction derives from two California Court of Appeal decisions, *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal. App. 4th 525, 536 (2007) and *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th at 1538 (2003)." *Sims*, 2021 WL 1391565, at *4.

In *Beechum v. Navient Sols., Inc.*, a Central District of California court surveyed California appellate case law and rejected the "true lender" approach to identifying the lender. The plaintiffs in *Beechum* asserted usury claims and argued that the non-bank service-provider defendants were the "true lenders" of the plaintiffs' loans in that case because they entered into a forward purchase agreement with the bank to purchase its loans within 90 days, and originated, underwrote, marketed, determined the terms of, and bore the risk of loss as to the loans. *Beechum,* 2016 WL 5340454, at *1-2. The plaintiffs argued that the court should "look[] to substance over form to assess whether a loan, that on its face appears non-usurious, is in fact usurious," as well as the lender's intent, in order to determine whether their loans were exempted from California's interest-rate limitations. *Id.* at *6. The court rejected this proposition, concluding that California decisions considered these factors only "when assessing whether a transaction satisfies the elements of usury or falls under a common law exemption to the usury prohibition—*not* when assessing whether the transaction or a party to the transaction fall under a constitutional or statutory exemption from the usury prohibition." *Id.* Since the plaintiffs alleged that their loans were issued by a bank, the court concluded that the loans were exempted from the usury prohibition and dismissed all their claims. *Id*. at *6 n.7, 8; *see also*

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Jones, 112 Cal. App. 4th at 1535, 1537-39 (the plaintiff's allegation that the defendants intended to violate the usury law by creating a "sham" loan did not exclude loan from statutory exemption because the defendants' intent was irrelevant given that the loan "fit within a legally authorized exception to the general usury law," which "remove[s] the need for evasion"); *WRI*, 154 Cal. App. 4th at 536 ("when a loan meets the requirements for a statutory exemption to the usury law, courts will not look beyond those requirements to determine whether the underlying transaction exposes the lender's profits to significant risk or betrays an intent to evade the usury law").

Just last year, Judge Hamilton confirmed in *Sims* that the application of these well-settled principles to Program Loans leads to the conclusion that FinWise is the lender on Program Loans, and that Program Loans are exempt from the interest rate caps in the California Financial Code. In *Sims*, the plaintiff alleged that his FinWise Program Loan was usurious because OppFi, and not FinWise, was the true "finance lender" on his loan because OppFi acquired an interest in the loan shortly after origination. RJN, Ex. B, ¶¶ 21, 24. Specifically, he alleged that OppFi and FinWise "conspired" to "evade" California's interest rate caps by allowing OppFi to "rent" FinWise's state charter to make loans at rates permissible for FinWise, but not OppFi. *Id.* ¶¶ 21-22, 64-68. Based on these allegations, the plaintiff asserted that his loan was subject to the interest rate caps in the CFL and violated them. *See e.g. Id.* ¶¶ 69, 102. OppFi moved to dismiss, arguing that the loans were statutorily exempt from the CFL. RJN, Ex. C, at 27-30.

After considering the parties' arguments, the *Sims* court rejected the plaintiff's argument, holding that under *Beechum, Jones*, and *WRI*, the loan itself is statutorily exempt from the CFL's interest rate caps because FinWise—a state-chartered bank—is the lender, and loans made by state banks are exempt from California's interest rate caps. *Sims*, 2021 WL 1391565 at *4. The court likewise rejected the argument about the defendants' supposed intent to evade California's usury laws as "irrelevant" under *Jones*, and also rejected the plaintiff's argument that OppFi was subject to the CFL because it is a "finance lender," explaining that "whether OppFi generally qualifies as a finance lender is irrelevant" because "[t]he particular transaction that forms the basis for the alleged violations here is exempt." *Id.*

Sims and *Beechum* are dispositive here. They faithfully apply well-settled California appellate decisions to the "true lender" theories undergirding the Commissioner's Cross-Complaint, and find that the theories are invalid under California law. Because the Bank funds the loans and is the lender on all of the promissory notes for Program Loans, the loans are exempt from California's interest rate caps.[3]

[3] Nor is there any merit to the Commissioner's conclusory allegation that marketing and servicing of loans are "the functions of a traditional lender." Cross-Compl. ¶¶ 5, 19. These functions are regularly handled by loan servicers or otherwise outsourced. Likewise, the claim that OppFi performs the underwriting is conclusory and deceptive because, as explained in the Complaint, OppFi operates and applies an underwriting model approved by the Bank. Compl. ¶ 43(a). In any event, none of this provides any basis under California law to recharacterize the lender.

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(b) The Commissioner's "True Lender" Cases Are Inapposite

In the Cross-Complaint, the Commissioner simply presumes the "true lender doctrine" applies in California, stating:

> Under the true lender doctrine, the question is whether the entity named as the 'lender' in the loan documents is in fact the true lender or if another entity—here, OppFi—should be viewed as the de facto lender. The substance of the transaction controls, not the form, and courts consider the totality of the circumstances. The primary factor is which entity --bank or non-bank-- has the predominant economic interest in the transaction.

Cross-Complaint, ¶ 18. The fundamental problem with this articulation of the "true lender doctrine" is it is wholly unmoored from California law—the Commissioner cites to no California statute or state court case to support using such a test. Instead, the Commissioner cites to three federal cases in a footnote (*see* Cross-Compl. ¶ 18, n.5), none of which are relevant here.

To start, two of the three cited cases have no connection to California at all. *People ex rel. Spitzer v. Cty. Bank of Rehoboth Beach, Del.*, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007) is a New York law case, and *D.C. v. Elevate Credit, Inc.*, No. CV 20-1809 (EGS), 2021 WL 2982143 (D.D.C. July 15, 2021) applied federal law to the question of whether a District of Columbia usury action could be removed to federal court on the basis of complete preemption. These cases have no bearing whatsoever on OppFi's California law argument. They are irrelevant.

Ubaldi was issued by a court located in California but is plainly distinguishable on several levels. For starters, the issue before the Court in *Ubaldi* was not whether courts may engage in a so-called "true lender" analysis for purposes of determining the applicability of exemptions under the California Constitution or CFL. Instead, the court considered whether section 85 of the National Bank Act "expressly preempts claims against a loan servicer that is alleged to have actually 'made' the loan." *Ubaldi v. SLM Corporation*, 852 F. Supp. 2d 1190, 1203. Because "neither party offer[ed] persuasive authority" as to that federal preemption question, the court permitted the plaintiff to explore her theory in discovery. *Id.* But critically, the *Ubaldi* court reached no conclusion as to whether a true lender theory is viable as a matter of California state law and did not consider the uniform California authority providing that courts should not look beyond the face of the loan documents when considering the applicability of a statutory exception to California's usury laws.

Importantly, four years after *Ubaldi* was decided, a different court (*Beechum*) looked at the very same underlying bank partnership at issue in *Ubaldi*, but actually considered California law on the issue. In *Beechum*, as here, the plaintiff asserted that the nonbank was the "true lender" because it allegedly "controlled all aspects of marketing [the] loans" and bore the risk of loss in the event of default. *Beechum*, 2016 WL 5340454 at *2. The court rejected that argument and correctly held the lender named on the loan agreement was the lender under California appellate cases "hold[ing] that the Court must look only to the face of a transaction when assessing whether it falls under a

statutory exemption from the usury prohibition and not look to the intent of the parties." *Id.* at *7 (collecting cases). In reaching this conclusion, the court properly distinguished *Ubaldi* as "irrelevant" given that it did not involve usury claims. *Id.* at *20-21, n.8. After *Beechum* (and *Sims*), *Ubaldi* has zero persuasive value with respect to California law.[4]

(c) *Jones* and *WRI* Foreclose the Commissioner's "True Lender" Theory

In contrast to *Ubaldi*, the California appellate authorities upon which *Beechum* and *Sims* relied to reject the "true lender" theory are directly on point and dispositive here.

In *Jones v. Wells Fargo Bank*, the lender defended against usury claims on the grounds that the loans in question were exempt from the interest rate cap under the exemption for "shared appreciation loans."[5] 112 Cal. App. 4th at 1534. Resisting that conclusion, the plaintiff argued that the exemption did not apply because the loans were actually "sham" loans since Wells Fargo's "profits were never at risk" in the transactions. *Id.* at 1538. The Court of Appeal rejected this argument, holding that "[t]he question of whether the loaned money or interest were at risk" is only relevant to a party's "intent to evade the usury law," *id.* which does "not apply to loans or forbearances covered by modern statutory exemptions that remove the need for evasion" by providing clear, bright line rules as to when loans are exempt and when they are not. *Id.* at 1539. As the Court of Appeal explained, "cases where the intent to evade usury law is an issue typically involve situations where the lender claims a transaction is not a loan at all." *Id.* at 1539 (collecting cases). However, where "both sides agree the transactions include a loan" and "the note…fit[s] within a legally authorized exception to the general usury law," the "[d]efendants' intent is irrelevant." *Id.* at 1538. Because the note, on its face, demonstrated that it was a shared appreciation loan, the exemption applied and the usury claim failed. *Id.* at 1539.

Similarly, in *WRI Opportunity Loans II, LLC v. Cooper* ("*WRI*"), borrowers asserted their loans were usurious, and the lender claimed the loan fell within the statutory exemption from the usury prohibition for shared appreciation loans. 154 Cal. App. 4th at 530-31. Addressing the applicability of the exemption, the California Court of Appeal re-affirmed the *Jones* decision, holding that "when a loan meets the requirements for a statutory exemption to the usury law, courts will not look beyond those requirements to determine whether the underlying transaction exposes the lender's profits to significant risk or betrays an intent to evade the usury law." *Id.* at 536.

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[4] Moreover, *Ubaldi* is distinguishable for another reason: "the plaintiff in *Ubaldi* disputed that the bank even funded his loan." *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1369-70 (D. Utah 2014) (distinguishing *Ubaldi* as inapplicable where the named lender funded the loan). That is not the case here—as the Commissioner admits, FinWise makes the loans with its own funds and sells a percentage interest in their performance to OppFi after origination.

[5] The bank in *Jones* also raised another exemption as a defense, but the discussion of that exemption is not relevant to this case.

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As Judge Bernal (in *Beechum*) and Judge Hamilton (in *Sims*) properly held, these controlling cases foreclose the Commissioner's "true lender" theory. Here, as in *Jones*, the Commissioner alleges that the exemption to the interest rate cap for state banks does not apply because the loans are a part of a "rent-a-bank ruse" in which the named lender on the loans does not have sufficient economic interest in the loan's performance. *See* Cross-Compl. ¶¶ 20-22. That is almost identical to the argument considered and rejected in *Jones*. *Jones,* 112 Cal. App.4th at 1538 (arguing loans were "sham" transactions because "the lender's profits were never at risk," and therefore exemption did not apply). Moreover, just as was the case in *Jones*, "both sides [in this case] agree the transactions include a loan," the loan agreements for Program Loans clearly "provide for . . . interest above" the rate cap, and the agreements on their face "fit within a legally authorized exception to" the rate cap. *Id.* at 1538.

Therefore, OppFi's purported "intent [to evade the interest rate cap] is irrelevant"— the exemption applies and the interest rate claims fail. *WRI,* 154 Cal. App. 4th at 536 ("[W]hen a loan meets the requirements for a statutory exemption to the usury law, courts will not look beyond those requirements to determine whether the underlying transaction exposes the lender's profits to significant risk or betrays an intent to evade the usury law."); *Beechum,* 2016 WL 5340454, at *7 (explaining that *Jones* and *WRI* "hold that the Court must look only to the face of a transaction when assessing whether it falls under a statutory exemption from the usury prohibition and not look to the intent of the parties."); *Sims*, 2021 WL 1391565, at *4 (same).[6]

2. The Commissioner's Derivative CFL Theories All Fail

Within the first cause of action for violation of the CFL, the Commissioner alleges that the same conduct by OppFi with regard to Program Loans also violated a number of other CFL provisions. As explained below, these claims are derivative of the interest rate claims, and fall with them. But even if the claims were not derivative, they would fail anyway.

(a) The Commissioner's Implicit Marketing Misrepresentation Theory Fails

The Commissioner's first derivative claim is for allegedly deceptive marketing in violation of Financial Code section 22161, which provides that "[n]o person shall make a materially false or misleading statement or representation to a borrower about the terms or conditions of that borrower's loan, when making or brokering the loan." The Cross-Complaint does not allege a single false statement. Instead, it asserts that simply by offering Program Loans on its website, OppFi implicitly represented that the loans were lawful in California. Cross-Compl. ¶ 45. According to the Commissioner, this was a material misrepresentation because the loans were actually made in

[6] Nor does it matter that *Jones* and *WRI* involved constitutional usury claims. As explained above, the constitutional usury cap and CFL are part of the same integrated California usury framework, and the same principles apply. *Sims,* 2021 WL 1391565, at *4 (applying *Jones, WRI,* and *Beechum* to CFL claims).

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violation of the CFL's interest rate caps. *Id.* This theory has no merit and fails for several reasons.

First, as explained above, the CFL's interest rate caps do not apply to Program Loans. Because this misrepresentation theory depends entirely on the conclusion that they *do apply*, it is entirely derivative of the interest rate claim and fails for the same reasons that claim fails: Program Loans are exempt from the CFL's interest rate caps.

Second, this claim fails because the Commissioner has failed to identify any "materially false or misleading statement." Instead, its claim depends on OppLoans' *accurate* advertising of the interest rate to potential customers. Cross-Compl. ¶ 45. Nor is there any merit to the Commissioner's suggestion that merely by offering the loans, OppFi "was implying that [it] was advertising that it could lawfully make such loans in California." *Id.* Indeed, "courts have rejected the notion that an entity implicitly represents that its conduct is lawful when engaging in the ordinary course of business." *Wash. Cty. Bd. of Educ. v. Mallinckrodt ARD, Inc.*, 431 F. Supp. 3d 698, 715 (D. Md. 2020). In any event, each borrower's promissory note makes it clear that FinWise, a state bank, is the entity making the loan, and the Commissioner admits the rate caps do not apply to loans made by FinWise. Cross-Compl. ¶ 5 (Conceding FinWise "is not…subject to California's interest rate caps"); *See* Cross-Compl. ¶ 32 (admitting FinWise is the named lender on the loan agreements).

(b) The Commissioner's "Evasion" Theories Fail

The Commissioner also alleges two separate (but closely related) evasion theories. First, the Commissioner alleges that by entering into the Program, OppFi engaged in a "rent-a-bank ruse to evade the CFL" in violation of Financial Code section 22326, which provides that the CFL's interest rate cap "applies to any person, who by any device, subterfuge, or pretense charges, contracts for, or receives greater interest, consideration, or charges than is authorized by this division for any loan, use, or forbearance of money, goods, or things in action or for any loan, use, or sale of credit." Second, the Commissioner alleges that "by negotiating, in California, for loans to California consumers to purportedly be made in Utah, in order to evade and avoid the provisions of the CFL, OppFi violated section 22324 of the Financial Code, which prohibits "contract[ing] for or negotiat[ing] in this state for a loan to be made outside of the state for the purpose of evading or avoiding" California lending law. These claims are meritless.

The Commissioner's theory of evasion is circular and fundamentally flawed. It essentially creates a "heads I win, tails you lose" scenario: either a party is subject to the California interest rate caps or, if they have structured their business to qualify for the exemption, they have violated the anti-evasion provision. This makes no sense. The entire function of a statutory exemption is to protect or exclude a class of persons from compliance with the law. It is not unlawful to take advantage of them. *See Consumer Fin. Protec. Bureau v. CashCall, Inc.*, No. CV15-07522-JFWRAOX, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018) (rejecting argument that Defendants created a loan program "to avoid state licensing and usury laws" because "businesses are generally free to structure their affairs as they see fit" and "companies frequently structure business operations

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and transactions to minimize exposure to unfavorable laws and regulations") (citing *Ratzlaf v. United States*, 510 U.S. 135, 145 (1994) ("Courts have noted 'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation.'") (citations omitted).

Here, for the reasons discussed above, the Program is structured in a manner to lawfully qualify for the constitutional and statutory exemptions to interest rate caps in California. If such conduct constitutes actionable "evasion," that would render the constitutional and statutory exemptions null and void. Such an interpretation is forbidden by "well-established principles of statutory construction [that] preclude judicial construction that renders part of the statute meaningless or inoperative." *Nativi v. Deutsche Bank Nat'l Tr. Co.*, 223 Cal. App. 4th 261, 284 (2014) (quotations omitted).

Moreover, the Commissioner has not alleged any violation of sections 22326 or 22324. As to 22326, even if one indulges the false premise that OppFi is the entity charging interest, there is no basis to conclude it is charging more than it would be allowed to charge if it "were not a licensee hereunder." To the contrary, as a successor in interest to a bank loan, there is no cap on the interest rate it may charge under the California constitution. *Supra* § III.B.1. As to section 22324, that section is inapplicable because Program Loans are exempt by virtue of the fact that they were made by a bank, not because they were made in another state. All bank loans are exempt from the CFL. *Supra* at § III.B.1.a.

(c) The Commissioner's Unconscionability Theory Fails

The Commissioner also alleges that Program Loans are unconscionable because they have "unconscionably high interest rates." Cross-Compl. ¶ 6, 44 ("OppFi has made…consumer loans to California borrowers that are unconscionable, in violation of California law"). Based on this allegation alone, the Commissioner alleges that OppFi violated section 22302 of the Financial Code, which provides that "[a] loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be in violation of" the CFL and subject to CFL remedies." This unconscionability claim fails for several reasons.

First, the Commissioner's unconscionability claim is brought under section 22302(b) of the Financial Code, which provides that "a loan found to be unconscionable…shall be deemed to be in violation of **this division** and subject to the remedies of **this division**." Cal. Fin. Code § 22302(b) (emphasis added). "This division" is the CFL, and for the reasons explained above, Program Loans are exempt from the CFL because they are made by a state-chartered bank. *Id.* § 22050(a) ("This division does not apply to any person doing business under any law of any state or of the United States relating to banks . . . "). That exemption dooms this claim because exempt loans cannot be "in violation of" or "subject to the remedies of" a division from which they are exempt.

Second, the Commissioner's unconscionability claim fails because the Commissioner has wholly failed to plead facts establishing procedural unconscionability, which is a necessary element

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of any unconscionability claim. "As a matter of general contract law, California courts require both procedural and substantive unconscionability" to find a contract unconscionable. *Torrecillas v. Fitness Internat., LLC*, 52 Cal. App. 5th 485, 492 (2000). "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power," while "substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *The McCaffrey Grp., Inc. v. Superior Court*, 224 Cal. App. 4th 1330, 1348 (2014) (quotations omitted). The Cross-Complaint does not allege any procedural unconscionability; indeed, it is silent on "contract negotiation and formation." *Id.* The only unconscionability alleged in the Cross-Complaint is the interest rate charged, which could only go to substantive unconscionability because the allegation is that the price term is unfair or one-sided, and not that borrowers were somehow surprised by it. For this reason alone, the unconscionability claim fails. *See Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) ("Because [the plaintiff] fails to satisfy even the procedural unconscionability prong . . . we need not reach his arguments that the agreement is substantively unconscionable."); *Crippen v. Central Valley RV Outlet*, 124 Cal. App. 4th 1159, 1167 (2004) ("[W]e need not address whether there was a showing of substantive unconscionability" because the record disclosed no procedural unconscionability).

Third, the Commissioner's unconscionability claim fails because the only substantive unconscionability alleged in the Cross-Complaint is the interest rate, and that is insufficient to state a cause of action for unconscionability under California law. "Unconscionability is a flexible doctrine," but "at least one thing about the doctrine is clear: it requires more than just looking at one particular term in a contract, comparing it to a fixed benchmark, and declaring the term unconscionable." *De La Torre*, 5 Cal. 5th at 982. As the California Supreme Court explained in *De La Torre*, "[i]n assessing the presence of substantive unconscionability, a court may also need to consider context," as "[w]hen a price term is alleged to be substantively unconscionable, we have explained that it is not sufficient for a court to consider only whether 'the price exceeds cost or fair value.'" *Id.* at 983 (quoting *Perdue v. Crocker National Bank*, 38 Cal.3d 913, 926 (1985)). "The court must also look to the basis and justification for the price." *De La Torre*, 5 Cal 5th at 983. Focusing on interest rate claims, the California Supreme Court explained that "[i]f, for example, the interest rate is high because the borrowers of the loan are credit-impaired or default-prone, then this is a justification that tends to push away from a finding of substantive unconscionability." *Id.*

The Cross-Complaint is bereft of any of this required context. Indeed, it pleads *no facts* about any particular borrower; wholly fails to allege any facts about whether the cost exceeded the value to these borrowers; and ignores the fact that these are unsecured loans to high-risk borrowers without any security, "a justification that tends to push away from a finding of substantive unconscionability." *Id.* As *De La Torre* makes clear, "[a]n evaluation of unconscionability is highly dependent on context," and the Cross-Complaint fails to plead any of the facts that would allow the

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court to "look not only at the complained-of term but also at the process by which the contractual parties arrived at the agreement and the larger context surrounding the contract, including its "commercial setting, purpose, and effect." *Id.* at 976 (quotations omitted). It therefore fails to state a cause of action for unconscionability.

(d) The Commissioner's Ability to Repay Theory Fails

The Commissioner also alleges that OppFi violated section 1452 of title 10 of the California Code of Regulations, which provides that "[w]hen making or negotiating loans, a finance company shall take into consideration, in determining the size and duration thereof, the financial ability of the borrowers to repay the same, to the end that the borrowers should be reasonably to repay said loans in the time and manner provided in the loan contracts." According to the Commissioner, because OppFi has stated that approximately 37% of individuals who take out Program Loans from FinWise have defaulted, this must mean that OppFi failed to conduct a required ability to repay analysis. *See* Cross-Compl. ¶ 46-48. The flaws in this theory are readily apparent.

First, this claim fails because it only applies to a "finance company" that is "making or negotiating loans." The term "finance company" is defined as "a finance lender or broker subject to the California Financing Law." Cal. Code Regs., title 10, § 1404(d). For the reasons explained at length above, OppFi does not make or negotiate the Program Loans—FinWise does. And since the loans are exempt, OppFi is not acting as a finance lender subject to the CFL in connection with Program Loans. Because this regulation only applies to loans subject to the CFL, the exempt status of the Program Loans forecloses this claim.

Second, even if the Court considered the claim, it is insufficiently pled and conclusory. The regulation at issue merely requires a finance company "to take into consideration, in determining the size and duration" of loans, "the financial ability of the borrowers to repay the same, to the end that the borrowers should be reasonably to repay said loans in the time and manner provided in the loan contracts." Cal. Code Regs., title 10, § 1452. The alleged default rate of 37%, without more, does not establish a violation of this regulation. For one thing, it means that 63% did pay, and DFPI provides no reason why this Court should look to the minority that defaulted and conclude that no ability to repay analysis was conducted. Indeed, the DFPI's theory fails because it is predicated on the unstated assumption that if borrowers default, they must have not been able to pay back the loan from the outset. But that assumption has no basis in law or logic. Borrowers default for any number of reasons, including post-origination events (such as job losses or health issues), and the Commissioner has simply failed to plead any facts sufficient to identify even one borrower for whom there was an inadequate analysis of ability to repay performed at origination. Instead, the Cross-Complaint states in conclusory fashion that "[b]ased on information disclosed during her investigation, **the Commissioner believes** that OppFi fails to ensure that borrowers have the ability to repay the OppFi loans." Cross-Compl. ¶ 46 (emphasis added). This self-serving statement of belief, with nothing behind it, is not sufficient to state a cause of action. *See Gomes v. Countrywide*

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Home Loans, Inc., 192 Cal. App. 4th 1149, 1158-59 (2011) ("[A] pleading made on information and belief is insufficient" if it fails to allege the "information that 'leads [the plaintiff] to believe that the allegations are true.'") (quoting *Doe v. City of Los Angeles*, 42 Cal.4th 531, 551 n.5 (2007).

Further, even if the Commissioner believes the default rate on Program Loans is too high as compared to some unstated ideal rate, the regulation's narrow focus does not allow for such a sweeping theory of liability: by its own terms, the regulation requires finance companies to take ability to repay into account with respect to "the size and duration" of the loans, not the interest rate. The DFPI does not allege anywhere that the size or duration of these loans makes them unaffordable, or that OppFi failed to consider the appropriate factors when it determined the "size or duration" of the loans.

C. The Demurrer Should Be Sustained Without Leave to Amend

Leave to amend should be denied where the facts relevant to the Demurrer "are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists." *Eckler v. Neutrogena Corp.*, 238 Cal. App. 4th 433, 439 (2015). Here, amendment would be futile because no amount of pleading can change the fact that the Bank is the lender on the Program Loans. And the result of that fact is that "under the substantive law, no liability exists" with respect to the first cause of action for violation of the CFL. *Id.* The Demurrer should be sustained without leave to amend.

IV. CONCLUSION

For all the foregoing reasons, the Court should sustain the Demurrer to the Commissioner's first cause of action without leave to amend.

DATED: May 10, 2022

Respectfully submitted,

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By: _____

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OPPORTUNITY FINANCIAL, LLC vs CLOTHILDE HEWLETT

Case Number: 22STCV08163 Case Type: Civil Unlimited Category: Other Complaint (non-tort/non-complex)
Date Filed: 2022-03-07 Location: Stanley Mosk Courthouse - Department 73

Reservation

Case Name: OPPORTUNITY FINANCIAL, LLC vs CLOTHILDE HEWLETT	Case Number: 22STCV08163
Type: Demurrer - without Motion to Strike	Status: RESERVED
Filing Party: Clothilde Hewlett (Cross-Complainant)	Location: Stanley Mosk Courthouse - Department 73
Date/Time: 07/20/2022 8:30 AM	Number of Motions: 1
Reservation ID: 396421095767	Confirmation Code: CR-ZWK6Z58XRRKACPDZO

Fees

Description	Fee	Qty	Amount
Demurrer - without Motion to Strike	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			**$61.65**

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