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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES, CENTRAL DIVISION

10
11 OPPORTUNITY FINANCIAL LLC,
12 Plaintiff,

13 v.

14 CLOTHILDE HEWLETT, in her official
capacity as Commissioner of the
15 Department of Financial Protection and
Innovation for the State of California,
16 Defendant.

17
18 CLOTHILDE HEWLETT, in her official
capacity as Commissioner of the
19 Department of Financial Protection and
Innovation for the State of California,
20 Cross-Plaintiff,

21 v.

22
23 OPPORTUNITY FINANCIAL LLC, and
DOES 1-100
24 Cross-Defendants.
25

Case No: 22-ST-CV-08163

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

**BRIEF OF AMICI CURIAE CENTER FOR
RESPONSIBLE LENDING ET AL. IN
OPPOSITION TO DEMURRER FILED BY
PLAINTIFF/CROSS-DEFENDANT
OPPORTUNITY FINANCIAL LLC**

Demurrer Hearing:
Date: July 20, 2022
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Dept: 73

Action Filed: March 7, 2022

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1 Pursuant to this Court’s inherent discretion to entertain amicus filings, *see In re Veterans’*
2 *Indus.* (1970) 8 Cal.App.3d 902, 924, Center for Responsible Lending, California Reinvestment
3 Coalition, Consumer Federation of California, National Consumer Law Center, Public Law
4 Center, and UC Berkeley Center for Consumer Law & Economic Justice, as *amici curiae*,
5 through their counsel and their accompanying Application for Leave to File Brief of *Amici*
6 *Curiae*, hereby submit this brief in support of Defendant/Cross-Plaintiff Department of Financial
7 Protection and Innovation (“DFPI”).¹

8 INTRODUCTION

9 The question in this case is whether California law allows courts to consider the
10 substance of a loan transaction, including all relevant facts, in order to prevent evasions of the
11 state’s usury laws, or whether courts must instead simply accept the bald assertion in the loan
12 documents about the identity of the lender even in the face of evidence to the contrary.
13 California law is clear that courts may look beyond the form of the transaction to the substance,
14 and nothing in California law supports the theory put forward by Plaintiff/Cross-Defendant
15 Opportunity Financial LLC (“OppFi”) that courts must unquestioningly accept that the entity
16 named on a loan document is the lender, however fictitious and designed to evade California’s
17 consumer protection statutes the arrangement may be.

18 Since the American Revolution, states have limited interest rates to protect consumers
19 from predatory lending. Evasions of usury laws are as old as the laws themselves and are
20 infinitely varied. “Sensitive to the ingenuity and creativity of those entrepreneurs willing to
21 engage in legal brinkmanship to maximize profits, courts have carefully scrutinized the form of
22 seemingly innocuous commercial transactions to determine whether the substance amounts to a
23 usurious arrangement.” *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 802 (quoting *DCM Partners*
24 *v. Smith* (1991) 228 Cal.App.3d 729, 733).

25 This case concerns a growing form of evasion: “rent-a-bank” lending. Two decades ago,

26
27 ¹ No person or entity other than *amici curiae* or their counsel directly or indirectly,
28 authored this brief in whole or in part or made a monetary contribution to the preparation or
submission of this brief.

1 payday lenders first started using banks as a front to evade state usury laws, attempting to take
2 advantage of exemptions that banks receive in state laws or through federal preemption. *See*
3 Michael Calhoun, *Bank regulator’s True Lender Rule undercuts bank regulatory protections and*
4 *shelters predatory lending*, Brookings Inst. (June 21, 2021).² While courts and regulators
5 eventually halted schemes involving store-front payday lenders, recent years have witnessed the
6 growth of rent-a-bank schemes involving on-line installment loans. *Id.* Today, high-cost, non-
7 bank lenders like OppFi are again trying to hide behind banks to evade usury laws that forbid
8 rates that can reach an annual percentage rate (“APR”) of 225%. These lenders have even
9 openly boasted on public calls to investors that they can evade newly enacted laws aimed at their
10 predatory installment loans by moving to rent-a-bank models. *See infra* at 10-11. Indeed, OppFi
11 itself once offered loans directly in California but later shifted fully to the “bank partnership
12 model” after California adopted stronger interest rate protections via the passage of Assembly
13 Bill 539, the Fair Access to Credit Act, enacted to address the very predatory lending conducted
14 by lenders like OppFi. *See infra* at 10.

15 In a variety of contexts, courts have repeatedly recognized that the bank’s name on the
16 paperwork may not reflect the “true lender”; and if the true lender is not a bank, then state usury
17 laws apply. *See infra* at 11-12. The true lender doctrine is simply an application of the broadly
18 accepted substance-over-form anti-evasion doctrine. The Federal Deposit Insurance Corporation
19 (“FDIC”) has also acknowledged the true lender doctrine, and Congress recently repealed a
20 regulation that would have overturned the doctrine. *See infra* at 12 (citing Federal Interest Rate
21 Authority, 85 Fed. Reg. 44146, 44155 (July 22, 2020); S.J. Res. 13, 117th Cong. (2021)).

22 In the face of this well-established jurisprudence, OppFi relies on two unpublished
23 federal district court decisions that misinterpret California law. Contrary to those federal court
24 decisions, under California law courts are not powerless to look beyond the face of a transaction
25 to prevent evasions of usury statutes, no matter what form the evasion takes. To be sure, a
26 party’s *subjective intent* to evade a usury statute may not be relevant if the transaction is

27 ² <https://brook.gs/3nGgIpp>
28

1 *Lending in the States 2022* (June 2022)⁵, and 25% for a \$10,000, five-year installment loan,
2 NCLC, *A Larger and Longer Debt Trap? Analysis of States' APR Caps for a \$10,000 5-year*
3 *Installment Loan* (Oct. 2018).⁶

4 But these usury protections are threatened by the “ingenuity and creativity of those
5 entrepreneurs” seeking to “maximize profits.” *Ghirardo*, 8 Cal. 4th at 802. The latest
6 contrivance is a form of rent-a-bank lending, which tries to take advantage of the fact that, due to
7 a combination of federal preemption and states not wanting to put state-chartered banks at a
8 disadvantage compared to federally chartered banks, most banks are not subject to interest rate
9 caps on loans to consumers. *See generally* NCLC, *Consumer Credit Regulation* § 3.5.4 (3d ed.
10 2020), *updated at* www.nclc.org/library. Under California law, for example, if the actual lender
11 is an out-of-state bank, the loan is exempt from the state’s constitutional usury limits. *See* Cal.
12 Const. art. XV, § 1. Amici do not dispute that a true bank loan by FinWise bank is exempt; the
13 question is whether, for the loans at issue in this case, FinWise or OppFi is the true lender.

14 In a rent-a-bank scheme, the bank is designated the lender but has only a minor role; the
15 lending program is run almost entirely by a non-bank institution that typically bears most of the
16 risk, takes most of the profits, and effectively designs, runs and controls the program. The non-
17 bank typically designs and markets the loan, sets pricing and underwriting criteria (nominally
18 approved by the bank), owns the branding and intellectual property for the loan program, takes
19 and processes applications, controls which banks to partner with, and then sends the loan to a
20 bank to nominally approve and fund the loan. The bank then immediately sells the loan (or the
21 bulk of the receivables or participation interests) back to the non-bank lender (or a related entity),
22 which charges interest, collects payments, bears the primary risk of nonpayment, and typically
23 receives the vast majority of the revenues. In many cases, the non-bank covers most of the
24 bank’s costs, has a right to buy the loans or receivables, and protects the bank from the risk of
25 loss through indemnity agreements, required deposits, or other arrangements. Despite the fact

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27 ⁵ <https://bit.ly/3anqJEP>

28 ⁶ <http://bit.ly/instloan18>

1 that the bank’s role is only a minor part of the lending program, the non-bank claims that the
2 loans are bank loans immune from state rate caps. *See* NCLC, *Testimony of Lauren Saunders*
3 *before the U.S. House Financial Services Committee on Rent-a-Bank Schemes and New Debt*
4 *Traps* (Feb. 2020)⁷; CRL, *Testimony of Lisa F. Stifler before the Senate Committee on Banking,*
5 *Housing, and Urban Affairs on The Reemergence of Rent-a-Bank* (Apr. 2021).⁸

6 DFPI has alleged OppFi’s participation in a classic rent-a-bank scheme in this case. *See*
7 *Cross-Compl.* ¶¶ 19-27.

8 Rent-a-bank schemes first appeared 20 years ago, developed by payday lenders making
9 short-term loans up to 400% APR. States and federal bank regulators eventually shut down
10 those evasive stratagems. *See* NCLC, *Consumer Credit Regulation* § 3.5.4. Now, however,
11 similar schemes are making a comeback, primarily for longer-term loans. Today, a growing list
12 of high-cost, non-bank lenders are using a few obscure, rogue banks to enable installment loans
13 and lines of credit at 99% to 225% APR in states that forbid interest rates at those levels. *See*
14 *NCLC, High-Cost Rent-a-Bank Loan Watch List* (Jan. 2022).⁹ Although these new lenders may
15 market themselves as sophisticated new “fintech” companies, the gist of the evasion – laundering
16 high-cost loans through a bank to evade state usury laws – remains the same. *See DC v. Elevate*
17 *Credit, Inc.* (D.D.C. 2021) 2021 WL 2982143 at *9 (discussing “many similarities between the
18 rent-a-bank scheme” of a modern, high-cost fintech lender and other earlier arrangements where
19 the non-bank was found to be the true lender).

20 Most banks do not abuse their exemption from state usury laws. But the business model
21 of some less scrupulous banks, like FinWise, revolves almost entirely around rent-a-bank
22 partnerships with predatory lenders: *over 96%* of FinWise’s loan origination volume comes from
23 its “strategic partnerships” program with fintech companies like OppFi. *See* Seeking Alpha,
24 *FinWise Bancorp: A Risky Fintech-Heavy Partnership Model With Huge Potential Upside* (Jan.
25

26 ⁷ <http://bit.ly/debt-trap-schemes>

27 ⁸ <https://bit.ly/3IjIIZu>

28 ⁹ <https://bit.ly/2JCGf2c>

1 6, 2022).¹⁰ Thus, FinWise’s business model is based on “selling” its bank charter and exemption
2 from others states’ usury laws to allow OppFi and other lenders to make loans that would
3 otherwise be unlawful in the states where they are made. In this way, laundering a non-bank’s
4 loan into a “bank loan” undermines the reasoned policy choices of the vast majority of states that
5 have decided to protect their residents from predatory loans.

6 Indeed, rent-a-bank schemes have proliferated in California since the enactment of
7 California’s recent rate cap law – the law OppFi is alleged to have violated in this case. Cross-
8 Compl. ¶40 & n.8. Shortly after the legislature passed AB 539 in 2019, and before Governor
9 Newsom even signed the bill into law, executives at three companies – Enova, Elevate Credit,
10 and CURO – told investors during quarterly earnings calls that they were exploring the use of
11 bank “partners” to circumvent the new law and continue to make the kinds of predatory debt-trap
12 loans that the California legislature specifically sought to stop. *See Congress.gov, Testimony of*
13 *Assemblymember Monique Limón before the U.S. House Financial Services Committee on Rent-*
14 *a-Bank Schemes and New Debt Traps* (Feb. 2020).¹¹

15 Many rent-a-bank lenders, like OppFi, use bank “partnerships” in only some states,
16 typically where their loan products exceed state interest rate limits; in states that do not limit
17 high-cost loans, they lend directly in their own name. Through 2019, OppFi lent directly to
18 Californians through its license with DFP. *See Cross-Compl. ¶15.* After California tightened its
19 interest rate caps in 2019, OppFi switched exclusively to rent-a-bank lending in the state. *Id.*
20 Even today, OppFi lends through a rent-a-bank scheme in California and a handful of other states
21 but continues to lend directly in four states. NCLC, *High-Cost Rent-a-Bank Loan Watch List*.¹²
22 Other lenders structure their business similarly. *See NCLC, Payday Lenders Plan to Evade*
23 *California’s New Interest Rate Cap Law Through Rent-A-Bank Schemes* (Oct. 2019) (quoting
24 Elevate Credit, Inc. (ELVT), Q2 2019 Results - Earnings Call Transcript, Seeking Alpha (July
25

26 ¹⁰ <https://bit.ly/3IhliUH>

27 ¹¹ <https://bit.ly/3nGOBzV>

28 ¹² <https://bit.ly/2JCGf2c>

1 29, 2019) (“we expect to be able to continue to serve California consumers via bank sponsors
2 that are not subject to the same proposed state level rate limitations.”).¹³

3 **II. Courts routinely apply substance over form to unmask rent-a-bank schemes, and**
4 **California law supports that inquiry.**

5 California courts, like courts in virtually every state, “have carefully scrutinized
6 the form of seemingly innocuous commercial transactions to determine whether the substance
7 amounts to a usurious arrangement.” *Ghirardo*, 8 Cal.4th at 802 (quoting *DCM Partners*, 228
8 Cal.App.3d at 733); *see also Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915,
9 927 (“As we have often noted, substance not form must dictate the treatment that a transaction is
10 to be accorded under the usury law, and the question of substance is predominantly a factual
11 inquiry.”); NCLC, Consumer Credit Regulation § 3.9 (citing over 100 cases in 49 states
12 including 17 in California).

13 As rent-a-bank schemes emerged, courts applied the traditional substance-over-form
14 approach to assess whether a bank or non-bank was the true lender. *See, e.g., CashCall, Inc. v.*
15 *Morrissey* (W. Va. 2014) WL 2404300, *14 (citing *Crim v. Post*, 41 W. Va. 397, 23 S.E. 613
16 (1895)); *BankWest v. Oxendine* (Ga. Ct. App. 2004) 598 S.E.2d 343, 348 (quoting *Pope v.*
17 *Marshall* (Ga. 1887) 4 S.E. 116). Many courts have recognized the doctrine or have recognized
18 other ways to look beyond the name on the loan agreement to the facts when assessing who the
19 lender is. *See, e.g., Community State Bank v. Strong* (11th Cir. 2011) 651 F.3d 1241, 1259-60
20 (finding federal jurisdiction over potential racketeering claim because federal law does not
21 preempt usury laws if the bank is not the true lender); *In re Community Bank* (3d Cir. 2005) 418
22 F.3d 277, 297 (“despite the provision in the loan agreement that loans were made through a
23 national or state-chartered bank . . . , the loans were, in fact, made and serviced by Shumway, a
24 non-depository institution”); *Easter v. American West Fin’l* (9th Cir. 2004) 381 F.3d 948, 957-59
25 (applying Washington law); *Inetianbor v. CashCall, Inc.* (S.D. Fla. 2015) 2015 WL 11438192
26 (“because Inetianbor has raised a genuine issue of material fact as to Western Sky’s status as the
27

28 ¹³ <http://bit.ly/rent-a-bank-ib>

1 actual lender, enforcement of the choice-of-law provision in the Loan Agreement would be
2 unjust and unreasonable on a motion to dismiss”); *Ubaldi v. SLM Corp.* (N.D. Cal. 2012) 852
3 F.Supp.2d 1190, 1202-03 (denying motion to dismiss in case alleging that Sallie Mae, not a
4 national bank, was the true lender).

5 The FDIC, which regulates FinWise, has also recognized the true lender doctrine. *See* 85
6 Fed. Reg. at 44155 (noting that the rule regulating the terms by which banks can sell loans that
7 they validly and actually made “cannot be reasonably interpreted to foreclose true lender claims.
8 The rule ... is premised upon a State bank having made the loan.”).

9 Congress and the President have also recently supported true lender claims. When the
10 Office of the Comptroller of the Currency (“OCC”) in the previous Administration adopted a
11 rule that would have overturned the true lender doctrine as to national banks, Congress and the
12 current President overturned the OCC’s rule on a bipartisan basis. *See* National Banks and
13 Savings Ass’ns as Lenders, 85 Fed. Reg. 44223, 44224 n.8 (July 22, 2020); S.J. Res. 13, 117th
14 Cong. (2021). President Biden, when signing the resolution into law, noted that repealing the
15 rule would “protect borrowers against predatory lenders” that operated “so called ‘rent-a-bank’
16 schemes” to “prey on veterans, seniors, and other unsuspecting borrowers.” White House,
17 Remarks by President Biden Signing Three Congressional Review Act Bills into Law: S.J. Res.
18 13; S.J. Res. 14; and S.J. Res. 15 (June 30, 2021 17:37).¹⁴

19 California law is fully consistent with this authority recognizing the substance-over-form
20 doctrine and its application to determine the identity of the true lender. OppFi relies only upon
21 two federal district court cases. *See Sims v. Opportunity Fin, LLC* (N.D. Cal. 2021) 2021 WL
22 1391565 and *Beechum v. Navient Sols., Inc.* (C.D. Cal. 2016) 2016 WL 5340454). Decisions of
23 federal courts, of course, “are not binding on” California courts. *Rubin v. Ross* (2021) 65
24 Cal.App.5th 153, 163. Nor are OppFi’s cases even persuasive authority regarding the
25 application of substance-over-form to prevent usury evasions, because both fundamentally
26 misread the California Court of Appeal cases that *do* bind this Court.

27 _____
28 ¹⁴ <https://bit.ly/3utIGZk>

1 The California cases cited by *Sims* and *Beechum* support an outcome quite different from
2 that reached by the federal trial courts. First and foremost, neither *WRI v. Cooper* (2007) 154
3 Cal.App.4th 525 nor *Jones v. Wells Fargo Bank* (2006) 112 Cal.App.4th 1527 involved the
4 question of who the lender was; in neither case was there any dispute about the lender’s identity.
5 See *WRI*, 154 Cal.App.4th at 530 (no question that WRIO was lender); *Jones*, 112 Cal.App.4th at
6 1535 (no dispute that Wells Fargo was the lender). Thus, neither case addresses the question at
7 issue in this case: is the bank that is exempt from the usury statutes in fact the lender?

8 Further, none of the reasoning in *WRI* or *Jones* casts doubt on the power of California
9 courts to determine, *as a factual matter*, which entity is the actual lender. Both *WRI* and *Jones*
10 discuss the extent to which a lender’s *subjective intent* is relevant to a usury claim. In *WRI*, the
11 court held that the loan at issue was not exempt from the usury statutes because it did not meet
12 the statutory definition of a “shared appreciation loan.” 154 Cal.App.4th at 539. In so holding,
13 *WRI* explained that when the *substance* of the transaction at issue fits within an exception to the
14 usury statutes, “courts will not look beyond those requirements to determine whether the
15 underlying transaction . . . betrays an intent to evade the usury law.” *Id.* at 536. Similarly, in
16 *Jones*, a bank was alleged to have made usurious loans but was held exempt from the interest
17 rate cap because it was a bank acting in its fiduciary capacity. 112 Cal.App.4th at 1535. *Jones*
18 explained that because the loan agreements “fit within a legally authorized exception to the
19 general usury law, their interest provisions do not exceed the statutory maximum. Defendants’
20 intent is irrelevant.” *Id.* at 1538.

21 In sum, *WRI* and *Sims* foreclose an inquiry into the *subjective* intent of a lender only
22 when the objective circumstances of the transaction plainly put the transaction within or outside
23 a usury statute. All that *WRI* and *Jones* hold is that, where the substance of a transaction clearly
24 satisfies an exemption to the usury statutes, it is immaterial whether the lender intentionally
25 structured the transaction to satisfy that exemption and thereby avoid usury limits. Neither
26 decision precludes a court from considering the *objective* facts of a transaction to determine
27 whether the transaction does in fact satisfy an exemption to the usury statutes.
28

1 In fact, the courts in *WRI* and *Jones* performed just the sort of factual inquiry into the
2 substance over form required in true lender cases. In *WRI*, the court reaffirmed that courts
3 “look[] beyond the face of the agreement to assess whether” the usury exception is satisfied, 154
4 Cal.App.4th at 535, but the court did not look beyond the plain language of the agreement only
5 “[b]ecause neither party submitted extrinsic evidence bearing on the meaning of the loan
6 documents.” *Id.* at 532; *see also id.* at 537. In *Jones*, the court stated that, in determining
7 whether a transaction is subject to usury law, “a court must look beyond the surface of the
8 transaction to its substance,” 112 Cal.App.4th at 1538, but the “pleadings and stipulated facts
9 establish” an exception to the usury statutes, *id.* at 1535. That is precisely the inquiry in true
10 lender cases like this one: looking beyond the face of the loan to determine whether, taking the
11 facts as a whole, the exempt entity is in fact the lender. *Sims* and *Beechum* misread *WRI* and
12 *Jones* by reading those cases to foreclose that factual inquiry.

13 **III. The assertions about market disruption by *amici curiae* FinWise Bank and Capital**
14 **Community Bank are unfounded.**

15 *Amici curiae* FinWise Bank and Capital Community Bank (“FinWise”) offer scattershot
16 asserted “policy implications” of the true lender doctrine, which boil down to the claim that true
17 lender constrains lenders in selling their loans in the secondary market. *See* FinWise Br. at 8-11.
18 That claim is baseless. It makes no sense to assert, as FinWise does, that there will be serious
19 effects on the “mortgage market” (FinWise Br. at 9), because, banks’ assignees are already
20 exempt from state usury laws in the secondary market in home mortgage loans. State usury laws
21 are specifically preempted for federally insured mortgages (i.e., most mortgages), regardless of
22 what entity holds them. 12 U.S.C. §§ 1735f-7, 1735f-7a.

23 In any case, the true lender rule does not govern the ability of banks to sell valid bank
24 loans; its focus is on the *identity* of the lender. It is a different rule, the “valid-when-made”
25 doctrine, now codified in federal regulation, that addresses what rate applies after banks sell their
26 loans and makes them subject to any usury exceptions those banks may enjoy. *See California v.*
27 *Fed. Deposit Ins. Corp.* (N.D. Cal. 2022) 2022 WL 377403, at *2-*3. Current FDIC and OCC
28

1 regulations provide that “[w]hether interest on a loan is permissible . . . is determined as of the
2 date the loan was made. Interest on a loan that is permissible . . . shall not be affected by . . . the
3 sale, assignment, or other transfer of the loan, in whole or in part.” 12 C.F.R. § 331.4(e) (FDIC);
4 *see also* 12 C.F.R. § 7.4001(e) (same for OCC). Those regulations currently apply to all state
5 and national banks, making FinWise’s assertions about the threat of the true lender doctrine to
6 bank securitization a red herring. Indeed, the FDIC has specifically noted that its “valid-when-
7 made” rule “cannot be reasonably interpreted to foreclose true lender claims.” 85 Fed. Reg. at
8 4415. Securitization of loans actually and validly issued by banks is entirely distinct from rent-a-
9 bank schemes where the bank is a front for a non-bank true lender running the loan program.
10 Enforcement of true lender claims will not undermine state banks’ ability to securitize loans that
11 those banks actually and validly made.

12 What such enforcement *will* do is to protect the public from sham arrangements that, if
13 permitted, will frustrate the express and duly enacted will of 40 million Californians.

14 CONCLUSION

15 This Court should not accept OppFi’s unsupported and dangerous theory that California
16 law requires courts to blindly accept companies’ assertions and to look only at the nominal form
17 of a transaction, rather than evaluating the substance of the transaction based on all the facts to
18 determine the identity of the actual lender in a consumer transaction.

19 OppFi’s demurrer should be overruled.

20 Dated: July 8, 2022

21 Respectfully submitted,

22 **CENTER FOR RESPONSIBLE LENDING**
23 **ANDREW KUSHNER**

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25 Andrew Kushner
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