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State of California – Department of Financial Protection and Innovation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DIVISION

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. And Related Cross-Action	Case No. 22STCV08163 CROSS-COMPLAINANT'S OPPOSITION TO CROSS-DEFENDANT'S DEMURRER TO THE CROSS-COMPLAINT Assigned to: Hon. Timothy P. Dillon [Filed Concurrently with Opposition to Request for Judicial Notice] Date: July 20, 2022 Time: 8:30 a.m. Dept: 73 Reservation No.: 396421095767 Action Filed: March 7, 2022

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I. INTRODUCTION

Opportunity Financial's (OppFi) demurrer fails because it fundamentally misstates California law, which has always required courts to look at substance over form in evaluating usury claims to protect California borrowers. The Commissioner of Financial Protection and Innovation's (Commissioner) cross-complaint (Cross-Complaint) seeks to reveal that OppFi, and not FinWise, is the "true lender" whose rent-a-bank ruse is violating the California Financing Law (CFL) (Cal. Fin. Code § 22000 *et seq*.). Demurrer is improper because the Cross-Complaint states facts sufficient to invoke California's true lender doctrine and allege a cause of action for violation of the CFL.

The Commissioner alleges that OppFi is violating the CFL by making consumer loans (called OppLoans) at rates far exceeding California's interest rate caps for nonexempt lenders. OppFi claims that its OppLoans are exempt from California rate caps because it hires a Utah bank, FinWise, to stamp its name on the OppLoans notes. OppFi's demurrer is based on the misplaced assertion that this Court must accept the form of OppFi's loans on their face and, thus, is precluded from examining the substance of OppFi's evasive business model.

Since at least the 1920s, California courts have looked to substance over form when determining whether a transaction is usurious. The real beneficiary of a loan is the "true lender" when it prearranges for an exempt lender to "make" a loan and immediately sell the loan receivables back to a nonexempt entity in order to circumvent state usury laws. In such cases, the court should "examine the substance of the transaction, consider the assignee as the **true lender**, and not permit the assignee to hide behind the assignor's exemption." 11 Harry D. Miller & Marvin B. Starr, California Real Estate § 37:39 (4th ed. 2015) (emphasis added).

OppFi's demurrer to the First Cause of Action for violation of the CFL asks the Court to ignore this substance-over-form tenet of California law. OppFi invokes unpublished federal cases with flawed reasoning that contradict binding California authority and are deeply antithetical to California's approach to protecting consumers from usury. California law does not tolerate attempts to avoid usury safeguards by funneling loans through an exempt lender in straw transactions arranged by a nonexempt lender. Here, FinWise is a straw lender merely lending its name on paperwork to disguise usurious loans that OppFi could not itself issue. The Commissioner is not

asking the Court to "recharacterize who the lender is" (Demurrer, 3:3) but, rather, acknowledge that it is improper to sustain demurrer where the Cross-Complaint's allegations require factual inquiry under the true lender doctrine.

II. LEGAL STANDARD

To survive a demurrer, the complaint "need only allege facts sufficient to state a cause of action…." *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 872 (2012); *see also* Cal. Code Civ. Proc., § 430.10, subd. (e). Moreover, questions of fact or issues requiring factual inquiry cannot be decided on demurrer. *Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal. 4th 148, 172 (2006).

The extensive factual allegations of the Cross-Complaint are more than sufficient to state a cause of action under the CFL that OppFi is illegally evading California usury protections.

III. SUMMARY OF FACTS ALLEGED IN THE CROSS-COMPLAINT

The Cross-Complaint alleges the structure of the usurious OppLoans scheme and OppFi's true status as lender in great detail. Below is a summary of key facts, which are accepted as true on demurrer. *See Del E. Webb Corp. v. Structural Materials Co.,* 123 Cal. App. 3d 593, 604 (1981) .

Under the CFL, consumer loans under $2,500 are limited to, at most, an annual percentage rate (APR) of 30 percent (Cal. Fin. Code, §§ 22303-04), and consumer loans between $2,500 and $9,999 are limited to 36 percent plus the Federal Funds Rate (Cal. Fin. Code § 22304.5). (Cross-Complaint, ¶ 14). Notwithstanding these limits, OppFi promotes and makes OppLoans to California consumers with an APR between 59% and 160%, with an average APR of 153%. (*Id*. at ¶¶ 16-17).

OppFi pays FinWise to initially fund the OppLoans as the lender of record in a gambit to exploit FinWise's exemption from California interest rate caps. (*Id*. at ¶¶ 4-5, 14-28). But OppFi is the true lender of OppLoans (*Id*. at ¶¶ 18, 20-28) by virtue of the following facts:

- OppFi, by prearranged obligation to FinWise, purchases between 95 to 98 percent of the receivable for each loan made under its "rent-a-bank" ruse with FinWise, on average within three days, and before any loan payments are made to FinWise;
- OppFi's agreement with FinWise provides that FinWise is only obligated to fund loans if OppFi's purchasing special purpose entities (SPE) maintain specified security (i.e., FinWise is never at risk);

- OppFi pays FinWise a monthly "Bank Program Fee" based on a percentage of the principal amount of loans "made" by FinWise each month, literally providing FinWise rent for its state bank charter based on the volume of loans;
- OppFi paid FinWise's OppLoans startup costs and covers FinWise's expenses in connection with the OppLoans program;
- OppLoans are only available through OppLoans.com, which is controlled by OppFi, and borrowers cannot obtain an OppLoan through FinWise's website;
- OppFi is responsible for all marketing in association with OppLoans;
- OppFi underwrites applicants at OppLoans.com through proprietary software; and,
- OppFi is responsible for all servicing obligations, including collecting interest and principal payments, writing off loans, and transferring loans to a collection agency.

The Cross-Complaint alleges that OppFi, not FinWise, holds the predominant economic interest in OppLoans and bears the risk of poor loan performance. Therefore, OppFi is the true lender, and its loans are illegal in California. (*Id*. at ¶ 19).

IV. ARGUMENT

A. California Law Has Long Recognized a True Lender Evaluation for Usury

OppFi's demurrer fails because it contradicts binding California law. As described in the cases cited below, California courts must engage in a factual inquiry to determine if the proffered lender (FinWise) is merely named as an agent for the loan's intended beneficiary (OppFi) for the purpose of evading usury laws. The required factual inquiries into the true nature of OppFi's loan transactions are unsuitable for resolution by demurrer.

OppFi itself is not an exempt lender under the CFL or the California Constitution. OppFi's ability to legally offer OppLoans in California at interest rates in excess of state rate caps depends entirely on finding that FinWise is the true lender for purposes of an exemption, and not the agent or straw lender for OppFi.

For almost a century, California law has recognized the principle of looking at substance over form in evaluating usury claims and does not permit evasion of usury laws through disguise or subterfuge. *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 432 (1930) (citing *Haines v. Com. Mortg.*

Co., 200 Cal. 609, 616 (1927) (it is always permissible to show that a seemingly lawful transaction actually constitutes a usurious loan and was made with intent to evade usury laws). As the California Supreme Court has stated:

> No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings.

Milana v. Credit Discount Co., 27 Cal. 2d 335, 341 (1945) (nonsuit reversed because of sufficient evidence that transactions were usurious loans, not receivables purchases). California's long and robust history of elevating substance over form to root out usury is addressed further in Section IV.C below.

In applying substance over form, California law looks beyond the proffered lender to find the true lender and whether that true lender is committing usury. An assignee of a loan cannot hide a usurious transaction simply by routing a loan through an intermediary lender to create an aura of legality. *Janisse v. Winston Inv. Co*., 154 Cal. App. 2d 580, 586–87 (1957); *Anderson v. Lee*, 103 Cal. App. 2d 24, 26 (1951). In *Janisse,* the "assignee" of a loan determined whether a loan should be made to plaintiffs and, like OppFi, further determined the monetary amounts for the loan. *Janisse*, 154 Cal. App. 2d at 587. In an act of subterfuge, the name of the assignee in the *Janisse* case was put on the note instead of the true lender because "to sell the note it had to be made to a third party." *Id.* at 585. The *Janisse* court found the assignee to be the true lender, with the named lender serving the role of dummy in an arrangement designed to conceal usury. Similarly, in *Anderson*, the court saw through a misleading paper arrangement where the loan documents identified Mrs. Stout as the lender, finding the loan and its sale were a sham designed to hide a usurious transaction by the real lender. *Anderson*, 103 Cal. App. 2d at 27-28.

In *Glaire v. La Lanne-Paris Health Spa, Inc.*, 12 Cal. 3d 915 (1974), the California Supreme Court found that the trial court erred in sustaining a demurrer that "precluded plaintiff from offering evidence to establish that defendants' practice . . . operated to conceal the imposition of usurious interest charges . . .." *Glaire*, 12 Cal. 3d at 927. In *Glaire,* a health club purported to provide

installment payment contracts to its members for club membership, but by prearrangement immediately sold such contracts to a third party. In finding that plaintiffs established a cause of action for usury, the Supreme Court stated: "[A] finance company cannot shed the duties and responsibilities of a lender by accepting the assignment of contracts from a seller with which it is intimately connected." *Id.* at 924.

So too here, OppFi cannot disclaim its status as a lender when it has prearranged with FinWise to "make" loans at interest rates exceeding the California rate caps that OppFi immediately purchases back almost in their entirety.

A well-respected California treatise encapsulates this aspect of California usury law:

> [An] exemption [for transactions exceeding usury limits] should not pass with the note if the public purpose is not served and the transaction is structured with the intent to evade the Usury Law. For example, if the nonexempt assignee negotiates to make a loan at a usurious rate and thereafter arranges for the loan to be made by an exempt lender with the prior agreement that it will be assigned to the assignee, the exempt lender is merely acting as the agent for the nonexempt lender. **In such cases, the court should examine the substance of the transaction, consider the assignee as the true lender, and not permit the assignee to hide behind the assignor's exemption.**

11 Harry D. Miller & Marvin B. Starr, California Real Estate § 37:39 (4th ed. 2015) (emphasis added).

The Commissioner's Cross-Complaint states facts sufficient to invoke California's true lender doctrine and to constitute a cause of action that OppFi, as the true lender, is making usurious loans in violation of the CFL. This is not a case where FinWise issues loans on its own accord and then later seeks a buyer for its loans. Rather, California consumers use OppFi's website to initiate the OppLoans loan process, as marketed to them by OppFi. Cross-Complaint at ¶¶ 16, 23-25. **By prearrangement,** OppFi solicits California borrowers through its website and then FinWise initially funds the loans before OppFi, by prearrangement, immediately takes over the risks and rewards of the loans ostensibly made by FinWise through the purchase of over 95 percent of the rights to the interest and principal payments in the loans. *Id*. at ¶ 27.

As alleged by the Commissioner, OppFi and FinWise are not engaged in arm's-length loan sales but, rather, have carefully and systematically structured a business relationship designed to

ensure that the lending transaction starts and ends with OppFi; and that FinWise, as an exempt lender, does precisely the one thing OppFi cannot do itself – make loans at over 36 percent interest. These contentions raise triable questions of fact as to whether OppFi runs afoul of California law by using an exempt bank as an agent to circumvent the CFL, rendering this case unsuitable for demurrer.[1]

B. Courts Have Applied the "True Lender" Doctrine to Schemes Like OppFi's

The true lender doctrine has taken on increased urgency as nonexempt financial lenders hire exempt state banks in an effort to export usurious interest rates into California. Other courts, including the Central District and Northern District of California, have seen through these straw lender arrangements and recognized the application of the true lender doctrine in this scenario. In *Ubaldi v. SLM Corp*., 852 F. Supp. 2d 1190 (N.D. Cal. 2012), plaintiff alleged that Sallie Mae, a non-bank entity subject to state laws and the loan servicer, was the true lender of the loans and not Stillwater, a national bank exempt from state laws and the lender of record on the loan documents. The Northern District of California partially denied defendant Sallie's Mae's motion to dismiss because a factual dispute existed as to whether Sallie Mae was the true lender on the loans. Sallie Mae purportedly had an agreement to purchase all loans from the named lender on the loan documents once the loan was funded, was responsible for marketing and servicing of the loans, and bore the economic risks and rewards from the loans. *Ubaldi*, 852 F. Supp. 2d at 1190 (motion to dismiss denied where complaint presented "a factual dispute over the identity of the actual lender").

Several years later, in the matter of *CFPB v. CashCall, Inc.,* 2016 WL 4820635 (C.D. Cal. 2016), the Central District of California also applied a substance over form analysis and granted plaintiff's summary judgment motion on the basis that CashCall was the true lender on loans. CashCall was a non-bank entity subject to state usury laws that claimed to service loans made by Western Sky, a tribal entity exempt from state usury laws and the lender of record on the loan documents. The court concluded that CashCall was the true lender because CashCall bore the monetary risk and benefits of the loans by buying the loans from Western Sky within a short period

[1] The true lender doctrine arises from California common law. OppFi's demurrer is incorrect in pointing to Maine statutes to argue that the true lender doctrine must be codified by statute.

of time (before interest payments were made) and guaranteed minimum payments to Western Sky. *CashCall* at *6 (summary judgment granted in favor of regulator against the "true lender") aff'd, 35 F.4th 734 (9th Cir. 2022).

Additionally, in the District of Columbia, a federal district court in *D.C. v. Elevate Credit, Inc*., 554 F. Supp. 3d 125 (D.D.C. July 15, 2021), remanded a case back to state court on the basis that the District of Columbia's complaint adequately alleged that non-bank entity Elevate was the true lender, not FinWise Bank (the same bank partner hired by OppFi in the instant case), because Elevate provided the website, marketing, analytics, software, underwriting model, and servicing of the loans, and had the predominant economic interest in the loans through Elevate's purchase of 96 percent of loan receivables. *Elevate*, 554 F. Supp. 3d at 137-143.

In Colorado, the federal district court also remanded two cases after applying a substance over form analysis and finding that a non-exempt entity was the true lender, not the exempt entity named on the loan documents. *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1146 (D. Colo. 2018) (remanded back to state court on finding that Avant, the entity subject to state usury laws, was the true lender of the loans because it bears the primary economic interest in the loans and was responsible for servicing, administering, and purchasing the loans from WebBank); *Meade v. Marlette Funding LLC*, 2018 WL 1417706, at *3 (D. Colo. Mar. 21, 2018) (remanded back to state court on finding that Avant, the entity subject to state usuary laws was the true lender of the loans because it provides the website through which customers apply for the loans, develops the criteria for making loans, decides which applicants will receive the loans, and purchases the loans within two days after they are made).

OppFi, just like the defendants in the cases discussed above, is a non-bank entity subject to state usury laws that is alleged to have entered into a rent-a-bank ruse with an exempt entity, FinWise, to evade usury laws. As alleged in the Cross-Complaint, OppFi's arrangement has FinWise initially fund the OppLoans to California consumers while OppFi retains the primary economic interest in the loans, immediately purchasing over 95 percent of the loan receivables. OppFi markets and services the loan and handles all interactions with the borrowers, like the defendants in *CashCall, Ubaldi, Elevate, Avant* and *Marlette.* Like those cases, the Cross-

Complaint adequately alleges that OppFi is the "true lender" and subject to state usury laws. As such, the Cross-Complaint states facts sufficient to constitute a cause of action for violation of the CFL and the demurrer should be overruled.

C. Usurious Transactions Require Factual Inquiry Into Substance Over Form

Undergirding California's recognition of the true lender doctrine is California law's bedrock requirement that courts evaluate substance rather than form to determine whether a transaction is usurious. California courts, "alert to the resourcefulness of some lenders in fashioning transactions designed to evade the usury law," have consistently held that the courts will look into the substance, rather than mere form, of any transaction potentially designed as a cloak to hide usurious interest. *Boerner v. Colwell Co*., 21 Cal. 3d 37, 44 (1978) (financing for construction of homes were credit sales rather than loans); *Ghirardo v. Antonioli*, 8 Cal. 4th 791, 800 (1994), as modified on denial of reh'g (Feb. 2, 1995); *West Pico Furniture Co. v. Pac. Fin. Loans*, 2 Cal. 3d 594, 603 (1970).

California courts will look to the substance of a transaction "despite any disguise it may wear." *Haines v. Com. Mortg. Co*., 200 Cal. 609, 616 (1927), (disapproved on other grounds in *Heald v. Friis-Hansen*, 52 Cal. 2d 834 (1959) (quoting another source)). Evaluation of the substance requires looking beyond both what the parties claim to be and what they allege their transactions to be. *Milana*, 27 Cal. 2d at 341 (courts consider "[a]ll of the negotiations, circumstances and conduct of the parties surrounding and connected with their contracts . . . ."); *Batchelor v. Mandigo,* 95 Cal. App. 2d 816, 820 (1950); *Terry*, 210 Cal. at 432; *Janisse*, 154 Cal. App. 2d at 582.

As particularly relevant here, this mandate to elevate substance over form applies when evaluating whether a transaction is subject to consumer protection laws. *King v. Central Bank,* 18 Cal. 3d 840, 847 (1977) ("In determining the application of consumer protection laws to particular transactions, we have said that '. . . we must look to the substance of the transaction and not allow mere form to dictate the result'" (quoting *Glaire,* 12 Cal. 3d at 925)); *Thompson v. 10,000 RV Sales, Inc.*, 130 Cal. App. 4th 950, 966 (2005) ("[I]n determining whether consumer protection laws such as the ASFA apply to a particular transaction, we look to the substance of the transaction and do not allow mere form to dictate the result"). The CFL is indisputably such a consumer

protection law.[2] And, as addressed further in Section IV.E below, the cases of *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal. App. 4th 525, 533 (2007) and *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1537-38 (2003), relied upon by OppFi, acknowledge that substance controls over form.

The Cross-Complaint more than adequately asserts a legal basis and facts sufficient to constitute a cause of action. A factual inquiry and evaluation of the substance, not mere form, of OppLoans made to California consumers must be conducted to determine whether OppFi, not FinWise, is the lender and whether OppFi is therefore violating the CFL with usurious consumer loans. Accordingly, the claims in the Cross-Complaint cannot be dispensed with on demurrer.

D. <u>OppFi Cannot Avoid Inquiry by Invoking Flawed Unpublished Federal Cases</u>

Tellingly, OppFi's demurrer avoids any discussion of the longstanding binding California authorities cited above and instead is primarily premised on two unreported, non-binding and anomalous cases from federal district courts that failed to properly consider decades of California caselaw. While *Beechum* and *Sims*—cited by OppFi in support of their Demurrer—are readily dismissible as nonbinding unreported federal district court cases, it is important to recognize that their reading of California law is deeply flawed and, if adopted by California courts, would undermine the state's usury laws with seemingly unreviewable "on paper" claims of exemption. The court should disregard the incorrect superficial read of California usury law proffered by these cases.

In *Beechum v. Navient Sols., Inc*., 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016), the district court for the Central District of California dismissed a borrower action against student loan companies, finding that the identified lender's status as an exempt lender was sufficient to establish that the transaction was non-usurious. *Beechum* failed to contemplate that California law recognizes that the true lender may be someone other than the identified lender in the paperwork. In reaching its result, *Beechum* draws the wrong lesson from *Jones* and *WRI*.

[2] Consistent with the caselaw mandate to evaluate substance to protect consumers, the CFL provides that it "shall be liberally construed and applied to promote its underlying purposes and policies, which are . . . [t]o protect borrowers against unfair practices by some lenders, having due regard for the interests of legitimate and scrupulous lenders." Cal. Fin. Code, § 22001.

In *Sims v. Opportunity Fin., LLC*, 2021 WL 1391565 (N.D. Cal. Apr. 13, 2021), the district court for the Northern District of California tagged along with the flawed reasoning of *Beechum*. *Sims* relied on *Beechum*'s erroneous statement that "a court may 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 (quoting *Beechum*, 2016 WL 5340454, at *7). Like *Beechum*, the *Sims* decision purported to rely on *Jones* and *WRI* but did not acknowledge that both *Jones* and *WRI* direct California courts to focus on the substance of a transaction rather than its form and, like *Beechum***,** failed to discuss any California true lender cases.

E. <u>Reliance on *Jones* and *WRI* to Elevate Form Over Substance is Misplaced</u>

OppFi, *Beechum,* and *Sims* (by uncritically adopting *Beechum*) misuse statements from *WRI* and *Jones* to erroneously conclude that a court only needs to look at form to determine whether a loan is exempt from state usury laws. To the contrary, both *Jones* and *WRI* support the need to conduct an inquiry into the substance of a transaction, and the courts in those cases performed that inquiry. Both *Jones* and *WRI* expressly state that potentially usurious transactions must be evaluated for their substance:

> In determining whether a transaction is a loan or forbearance subject to the usury law, or some other sort of transaction that is not subject to that law, a court must look beyond the surface of the transaction to its substance.

Jones, 112 Cal. App. 4th at 1537–38.

> [T]he trier of fact must look to the substance of the transaction rather than to its form.... [I]t is for the trier of the fact to determine whether the intent of the contracting parties was that disclosed by the form adopted, or whether such form was a mere sham and subterfuge to cover up a usurious transaction.

WRI, 154 Cal. App. 4th at 533 (internal quotation marks omitted).

Neither *Jones* nor *WRI* simply accepted the label placed on the transaction by the parties, contrary to the route taken by *Beechum* and *Sims*. In both state court cases, the court performed an inquiry into substance in determining whether an exemption applied.

In *Jones*, a review of the facts, including the substance of the transaction and economic consequences, led to the determination that a note and forbearance agreement fit within a statutory

exception to the general usury law for shared appreciation loans. *Jones*, 112 Cal. App. 4th at 1538. The plaintiff, a member of a partnership, sued a national bank, Wells Fargo, acting in its capacity as a trustee for a pension plan trust in issuing a loan to the partnership, with plaintiff asserting, among other things, that the loan was usurious. The *Jones* court conducted a factual inquiry, looking at the facts or substance at issue; it was undisputed after reviewing the note and forbearance agreement that Wells Fargo was acting as trustee for the pension plant trust and therefore exempt from usury laws under California Financial Code section 1504. The *Jones* court did not simply accept Wells Fargo's assertion of exemption, stating: "The pleadings and stipulated facts establish that Wells Fargo is a national bank . . . it is authorized to engage in the trust business; and it acted in its fiduciary capacity . . . in arranging the note and forbearance agreement. These features place it squarely within the section 1504 exemption." *Jones* at 1535.

Plaintiff Jones also asserted that the loans were "shams" that reflected Wells Fargo's intent to evade the usury law, essentially arguing that intent alone was enough to trigger a usury violation. However, since the *Jones* court concluded—after conducting an inquiry—that Wells Fargo satisfied the exemption under the usury laws, Wells Fargo's "intent" in issuing the loans was irrelevant. *Id*. at 1538. *Beechum* ignores all of the analysis done in *Jones*, and incorrectly interprets the *Jones* court's statement about intent to mean that the analysis of facts and substance to reach that conclusion need not occur. Here, the Cross-Complaint alleges not mere intent but the economic reality of the arrangement between FinWise and OppFi which allows the court to conduct a factual inquiry into OppFi's liability under the CFL.

So too in *WRI*, the court looked at how the parties' agreements actually operated and, examining the facts, rejected the lender's assertion that the loan fell within a shared appreciation loan exemption. In *WRI*, the Second District Court of Appeal reversed a grant of summary judgment in favor of a lender on a usury exemption. The borrower in that case had entered into a loan agreement as a guarantor with WRI Opportunity Loans (WRI) to borrow money for the construction of condominiums. The loan agreement required the borrower to pay a set interest rate to WRI, but also contained a provision that the borrower would be obligated to pay WRI "additional interest" upon sale of the condominium units, consisting of a set percentage of the gross sales price of each

unit. *WRI*, 154 Cal. App. 4th at 530. The borrower subsequently filed for bankruptcy, and WRI sued to enforce the terms of the loan agreement and seek repayment. WRI sought, and the borrower opposed, summary judgment on the basis that the loan from WRI was usurious because the "additional interest" that the borrower was obligated to pay WRI in the loan agreement exceeded the usury rate in California. WRI, in response, argued as a defense that the loans were exempt from the usury laws as a shared appreciation loan under the California Civil Code, and moved for summary judgment on that basis.

WRI undertook an extensive analysis of how the parties' agreements actually worked. *Id.* at 537-541. In *WRI*, *"*neither party submitted extrinsic evidence bearing on the meaning of the loan documents and the pertinent historical facts regarding the loan are undisputed . . .." *Id.* at 532. *WRI* assessed those facts to determine if the transaction fell within the statutory exemption for shared appreciation loans and ultimately reversed summary judgment that had been granted in favor of the lender, finding the transaction did not satisfy the statutory exemption for shared appreciation loans.

Neither *Jones* nor *WRI* bypassed evaluation of the relevant facts and substance based on the mere claim of an exemption by a party as OppFi has argued this court should adopt. OppFi has failed to identify, and the Commissioner has not found, a single binding California state court opinion that has allowed for disregarding a factual inquiry into the substance of a potentially usurious transaction solely because two parties have structured their business plans to meet a statutory exemption on paper. Accordingly, OppFi is incorrect in positing that an exemption from the usury laws allows for evaluation of only form and that the inquiry should end simply because FinWise initially funds the loans and is named on the loan documents. *WRI* and *Jones* dove into the economic realities of the arrangements, not accepting the lenders' labeling. The reasoning of *Beechum* and *Sims* is fatally flawed as circular: Ignoring the true lender doctrine, they argue that evaluation of form alone can establish an exemption from the usury laws, but the usury laws specifically look to the substance to prevent concealment through form. *See e.g., Glaire*, 12 Cal. 3d at 927. Neither *Jones* nor *WRI* command a court to ignore a nonexempt party's clear subterfuge simply because of the stated form of the transaction.

OppFi's argument that mere form must be elevated over substance would fashion a path for

persons to conceal usurious interest charges. Such a position strikes against the heart of the rationale for why substance is the basis for evaluating whether a transaction is usurious, not mere form. Indeed, that is the crux of the allegations in the Cross-Complaint: a nonexempt lender has crafted a process to conceal its usurious interest charges by routing its loans through an exempt lender bank. It is for the trier of fact to determine whether the contracting parties have violated the usury laws. *Glaire*, 12 Cal. 3d at 927. Under long-established California law, the Commissioner has both alleged sufficient facts to state a cause of action and shown that a factual inquiry is required to determine if OppLoan is the true lender and subject to the CFL, thus rendering demurrer improper.

F. <u>OppFi's Proffered Bill Analysis is Improper and Inapplicable</u>

As OppFi is unable to provide binding California authority or any statutes to expressly support its position, OppFi refers to a bill analysis of Assembly Bill 539 that tangentially touched on bank partnership in the abstract. Cross-Defendant's Request for Judicial Notice in Support of Demurrer to Cross-Complaint, Exhibit A. As an initial matter, OppFi's request for judicial notice of the bill analysis is improper.[3] Moreover, the bill analysis was focused on statutory changes for regulating loans of amounts between $2,500 and $9,999. It did not encompass or analyze California precedent on the true lender doctrine, which would have far exceeded the scope of the bill analysis.

The Commissioner's Cross-Complaint is not about bank partnerships in the abstract. It is focused on the specific facts and questions of fact raised regarding the true lender of OppLoans and whether OppFi is improperly concealing its usurious transactions by disguise in form only. The issues here are based on the arrangement between OppFi and FinWise in light of California law. By prearranged obligation, OppFi purchases between 95 to 98 percent of the receivables for each of the OppLoans. FinWise is only obligated to fund OppLoans if OppFi's purchasing SPE maintains a specific security. It is OppLoans' unique characteristics that are at issue in terms of a true lender evaluation. None of this is contemplated by cursory statements in the bill analysis, nor is the bill analysis binding by any means.

[3] Resort to legislative history is "appropriate only where statutory language is ambiguous" and the legislative history materials must establish the requisite collegial view of the Legislature as a whole for usage as legislative history for statutory interpretation. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 30-31 (2005). Such is not the case here.

G. OppFi's Violations of the CFL Are Properly Alleged

OppFi also attacks other CFL violations alleged in the Cross-Complaint beyond interest rate caps. OppFi's primary argument that "derivative" CFL theories fail due to an exemption is, as set forth above, both incorrect and subject to factual issues inappropriate for demurrer. OppFi's other arguments fail as below.

Material Misrepresentation: OppFi misstates the criteria for a violation of California Financial Code section 22161, which is not limited to a "materially false or misleading statement" as OppFi suggests. Section 22161 is also violated (1) where one omits material information that is necessary to make the statements not false, misleading, or deceptive or (2) one knowingly misrepresents, circumvents, or conceals, through subterfuge or device, any material aspect or information regarding a transaction to which the person is a party.

Here, OppFi's advertisements of OppLoans with an APR of up to 160% omits the material information that OppFi itself cannot lawfully issue these loans, leading borrowers to believe that they are legally obligated to pay OppFi interest payments at rates that California law strictly prohibits lenders from charging. (Cross-Complaint, ¶¶ 28, 45) *See e.g. CFPB v. CashCall, Inc.,* 2016 WL 4820635 at *10 (nonexempt true lender giving impression that void usurious loans were enforceable was materially deceptive).

Evasion: OppFi's arguments against evasion run contrary to California law as described above, which requires evaluation of substance over form specifically to uncover disguised usury. Indeed, these anti-evasion statutes reinforce that approach. The Cross-Complaint adequately alleges that OppFi is using "its rent-a-bank ruse to evade the CFL and illegally charge California consumers higher rates on OppLoans." (Cross-Complaint, ¶¶ 42-43).

Unconscionability: The Cross-Complaint provides fair notice to OppFi of the unconscionability issues regarding its loans, more than sufficient to enable preparation of a defense. Less particularity is required in pleading matters of which the defendant has superior knowledge. *Foster v. Sexton*, 61 Cal. App. 5th 998, 1028 (2021). The Cross-Complaint pleads the necessary ultimate facts sufficient to state a cause of action as not every fact that might form part of the proof need be alleged. *C.A. v. William S. Hart Union High School Dist*., 53 Cal. 4th 861, 872 (2012).

Ability to Repay: The Cross-Complaint adequately alleges that OppFi fails to ensure that its borrowers have the financial ability to reasonably repay. It is a factual inquiry for the parties to establish whether OppFi violated section 1452 of title 10 of the California Code of Regulations based on OppLoans' 37 percent default rate. (Cross Complaint, ¶¶ 46-47). *See O'Donovan v. CashCall, Inc.*, 278 F.R.D. 479, 502 (N.D. Cal. 2011).

H. If a Demurrer is Sustained, Leave to Amend Should be Granted

If the Court does sustain the demurrer, the Commissioner respectfully requests that the court allow her to amend the pleadings. Leave to amend should be liberally granted where, as here, "a fair opportunity to correct any defect has not been given." *Angie M. v. Super. Ct.*, 37 Cal. App. 4th 1217, 1227 (1995); *see also McDonald v. Superior Ct.*, 180 Cal. App. 3d 297, 303–04 (1986) ("Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion . . . ."). The Commissioner is capable of amending her claims to address any concerns of the Court and should have a chance to do so.

V. CONCLUSION

OppFi's form-only approach is diametrically opposed to California's mandate to evaluate the substance of potentially usurious transactions to identify the real lender. OppFi cannot evade review by merely inserting an exempt bank's name into the loan process when that arrangement calls for OppFi to take on the benefit and risk of such loans while insulating the straw lender from risk. The Cross-Complaint more than adequately alleges facts sufficient to constitute a cause of action. Moreover, the Cross-Complaint establishes questions of fact that are unsuitable for demurrer. As the true lender, OppFi is violating the CFL by making loans to California consumers far in excess of the interest rate limitations allowed by California law. The Commissioner respectfully requests that the Court overrule OppFi's demurrer.

Respectfully submitted,

Dated: July 7, 2022

CLOTHILDE V. HEWLETT
Commissioner of Financial Protection and Innovation

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