

State of California – Department of Financial Protection and Innovation

1 CLOTHILDE V. HEWLETT
 Commissioner
 2 MARY ANN SMITH
 Deputy Commissioner
 3 SEAN M. ROONEY
 Assistant Chief Counsel
 4 JOHNNY O. VUONG (State Bar No. 249570)
 Senior Counsel
 5 FRANCIS N. SCOLLAN (State Bar No. 186262)
 Senior Counsel
 6 ALLARD C CHU (State Bar No. 328121)
 Senior Counsel
 7 Department of Financial Protection and Innovation
 320 West 4th Street, Suite 750
 8 Los Angeles, California 90013
 Telephone: (213) 503-4164
 9 Facsimile: (213) 576-7181
 Email: Johnny.Vuong@dfpi.ca.gov
 10 Email: Frank.Scollan@dfpi.ca.gov
 Email: Allard.Chu@dfpi.ca.gov

**FILING FEE EXEMPT PER
GOV'T CODE, § 6103**

11 Attorneys for Defendant and Cross-
 12 Complainant CLOTHILDE HEWLETT,
 in her official capacity as Commissioner
 13 of Financial Protection and Innovation

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 FOR THE COUNTY OF LOS ANGELES, CENTRAL DIVISION

16 OPPORTUNITY FINANCIAL, LLC) Case No. 22STCV08163
)
 17 Plaintiff,) **DEFENDANT AND CROSS-COMPLAINANT**
) **COMMISSIONER CLOTHILDE**
 18 v.) **HEWLETT'S EX PARTE APPLICATION**
) **AND MEMORANDUM TO STRIKE**
 19) **PLAINTIFF, CROSS-DEFENDANT AND**
) **CROSS-COMPLAINANT OPPORTUNITY**
 20) **FINANCIAL, LLC'S VERIFIED CROSS-**
) **COMPLAINT AND CROSS-PETITION FOR**
 21) **WRIT OF MANDATE**
)
 22 Defendant.) **Filed Concurrently With:**

23 And Related Cross-Action) **1. Declaration of Notice;**
) **2. Declaration in Support of; and**
 24) **3. [Proposed] Order**
)
 25) Assigned to: Hon. Timothy P. Dillon
) Department: 73
 26)
) Date: October 20, 2022
 27) Time: 8:30 a.m.
) Dept: 73
 28)
) Action Filed: March 7, 2022

1 **I. INTRODUCTION**

2 This Ex Parte Application is made to respectfully request that the Court strike Plaintiff,
3 Cross-Defendant and Cross-Complainant Opportunity Financial, LLC’s (OppFi) Verified Cross-
4 Complaint and Cross-Petition for Writ of Mandate. OppFi’s filing does not comply with the Code of
5 Civil Procedure. This Court has inherent authority “at any time in its discretion” to “[s]trike out all
6 or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule,
7 or an order of the court” without need for a noticed motion. Cal. Code Civ. Proc. § 436.

8 OppFi’s filing of a further pleading (Further Pleading) is improper. OppFi is the Plaintiff and
9 has a pending Complaint against Defendant Commissioner Hewlett (Commissioner or Defendant).
10 Defendant has answered that Complaint. If OppFi wishes to now bring *additional* claims against
11 Defendant, or to add a defendant, it should seek leave to amend its Complaint. Instead, OppFi, the
12 Plaintiff, has now fashioned itself as a Cross-Complainant against the Commissioner, who is the
13 original Defendant and now seemingly a Cross-Defendant. With this filing, OppFi now asserts two
14 concurrently operative complaints and has now created a situation where the Commissioner must
15 defend itself from two separate pleadings. If OppFi has a new cause of action, it needs to seek leave
16 from the Court to amend its original Complaint, and its new complaint and petition should be struck.
17 Also, the cross petition for writ of mandate is improperly filed with this Court because such a writ
18 must be a mandate for an inferior court.

19 Ex parte relief is warranted because OppFi’s filing is improper and creates problems as to the
20 Commissioner’s obligations to respond—or not—to these errant pleadings. Defendant brings this
21 request by ex parte application so that Defendant can understand what its obligations, if any, are to
22 respond to OppFi’s errant pleading. OppFi’s approach leaves the Commissioner at an untenable
23 crossroads on how to respond.

24 Accordingly, the Commissioner respectfully requests that the Court strike the Further
25 Pleading as a procedurally improper filing.

26 **II. RELEVANT FACTUAL BACKGROUND**

27 OppFi filed its Complaint against the Commissioner on March 7, 2022, seeking declaratory
28 relief regarding the nature of OppFi’s bank-partnership lending program under California law.

1 (Declaration of Allard Chu (Chu Decl.), ¶ 3). On April 8, 2022, the Commissioner filed her
 2 Answer to the Complaint. (*Id.*) The Commissioner also filed a Cross-Complaint against OppFi, to
 3 which OppFi demurred on May 10, 2022. (*Id.*)

4 Briefing on the demurrer subsequently followed and a hearing was held on August 26,
 5 2022. The Court issued its ruling overruling OppFi’s demurrer on September 30, 2022. (Chu
 6 Decl., ¶ 4).

7 On October 17, 2022, Plaintiff OppFi served the Further Pleading at issue. The Further
 8 Pleading named original Defendant, the Commissioner, as a Cross-Defendant and added the
 9 Department of Financial Protection and Innovation as a second Cross-Defendant. (Chu Decl., ¶ 5,
 10 Ex. A).

11 On October 18, counsel for the Commissioner informed counsel for OppFi of the
 12 procedural defects of the filing. (Chu Decl., ¶ 6, Ex. B). The Commissioner sought withdrawal of
 13 the filing, but OppFi disagreed regarding withdrawal. (Chu Decl., ¶¶ 6-7, Ex. C). Accordingly,
 14 the Commissioner brings the present *ex parte* application to strike.

15 **III. LEGAL ARGUMENT**

16 OppFi’s filing fails to comply with the Code of Civil Procedure and should be struck. If
 17 OppFi wishes to now bring *additional* claims against Defendant, or to add a defendant, the proper
 18 course is for Plaintiff to seek leave to amend its Complaint, not purport to make Defendant
 19 Commissioner a Cross-Defendant to a second and concurrently effective complaint in this litigation.
 20 This Court has inherent authority “at any time in its discretion” to “[s]trike out all or any part of any
 21 pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the
 22 court.” Cal. Code Civ. Proc. § 436.

23 **A. It is Improper for OppFi to Style Itself as a Cross-Complainant Against Defendant** 24 **Commissioner to Avoid the Rules on Amending Pleadings**

25 OppFi’s filing as a cross-complaint is fundamentally improper and circumvents all of the
 26 processes for amendments and supplements to a complaint. *See, e.g.*, Code Civ. Proc. § 472 (right to
 27 amend a pleading once prior to an answer or demurrer); *Woo v. Sup.Ct.*, 75 Cal. App. 4th 169, 175
 28 (1999) (leave of court required to amend complaint); *Flood v. Simpson*, 45 Cal. App. 3d 644, 647

1 (1975) (recognizing that a supplemental pleading cannot allege facts constituting a new cause of
2 action or defense).

3 OppFi did not seek leave and bypassed the set statutory provisions for amending OppFi’s
4 original complaint which the Commissioner had answered by attempting to add new causes of action
5 and a “new” defendant (the Department) in this second complaint. OppFi is attempting to use two
6 concurrently operative complaints against the Commissioner.

7 OppFi provides only a tortured reading of the Code of Civil Procedure to justify its ability to
8 assert two separate complaints, a concept that is fundamentally antithetical to the Code of Civil
9 Procedure and considerations of judicial efficiency. (Chu Decl., ¶ 7, Ex. C). In a meet and confer,
10 OppFi selectively references the Rutter Group’s seminal California Practice Guide: Civil Procedure
11 Before Trial as explaining that there is no express prohibition on a plaintiff filing a cross-complaint.
12 (*Id.*). However, OppFi assiduously omits the guide’s following statement that “such an unending
13 ‘daisy chain’ of pleadings should be discouraged. Each party should assert all of its claims in a
14 single complaint or cross-complaint.” 1 Robert E. Weil et al., *California Practice Guide: Civil
15 Procedure Before Trial* ¶ 6:582.1 (2022). Nor has OppFi explained why its interpretation allows
16 bypassing of the rules on amending its original complaint.

17 Plaintiff is attempting to bootstrap in new background allegations and causes of action
18 simply by fashioning itself now as a Cross-Complainant against the original Defendant
19 Commissioner, who is now seemingly also a Cross-Defendant. This improperly manufactures a
20 situation where the Commissioner must defend two separate pleadings with significant uncertainty.
21 If OppFi has a new cause of action, it needs to seek leave from the Court to amend its original
22 Complaint. It cannot simply file a second complaint in the present action and ignore the Code of
23 Civil Procedure.

24 OppFi’s Further Pleading is an improper attempt by OppFi to take a second bite at the apple
25 without following any of the procedural steps required of it by California law. The filing should be
26 stricken.

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1 **B. The Petition for Writ of Mandate Cannot be Filed with This Court as It Must Be a**
 2 **Mandate for an Inferior Court**

3 Additionally, the joint Further Pleading is also improper because this Court is not the proper
 4 venue for a petition for writ of mandate essentially tied to this Court’s order overruling OppFi’s
 5 demurrer issued on September 30, 2022.

6 Code of Civil Procedure section 1085 explains the basis for a writ of mandate:

7 **A writ of mandate may be issued by any court to any inferior tribunal,**
 8 corporation, board, or person, to compel the performance of an act which the law
 9 specially enjoins, as a duty resulting from an office, trust, or station, or to compel the
 10 admission of a party to the use and enjoyment of a right or office to which the party is
 entitled, and from which the party is unlawfully precluded **by that inferior tribunal,**
 corporation, board, or person.

11 Cal. Code Civ. Proc. § 1085. This means that a writ of mandate is intended to compel performance
 12 of a lower court. Thus, a petition to this Court would be appropriate to challenge a municipal court
 13 or other tribunal. *See, e.g., Burrus v. Mun. Ct.*, 36 Cal. App. 3d 233, 235 (1973) (petition for writ of
 14 mandate was filed with a superior court to review a pleading question in a municipal court action).

15 That is not the case here.

16 Here, the present Court is the trial court that heard OppFi’s demurrer and overruled it. In
 17 such a case, the proper venue for a petition for writ of mandate is the Second District Court of
 18 Appeal. Even the Rutter Group’s California Practice Guide: Civil Procedure Before Trial makes it
 19 clear that the procedure to contest the overruling of a demurrer is that “Defendant may petition an
 20 **appellate court** for an extraordinary writ (mandamus or prohibition) to review the demurrer ruling.”

21 1 Robert E. Weil et al., *California Practice Guide: Civil Procedure Before Trial* ¶ 7:153 (2022)
 22 (emphasis added).

23 Thus, OppFi’s attempt to petition for writ of mandate is improper as it was incorrectly filed
 24 in the wrong venue. The petition for writ of mandate for review of the demurrer at issue is not one
 25 for a superior court to review. Accordingly, the filing should be stricken.

26 **C. Ex Parte Relief Is Warranted**

27 Defendant brings this request by ex parte application so that Defendant can timely
 28 understand what her obligations, if any, are to respond to OppFi’s errant pleading. OppFi’s

1 approach leaves the Commissioner at an untenable crossroads on how to respond. OppFi’s pleading
2 appears invalidly filed, and a prompt determination of that issue is needs so that the Commissioner
3 can know whether resources- of the Commissioner and of the Court—need to be expended
4 addressing fully what appears to be an improper filing.

5 **IV. CONCLUSION**

6 Based on the foregoing, the Commissioner respectfully requests that this Court grant her ex
7 parte application and strike OppFi’s Further Pleading in its entirety.

8 Dated: October 19, 2022

CLOTHILDE V. HEWLETT
Commissioner of Financial Protection and Innovation

10 By: Allard Chu
11 Allard C Chu
12 Senior Counsel
13 Enforcement Division
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