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9 Cross-Complainant Opportunity Financial, LLC

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

12 OPPORTUNITY FINANCIAL, LLC,

13 Plaintiff,

14 v.

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

17 Defendant.

Case No. 22STCV08163

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

**PLAINTIFF, CROSS-DEFENDANT AND  
CROSS-COMPLAINANT OPPORTUNITY  
FINANCIAL, LLC'S OPPOSITION TO  
COMMISSIONER CLOTHILDE  
HEWLETT'S EX PARTE APPLICATION  
TO STRIKE CROSS-COMPLAINT AND  
CROSS-PETITION FOR WRIT OF  
MANDATE**

18  
19 And Related Cross-Action.

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

Action Filed: March 7, 2022  
Trial Date: N/A

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1 **I. INTRODUCTION**

2 The Court should reject the Commissioner’s procedurally improper and meritless attempt to  
3 strike Opportunity Financial, LLC’s (“OppFi”) Cross-Complaint and Cross-Petition (“Cross-  
4 Complaint”), which was just filed on October 17, 2022. The Commissioner’s *ex parte* application is  
5 flawed in every respect. The Commissioner has no statutory grounds to move to strike a pleading on  
6 an *ex parte* basis and has identified no immediate threat of harm or irreparable injury that could  
7 theoretically result if the Commissioner filed a properly noticed motion. The Commissioner has no  
8 applicable authority supporting her request to strike the Cross-Complaint, which is expressly  
9 permitted by the California Code of Civil Procedure. And the Commissioner’s contentions regarding  
10 OppFi’s request for traditional mandamus are based on a misreading of the Cross-Complaint and, like  
11 the Commissioner’s other arguments, are wholly lacking in applicable statutory or case law support.

12 **II. BACKGROUND**

13 On March 7, 2022, OppFi filed a Complaint for Declaratory and Injunctive Relief against the  
14 Commissioner in this Court because AB 539 and other interest rate caps in the California Financing  
15 Law do not apply to loans made by FinWise Bank and for which OppFi provides technology and other  
16 services. On April 8, 2022, the Commissioner filed her Answer to the Complaint. She also filed a  
17 cross-complaint against OppFi. On October 17, 2022, OppFi filed the Cross-Complaint against the  
18 Commissioner and DFPI.

19 The very next day, the Commissioner demanded that OppFi withdraw the Cross-Complaint  
20 because it is allegedly procedurally improper. Decl. of Allard Chu (“Chu Decl.”) Ex. C. The  
21 Commissioner did not provide any authority for her position. *Id.* OppFi responded offering to meet  
22 and confer and providing authority demonstrating the propriety of the Cross-Complaint and its request  
23 for traditional mandamus. *Id.* In response, the Commissioner filed her *ex parte* application, refusing  
24 OppFi’s offer for a meet and confer discussion.

25 **III. ARGUMENT**

26 **A. The Commissioner’s *Ex Parte* Application Is Procedurally Improper.**

27 The Commissioner’s *Ex Parte* Application should be denied for her failure to comply with the  
28 basic requirements of such an application. Cal. R. Ct. 3.1202 requires an *ex parte* application to

1 “make an affirmative factual showing in a declaration containing competent testimony based on  
2 personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting  
3 relief *ex parte*.” Cal. R. Ct. 3.1202(c). The Commissioner filed two declarations from the same  
4 attorney (Allard Chu), but neither demonstrates (i) irreparable harm, (ii) immediate danger, or (iii) a  
5 statutory basis for *ex parte* relief. Accordingly, the Commissioner has not provided the required  
6 “affirmative factual showing” for relief.

7 In her Memorandum, the Commissioner claims that *ex parte* relief its warranted so that she can  
8 “timely understand what her obligations, if any, are to respond” to OppFi’s purportedly “errant  
9 pleading.” Mem. at 5. The Commissioner’s concerns are unfounded because her obligations here are  
10 already clear: She has 30 days to respond. Cal. Civ. Proc. Code § 432.10. If the Commissioner  
11 believes OppFi’s filing of the Cross-Complaint is procedurally improper (it is not), she may raise that  
12 argument in a noticed motion to strike.

13 Section 436 is of no help to the Commissioner. A procedurally proper motion to strike is not  
14 made on an *ex parte* basis. Rather, a motion to strike under Section 436, can only be made after (1)  
15 meeting and conferring, *in person or by telephone*, and (2) upon a duly noticed motion to strike under  
16 Section 1005. Cal. Civ. Proc. Code § 435.5 (“Before filing a motion to strike pursuant to this chapter,  
17 the moving party shall meet and confer in person or by telephone with the party who filed the pleading  
18 that is subject to the motion to strike[.]”); *id.* § 435(b)(2) (“A notice of motion to strike the answer or  
19 the complaint, or a portion thereof, shall specify a hearing date set in accordance with Section  
20 1005.”). Where a statute expressly requires a noticed motion, *ex parte* relief is plainly improper. The  
21 Commissioner does not explain why having to follow the procedure contemplated by the Code of  
22 Civil Procedure in the normal course will cause her any harm or danger. And there is no reason to  
23 think any harm would result. She has more than ample time to file a noticed motion to strike, i.e., 30  
24 days. Cal. Civ. Proc. Code § 432.10. And by doing so she would even avoid the need to answer the  
25 Cross-Complaint. Cal. Civ. Proc. Code § 435.

26 Simply put, the Commissioner has no statutory authority authorizing an *ex parte* application  
27 under these circumstances and she has failed to make an affirmative factual showing of irreparable  
28 harm or immediate danger because there is no risk of either. Her *ex parte* application should be

1 denied for this reason alone. *See Newsom v. Superior Ct. of Sutter Cnty.*, 51 Cal.App.5th 1093, 1098  
2 (2020) (vacating trial court’s granting of *ex parte* application in part because of applicant’s failure to  
3 make required showing of urgency where applicant alleged vague concerns about “uncertainty” from  
4 Governor’s Executive Order on election rules); *People ex rel. Allstate Ins. Co. v. Suh*, 37 Cal.App.5th  
5 253, 257 (2019) (explaining that “[a] trial court should deny an *ex parte* application absent the  
6 requisite showing” of “irreparable harm, immediate danger, or any other statutory basis for granting  
7 relief *ex parte*” and affirming trial court’s denial on that basis) (quoting Cal. R. Ct. 3.1202(c)).

8 **B. The Code of Civil Procedure Expressly Permits OppFi to File a Cross-Complaint**  
9 **As of Right Asserting new Claims and Adding New Parties at the Same Time as it**  
10 **Answers the Commissioner’s Cross-Complaint.**

11 The California Code of Civil Procedure expressly permits OppFi, as a cross-defendant, to file a  
12 cross-complaint at the same time as its answer, without seeking leave. This follows from the plain  
13 language of several statutes.

14 First, California Code of Civil Procedure sections 428.10(a) and (b) establish that any party  
15 against whom a cross-complaint is filed may file a cross-complaint against the person who filed the  
16 cross-complaint against them and other non-parties.<sup>1</sup>

17 To start, pursuant to Section 428.10(b) “[a] party against whom a cause of action has been  
18 asserted in a complaint or cross-complaint may file a cross-complaint setting forth...[a]ny cause of  
19 action he has against a person alleged to be liable thereon, *whether or not such person is already a*  
20 *party to the action*, if the cause of action asserted in his cross-complaint [] arises out of the same  
21 transaction, occurrence, or series of transactions or occurrences as the cause brought against him . . . .”  
22 (emphasis added). Here, OppFi, as a cross-defendant, has a cause of action to assert against the DFPI,  
23 a new party, arising out of the Commissioner’s cross-complaint against OppFi. Under Section  
24 428.10(b), OppFi’s Cross-Complaint against the DFPI is permissible.

25 Likewise, Section 428.10(a) states that “[a] party against whom a cause of action has been  
26 asserted in a complaint or cross-complaint may file a cross-complaint setting forth . . . [a]ny cause of  
27 action he has against any of the parties who filed the complaint or cross-complaint against him . . . .”

28 <sup>1</sup> Statutory references are to the Cal. Code of Civil Procedure unless otherwise stated.

1 Here, the Commissioner asserted multiple causes of action against OppFi in a cross-complaint.  
2 OppFi, in turn, has cause of actions against the Commissioner. Under Section 428.10(a), OppFi is  
3 expressly permitted to file its Cross-Complaint against the Commissioner.

4 Second, OppFi is permitted to file its cross-complaint, *without leave*, at the same time as it  
5 files its answer. Specifically, pursuant to Section 428.50(a), “[a] party *shall* file a cross-complaint  
6 against any of the parties who filed the complaint or cross-complaint against him or her before or at  
7 the same time as the answer to the complaint or cross-complaint.” (emphasis added). Otherwise,  
8 OppFi would need to seek leave under Section 428.50(c) to file a cross-complaint. Accordingly,  
9 under Section 428.50(a), OppFi was not just expressly permitted to file its Cross-Complaint with its  
10 answer, it was required to do so.

11 Third, if there was any doubt, Section 426.30 confirms that OppFi took the appropriate action  
12 by filing its cross-complaint with its answer. Under Section 426.30, “if a party against whom a  
13 complaint has been filed and served fails to allege in a cross-complaint any related cause of action  
14 which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may  
15 not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.”  
16 As used in this statute, “complaint” refers to a complaint or cross-complaint, and “plaintiff” refers to a  
17 person who files a complaint or cross-complaint. Cal. Civ. Proc. Code § 426.10. *This statute makes*  
18 *clear that if OppFi had not filed its cross-complaint at the same time as its answer, it risked waiving*  
19 *its claims.*

20 The Commissioner has no response to the authority above. Indeed, without citing or  
21 discussing the authority above, the Commissioner simply asserts that OppFi has a “tortured” reading  
22 of the Code of Civil Procedure. Mem. at 4. There is nothing tortured about OppFi’s reading. Section  
23 428.10 authorizes the filing of a cross-complaint by a party who is named in a cross-complaint against  
24 both new and existing parties. Section 428.50 permits the filing of a cross-complaint at the same time  
25 as the filing of an answer. And Section 426.30 confirms that a party who does not file a cross-  
26 complaint with its answer risks waiving its claims. In combination, these statutes make clear that a  
27 cross-defendant, like OppFi, is not only entitled to file its own cross-complaint, but that it risks waiver  
28 if it fails to do so.

1 Without any explanation for why the statutes cited above do not apply, the Commissioner turns  
2 to Code of Civil Procedure section 472 and two inapplicable cases. However, none of the  
3 Commissioner’s authority applies to new cross-complaints. By its plain language, Section 472 relates  
4 to the amendment of pleadings that have already been filed. However, OppFi is not amending a  
5 pleading. It filed a new cross-complaint, adding a party, which is responsive to the Commissioner’s  
6 cross-complaint against it. Section 472 says nothing about the permissibility of filing a cross-  
7 complaint. In contrast, this issue is squarely addressed by the statutes OppFi cites above.

8 Moreover, the Commissioner’s construction of Section 472—as covering new cross-  
9 complaints—violates basic canons of statutory construction as it creates a conflict between Section  
10 472 and Sections 428.10, 428.50, and 426.30. As one of California’s leading treatises explains,  
11 “[w]hen two statutes touch upon a common subject, they are to be construed in reference to each other  
12 so as to harmonize the two in such a way that no part of either becomes surplusage. A court must  
13 harmonize related statutes with each other so that all parts of the statutory scheme are given effect.”  
14 58 Cal. Jur. 3d Statutes § 117. Here, Section 428.10 expressly permits the filing of a cross-complaint  
15 by a party against whom a cross-complaint was filed. However, if read as the Commissioner suggests,  
16 Section 472 conflicts with Section 428.10—outlawing cross-complaints by plaintiffs—even though  
17 Section 428.10 permits any “party” against whom a cross-complaint is filed to file its own cross-  
18 complaint. The Commissioner’s reading of Section 472 also conflicts with Section 428.50, which  
19 states that a “party shall file a cross-complaint against *any of the parties* who filed the complaint or  
20 cross-complaint against him.” (Emphasis added.) If the Commissioner’s theory is correct, the phrase  
21 “any of the parties” in Section 428.50 becomes meaningless. There is no reason to read these statutes  
22 in conflict and, tellingly, the DFPI offers no explanation or authority for its interpretation of any of  
23 these statutes.

24 The two cases the Commissioner cites are of no help. In *Woo v. Superior Court*, 75  
25 Cal.App.4th 169, 175 (1999), the plaintiff amended his original complaint by stipulation. Unlike here,  
26 the defendant in *Woo* did not file a cross-complaint against the plaintiff. *Flood v. Simpson*, 45  
27 Cal.App.3d 644, 647 (1975), is inapplicable for the same reason. It had nothing to do with the  
28 permissibility of a plaintiff cross-defendant filing a new cross-complaint.

1 Without supporting authority, the Commissioner criticizes OppFi’s citation in meet and confer  
2 correspondence to the Rutter Group’s California Practice Guide: Civil Procedure Before Trial, which  
3 recognizes the validity of OppFi’s position. It states that “[n]othing in the statutes or rules prohibits a  
4 plaintiff who is served with a cross-complaint, from filing a cross-complaint in turn.” 1 Robert E.  
5 Weil et al., *California Practice Guide: Civil Procedure Before Trial* ¶ 6:582.1 (2022) (“Rutter”). **This**  
6 **statement confirms OppFi’s interpretation of Section 472 as not applying to these facts.**  
7 Undeterred, the Commissioner seizes on additional commentary from Rutter that notes that the  
8 practice of filing complaints back and forth is “discouraged.” The Commissioner’s reliance on this  
9 statement is misplaced. There is a fundamental difference between a practice being “discouraged,”  
10 but permitted by the rules, and a practice being prohibited as a matter of law as the Commissioner  
11 incorrectly claims in her *ex parte*. Whether or not it is discouraged, there is no rule that prohibits it  
12 and, at the same time, Sections 428.10, 428.50, and 426.30 expressly permit the filing of a cross-  
13 complaint by “any party” facing a cross-complaint and impose potential penalties for failing to do so.  
14 OppFi’s filing of its Cross-Complaint is permissible.

15 **C. OppFi’s Writ of Mandate Is Properly Before This Court.**

16 The Commissioner’s argument that this Court is not the proper venue for OppFi’s petition for a  
17 peremptory writ of mandate predicated on DFPI’s violation of the APA is without merit. The  
18 Commissioner argues that OppFi seeks a writ of mandate to review this Court’s demurrer and that  
19 such a writ must be filed in the Second District Court of Appeal. Mem. at 5. The Commissioner  
20 misreads the Cross-Complaint. OppFi seeks no such thing in its Cross-Complaint. Rather, OppFi  
21 alleges in its Cross-Complaint that the *DFPI* violated the APA through its underground adoption of  
22 the “true lender doctrine” to determine the applicability of the interest rate caps and/or the bank  
23 exemption set forth in the California Financing Law (“CFL”). OppFi’s Cross-Compl. ¶¶ 44-47. As a  
24 result, OppFi seeks “a peremptory writ of mandate” directed to the DFPI “setting aside and rendering  
25 invalid use of the true lender doctrine to determine the applicability of the interest rate caps in the CFL  
26 for DFPI’s failure to comply with the rulemaking requirements of the APA.” OppFi’s Cross-Compl.  
27 Prayer for Relief ¶ 1. ***There is no request to review the Court’s order on OppFi’s demurrer.***

28 It is black-letter administrative law that a traditional writ of mandate under Code of Civil

1 Procedure section 1085 is the proper remedy for OppFi to invoke for the relief *actually* requested in  
2 the Cross-Complaint. *See e.g., Vasquez v. Dep’t of Pesticide Regul.*, 68 Cal.App.5th 672, 677 (2021)  
3 (affirming trial court’s writ of mandate directing the Department of Pesticide Regulation to engage in  
4 rulemaking after adoption of underground regulation); *Clovis Unified School Dist. v. Chiang*, 188  
5 Cal.App.4th 794, 809 (2010) (holding that “declaratory and accompanying traditional mandate relief”  
6 is a proper mechanism to challenge an underground regulation as a violation of the APA); *California*  
7 *Assn. of Medical Products Suppliers v. Maxwell-Jolly*, 199 Cal.App.4th 286, 302-04 (2011)  
8 (explaining that petition for writ of mandate pursuant to section 1085 was proper mechanism for  
9 seeking court review of agency’s adoption of regulations); *Plastic Pipe & Fittings Assn. v. California*  
10 *Building*, 124 Cal.App.4th 1390, 399, 402-03 (2004) (explaining that organization used section 1085  
11 writ of mandate to challenge agency’s failure to adopt provisions permitting the use of certain kinds of  
12 pipe). Cross-Defendant’s citation to the Rutter Group’s California Practice Guide: Civil Procedure  
13 Before Trial regarding the procedure to contest the overruling of a demurrer and the use of a petition  
14 for writ of mandate to review a municipal court action, *Burrus v. Mun. Ct.*, 36 Cal.App.3d 233, 235  
15 (1973), are plainly inapposite because they respond to relief that OppFi is not seeking in its Cross-  
16 Complaint.

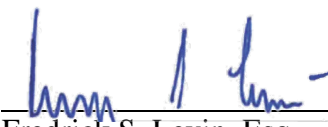
17 OppFi’s Cross-Complaint seeking a writ of mandamus is properly before this Court and the  
18 Commissioner’s *ex parte* application should be denied for this additional reason.

19 **IV. CONCLUSION**

20 Cross-Defendant’s *ex parte* application is both procedurally improper and substantively  
21 misguided. OppFi respectfully requests that the Court deny the application.

22 DATED: October 19, 2022

BUCKLEY LLP

23  
24 By:   
25 Fredrick S. Levin, Esq.  
26 Ali M. Abugheida, Esq.  
27 Attorneys for Plaintiff, Cross-Defendant,  
28 and Cross-Complainant  
Opportunity Financial, LLC



**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401.

On October 19, 2022, I served true copies of the following document(s) described as **PLAINTIFF, CROSS-DEFENDANT AND CROSS-COMPLAINANT OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S EX PARTE APPLICATION TO STRIKE CROSS-COMPLAINT AND CROSS-PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

Clothilde V. Hewlett, Commissioner	Attorneys for Defendant and Cross-
Mary Ann Smith, Deputy Commissioner	Complainant
Sean M. Rooney, Assistant Chief Counsel	
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**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address kmcfarlandramirez@buckleyfirm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 19, 2022, at Santa Monica, California.

  
Kathleen McFarland-Ramirez