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9 Cross-Complainant, and Cross-Petitioner

10 Opportunity Financial, LLC

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

13 OPPORTUNITY FINANCIAL, LLC,

14 Plaintiff,

15 v.

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

18 Defendant.

19
20 CLOTHILDE HEWLETT, in her official
capacity as Commissioner of Financial
21 Protection and Innovation for the State of
California,

22 Cross-Complainant,

23 v.

24 OPPORTUNITY FINANCIAL, LLC, and
25 DOES 1-100,

26 Cross-Defendant,
27
28

Case No. 22STCV08163

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

**PLAINTIFF, CROSS-DEFENDANT AND
CROSS-COMPLAINANT OPPORTUNITY
FINANCIAL, LLC'S VERIFIED CROSS-
COMPLAINT AND CROSS-PETITION
FOR WRIT OF MANDATE**

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

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OPPORTUNITY FINANCIAL, LLC,
Cross-Complainant and Cross-Petitioner,

v.

CLOTHILDE HEWLETT, in her official capacity as Commissioner of Financial Protection and Innovation for the State of California; DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION,

Cross-Defendants and Cross-Respondents.

1 Pursuant to Code of Civil Procedure section 428.10, Plaintiff, Cross-Defendant, Cross-
2 Complainant, and Cross-Petitioner Opportunity Financial, LLC (“OppFi”) hereby complains and
3 alleges against Defendant, Cross-Complainant, Cross-Defendant, and Cross-Respondent Clothilde
4 Hewlett (the “Commissioner”), in her official capacity as Commissioner of the California Department
5 of Financial Protection and Innovation, and Cross-Defendant and Cross-Respondent Department of
6 Financial Protection and Innovation (“DFPI,” together with the Commissioner, “Cross-Respondents”)
7 as follows:

8 **INTRODUCTION**

9 1. This Cross-Complaint and Cross-Petition challenges the DFPI’s adoption of the so-
10 called “true lender doctrine” to determine the applicability of the interest rate caps in the California
11 Financing Law (“CFL”).

12 2. The Fair Access to Credit Act (“AB 539”) became effective January 1, 2020 and
13 amended the CFL to include an interest rate cap of 36% for covered loans between \$2,500 and
14 \$10,000 made by “finance lenders” subject to the CFL.

15 3. As set forth in detail in the Complaint filed by OppFi on March 7, 2022, the
16 Commissioner threatened to enforce the AB 539’s interest cap against OppFi for loans originated by
17 FinWise Bank (“FinWise” or the “Bank”). The CFL’s interest rate caps only apply to “finance
18 lenders,” which the CFL expressly states excludes state-chartered banks like FinWise. Nonetheless,
19 the Commissioner has now sued OppFi for violating those interest rate caps.

20 4. In seeking to enforce the CFL’s interest rate caps against OppFi, Cross-Respondents
21 have asserted the applicability of the so-called “true lender doctrine.”¹ As articulated by the DFPI,
22 the applicability of its “true lender doctrine” depends on the “totality of the circumstances.” *Id.*
23 According to the DFPI, the “primary factor” in determining the so-called “true lender” is “which
24 entity – bank or non-bank – has the predominant economic interest in the transaction.” *Id.* “The
25 totality of circumstances also includes which entity actually performs lender roles, such as marketing
26 and servicing.” *Id.*

27 _____
28 ¹ See Commissioner’s Cross-Compl. ¶ 18.

1 Randolph St, Suite 3400, Chicago, IL 60601.

2 10. The DFPI is an agency of the State of California that is charged by law to execute any
3 laws relating to finance lenders.³ It is located at 2101 Arena Blvd., Sacramento, California 95834.
4 The DFPI also has an office in Los Angeles, California.

5 11. Clothilde Hewlett is the Commissioner of the DFPI. The Commissioner is charged by
6 law with “the performance of all duties, the exercise of all powers and jurisdiction, and the assumption
7 and discharge of all responsibilities vested by law in” the DFPI.⁴

8 **JURISDICTION AND VENUE**

9 12. This Court has jurisdiction over the matters alleged in the action pursuant to Code of
10 Civil Procedure sections 1060 and 1085, Government Code section 11350, and Article VI, section 10,
11 of the California Constitution.

12 13. Venue is proper in this Court because the DFPI has an office in the County of Los
13 Angeles located at 300 South Spring Street, Los Angeles, CA 90013.⁵

14 **BACKGROUND**

15 **A. The Loan Program**

16 14. OppFi is a leading financial technology platform and service provider focused on
17 helping middle income, credit-challenged consumers build a better financial path. OppFi’s platform
18 allows banks to provide access to simple short-term lending products for consumers who may
19 otherwise be turned away by traditional lenders in light of their credit profile.

20 15. FinWise has developed loan products that provide credit to serve these consumers who
21 cannot access traditional credit markets given their high credit risk. The loan products offered by the
22 Bank provide for transparent pricing, have no origination or late fees, are fully amortizing with no
23 balloon payments, and allow borrowers to prepay at any time with no penalty. In light of the high
24 credit risk posed by this population, the interest rates charged on these loans are often higher than

25
26 ³ Cal. Fin. Code § 300.

27 ⁴ Cal. Fin. Code § 326.

28 ⁵ Code of Civil Proc. § 401(1).

1 traditional loans because the borrowers have no collateral to use as security and default at a high rate.

2 16. OppFi and FinWise have entered into an agreement pursuant to which the Bank uses
3 the OppFi technology platform to provide such loan products to consumers throughout the United
4 States and, more specifically, consumers in California. In this way, OppFi allows the Bank to
5 compete against larger national banks with greater resources to develop their own technology
6 platforms.

7 17. The Bank is identified as the lender and funds the loans for all California borrowers
8 who obtain loans through OppFi’s online platform (“Program Loans”). As a federally-insured, state-
9 chartered bank located in Utah, FinWise may lend to out-of-state borrowers at the rate permitted by
10 Utah law.⁶ Utah does not have an interest rate cap.⁷

11 18. In July of 2020, the FDIC issued its Interest Rate Authority Rule, which provides that
12 “[w]hether interest [charged] on a loan is permissible under [S]ection 27 . . . is determined at the time
13 the loan is made,” and that “[i]nterest on a loan that is permissible under [S]ection 27 . . . shall not be
14 not affected by . . . the sale, assignment, or other transfer of the loan, in whole or in part.”⁸

15 **B. Interest Rate Regulation in California**

16 19. California’s usury law, though “far from a model of clarity,” regulates the charging of
17 interest in the state.⁹ Section 1 of Article XV of the California Constitution prohibits the charging of
18 interest on a loan at a rate in excess of 10 percent.¹⁰ It also enumerates several classes of lenders
19 exempt from that prohibition and makes clear that none of its interest-rate restrictions apply “to any
20

21 _____
22 ⁶ 12 U.S.C. § 1831d; Interest Rate Authority Notice, 85 Fed. Reg. at 44,147 (citing *Greenwood*
23 *Trust Co. v. Com. of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992)); *see also California v. Check ‘n Go of*
24 *Cal., Inc.*, No. C 07-02789 JSW, 2007 WL 2406888, at *2 (N.D. Cal. Aug. 20, 2007) (holding Section
25 27 preempted state usury claims against state-chartered bank).

26 ⁷ Utah Code Ann. § 15-1-1; *see also People of the State of California, et al. v. Federal*
27 *Deposit Insurance Corporation*, Case No. 20-5860, ECF No. 1, Complaint ¶ 37 (recognizing that
28 “Utah . . . imposes no caps on the rates banks may charge when the parties execute a written contract”).

⁸ 12 C.F.R. § 331.4(e).

⁹ *Wishnev v. Nw. Mut. Life Ins. Co.*, 8 Cal.5th 199, 206 (2019).

¹⁰ Cal. Const. art. XV, § 1; *Wishnev*, 8 Cal.5th at 209.

1 successor in interest to any” loan made by an exempted lender.¹¹ At the same time, it authorizes the
2 California Legislature to create additional classes of lenders exempt from the maximum rate and to set
3 alternative maximum interest rates applicable to the exempted lenders.¹²

4 20. Pursuant to its constitutional authority, the California Legislature created an exemption
5 to the constitutional usury provision for state banks, like FinWise.¹³ It also enacted the CFL to create
6 an additional exemption for, among others, “finance lenders.”¹⁴ The latter are subject to alternative
7 maximum interest rates prescribed by the CFL, but the CFL expressly exempts banks from the
8 definition of “finance lender.”¹⁵ Thus, as a matter of California law, a loan made by a state bank like
9 FinWise is not subject to any maximum interest rate prescribed by California law.

10 21. In contrast to FinWise’s loans, loans subject to the CFL must comply with alternative
11 maximum interest rate caps. Prior to January 1, 2020, the CFL only set interest maximum interest
12 rates for loans in amounts less than \$2,500. In 2019, California passed AB 539, which sets maximum
13 interest rates for loans between \$2,500 and \$10,000. Under AB 539, the interest rate finance lenders
14 may charge on loans in amounts between \$2,500 and \$10,000 is capped at “an annual simple interest
15 rate of 36 percent per annum plus the Federal Funds Rate.”¹⁶

16 22. AB 539 did not purport to alter any existing exemptions to the California Constitution
17 or CFL interest rate caps, or the long body of case law interpreting them.

18 **C. The Commissioner Touts AB 539 as a Weapon to Use Against Nondepositories
19 With Bank Partnerships.**

20 23. OppFi is informed and believes that, as soon as AB 539 was signed into law, and
21 despite knowing AB 539 does not apply to bank partnerships under the plain language of the CFL and

22 _____
23 ¹¹ Cal. Const. art. XV, § 1.

24 ¹² *Id.*; *Wishnev*, 8 Cal. 5th at 209.

25 ¹³ Cal. Fin. Code § 1675 (“Any foreign (other state) state bank is exempted from the
26 restrictions of Section 1 of Article XV of the California Constitution relating to rates of interest upon
27 the loan or forbearance of any money . . .”).

28 ¹⁴ Cal. Fin. Code § 22002.

¹⁵ Cal. Fin. Code § 22050.

¹⁶ Cal. Fin. Code § 22304.5(a).

1 in light of federal preemption, the former DFPI Commissioner began touting AB 539 as a weapon to
2 use against nondepositories that partner with state and federally chartered banks.

3 24. OppFi is informed and believes that the former Commissioner likewise quickly
4 expressed concern regarding “reports of companies using rent a bank schemes to avoid usury limits.”¹⁷

5 25. OppFi is informed and believes that, following up on those purported concerns, the
6 former Commissioner launched an “investigation into whether prominent auto title lender Wheels
7 Financial Group, LLC, which does business as LoanMart, is evading California’s newly-enacted
8 interest rate caps through its recent partnership with an out-of-state bank.”¹⁸

9 26. OppFi is informed and believes that, in launching this investigation, the Commissioner
10 stated that “[t]he ball is now in the [DFPI’s] court to enforce the Fair Access to Credit Act [i.e. AB
11 539]. We will not sit idly if the same exorbitant-interest credit is being marketed, processed, and
12 serviced by the same company as before, distributed through the same channels as before, and to the
13 same target customers as before.”¹⁹

14 27. The Commissioner’s statements are contrary to law. As set forth above, loans
15 originated by state-chartered banks are not subject to the CFL or AB 539.

16 28. Further, the Commissioner’s statements are contrary to the DFPI’s past positions. For
17 years before the enactment of AB 539, FinWise originated Program Loans in amounts less than
18 \$2,500 that would have been subject to interest rate caps if the CFL applied to loans originated by
19 FinWise. OppFi is formed and believes that, despite knowing about these loans, the DFPI never
20 sought to enforce the CFL’s interest rate limits, tacitly recognizing that existing statutory exemptions
21 and federal preemption precluded it from doing so. AB 539 did not and could not change any of that.
22 Instead, OppFi is formed and believes that the Commissioner and the DFPI are using the recent

23 ¹⁷ *Leaders are using banks to skirt a CA interest rate law.* Sacramento Bee, Dec. 18, 2019,
24 <https://www.sacbee.com/news/politics-government/capitol-alert/article238501288.html> (registration
required).

25 ¹⁸ Press Release, DFPI, DBO Launches Investigation Into Possible Evasion of California’s
26 New Interest Rate Caps By Prominent Auto Title Lender, LoanMart (Sept. 3, 2020),
27 [https://dbo.ca.gov/2020/09/03/dbo-launches-investigation-into-possible-evasion-of-californias-
new-interest-rate-caps-by-prominent-auto-title-lender-loanmart/](https://dbo.ca.gov/2020/09/03/dbo-launches-investigation-into-possible-evasion-of-californias-new-interest-rate-caps-by-prominent-auto-title-lender-loanmart/) (last visited March 4, 2022).

28 ¹⁹ *Id.*

1 passage of AB 539 as a pretext to wage a war against nondepositories that contract with banks that has
2 no basis in the law.

3 **D. The Commissioner Investigates OppFi and Concludes That OppFi Violated**
4 **the CFL’s Interest Rate Caps**

5 29. On February 24, 2020, after the public comments described above, the Commissioner,
6 through Mr. Johnny Vuong, contacted OppFi and requested information “relating to OppLoans’s
7 apparent partnership with a bank in the making of loans in California above the rate limit set forth in
8 the recent Fair Access to Credit Act (AB 539).”

9 30. Notwithstanding OppFi’s complete cooperation with the DFPI’s informal investigation,
10 on February 23, 2022, Mr. Vuong contacted OppFi and conveyed the Commissioner’s conclusion that
11 Program Loans are subject to and in violation of the CFL’s interest rate caps.

12 **E. The Complaint and Cross-Complaint**

13 31. In response, on March 7, 2022, OppFi filed a Complaint for Declaratory and Injunctive
14 Relief against the Commissioner in this Court because AB 539 and other interest rate caps in the CFL
15 do not apply to the Program Loans made by the Bank and for which OppFi provides technology and
16 other services. OppFi explained in the Complaint that a federal district court recently rejected the
17 argument that the Program Loans were subject to the CFL’s interest rate caps because OppFi was the
18 “true lender.” The district court held that because the loans were made by the Bank, and loans made
19 by state banks are exempt from California’s interest rate caps, the Program Loans were statutorily
20 exempt from the CFL’s interest rate caps.²⁰

21 32. On April 8, 2022, the Commissioner filed a Cross-Complaint against OppFi, alleging
22 violations of the CFL and California Consumer Financial Protection Law (“CCFPL”) based on the
23 Program Loans. The Commissioner claimed that OppFi’s relationship with FinWise is merely a “rent-
24 a-bank ruse” designed to permit OppFi “to circumvent interest rate limits[.]”²¹ In her view, OppFi is
25 the “true lender” of the Program Loans “[r]egardless of which entity the loan documents proffer as the

26 _____
27 ²⁰ *Sims v. Opportunity Fin., LLC*, No. 20-cv-04730-PJH, 2021 WL 1391565, *4 (N.D. Cal.
28 Apr. 13, 2021) (dismissing claims against OppFi alleging loans exceeded CFL interest rate caps).

²¹ Cross-Compl. ¶ 5.

1 *purported ‘lender.’”²² And since OppFi is subject to the interest rate caps in the CFL, the Program*

2 Loans are illegal in California.”²³

3 33. To reach the conclusion that OppFi is the true lender of the Program Loans and that the

4 interest rates on those loans must therefore comply with the CFL’s interest rate caps, the

5 Commissioner relied on the “true lender doctrine.”²⁴ According to the Commissioner:

6 Under the true lender doctrine, the question is whether the entity

7 named as the “lender” in the loan documents is in fact the true lender

8 or if another entity—here, OppFi-- should be viewed as the de facto

9 lender. The substance of the transaction controls, not the form, and

10 courts consider the totality of the circumstances. The primary factor

11 is which entity --bank or non-bank-- has the predominant economic

12 interest in the transaction. The totality of circumstances also includes

13 which entity actually performs lender roles, such as marketing and

14 servicing. When the non-bank lending company is the true lender, the

15 loans it is, in all reality, making are not exempt from state interest

16 rate caps.²⁵

17 34. The Commissioner concluded that it is “OppFi, not FinWise, that holds the

18 predominant economic interest in OppLoans, bears the risk of poor loan performance, and performs

19 all the functions of a traditional lender with minimal, if any, downside to FinWise. OppFi is the true

20 lender, and its loans are illegal.”²⁶

21 35. The Commissioner did not cite to any provision of the CFL or any implementing

22 regulations as the source of the true lender doctrine. Instead, it cited three legal decisions. California

23 law was not at issue in two of these cases. The third case did not involve, much less consider, the

24 California Constitution, the CFL, or their statutory exemptions. **Accordingly, the authority cited**

25 **provides no foundation for the DFPI’s true lender doctrine, much less for failing to comply with the**

26 **APA.**

27 **F. OPFI’s Demurrer and the Court’s Order**

28 36. On May 10, 2022, OppFi filed a demurrer to the Commissioner’s Cross-Complaint on

²² *Id.* (emphasis added).

²³ Cross-Compl. ¶ 5.

²⁴ *Id.* ¶ 18.

²⁵ *Id.*

²⁶ *Id.* ¶ 19; *see id.* ¶¶ 20-28.

1 the basis that the true lender doctrine has no basis in California law and that the *Sims* court rejected the
2 very application of the doctrine that the Commissioner adopted in her Cross-Complaint. In opposing
3 OppFi’s demurrer, the Commissioner doubled down on her adoption of the true lender doctrine,
4 claiming that it had deep roots in California law. Yet the Commissioner again failed to cite a single
5 California decision holding that the true lender doctrine determines who a lender is for purposes of the
6 CFL or limits the applicability of California’s Constitutional and statutory exemptions from usury.

7 37. On September 30, 2022, the Court overruled OppFi’s demurrer. It explained that the
8 “actual lender under the usury laws [] cannot be resolved on demurrer.”²⁷ The Court did not
9 undertake to determine whether the Commissioner’s adoption of the true lender doctrine is a valid
10 interpretation of any particular provision of the CFL. Nor did it determine what deference, if any, to
11 give to DFPI’s interpretation of the statute.

12 G. The APA’s Rulemaking Requirements

13 38. The APA establishes “basic minimum procedural requirements for the adoption,
14 amendment, or repeal of administrative regulations.”²⁸ “These requirements promote the APA’s
15 goals of bureaucratic responsiveness and public engagement in agency rulemaking.”²⁹ “One purpose
16 of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its
17 creation ..., as well as notice of the law’s requirements so that they can conform their conduct
18 accordingly The Legislature wisely perceived that the party subject to regulation is often in the
19 best position, and has the greatest incentive, to inform the agency about possible unintended
20 consequences of a proposed regulation.”³⁰

21 39. The APA’s rulemaking procedures meet these objectives by requiring the agency to
22 give public notice of its proposed regulatory action, prepare express regulatory terms and a statement
23 of reasons for the regulation, provide interested parties an opportunity to comment on the proposed
24

25 ²⁷ Sept. 30, 2022 Minute Order p. 9.

26 ²⁸ Gov’t Code § 11346.

27 ²⁹ *Morning Star Co. v. State Bd. of Equalization*, 38 Cal.4th 324, 333 (2006).

28 ³⁰ *Tidewater Marine W., Inc.*, 14 Cal.4th at 568–69 (1996).

1 regulation, and respond in writing to public comments.³¹ The agency must then send the proposed
2 regulation to the Office of Administrative Law for review with the standards of necessity, authority,
3 clarity, consistency, reference, and nonduplication.³²

4 40. The APA provides that “[n]o state agency shall issue, utilize, enforce, or attempt to
5 enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or
6 other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion,
7 bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a
8 regulation and filed with the Secretary of State pursuant to this chapter.”³³

9 41. Pursuant to Section 11342.600 of the APA, a regulation includes “every rule,
10 regulation, order, or standard of general application . . . to implement, interpret, or make specific the
11 law enforced or administered by it, or to govern its procedure.”³⁴ In particular, “[a]n unwritten,
12 generally applicable interpretation of an ambiguous statute ‘amount[s] to a regulation’ subject to the
13 APA.”³⁵

14 42. There are two requirements for a regulation. “First, the agency must intend its rule to
15 apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule
16 applies generally so long as it declares how a certain class of cases will be decided.”³⁶ “Second, the
17 rule must ‘implement, *interpret*, or make specific the law enforced or administered by [the agency], or
18 . . . govern [the agency’s] procedure.’”³⁷

19 43. If the rule is a “regulation,” and there is no express statutory exemption excusing the
20 agency from complying with the APA’s rulemaking procedures, then the underground regulation is
21
22

23 ³¹ Gov’t Code §§ 11346.2, 11346.4, 11346.5, 11346.8, 11346.9.

24 ³² Gov’t Code §§ 11349.1, 11349.3.

25 ³³ Gov’t Code § 11340.5(a).

26 ³⁴ Gov’t Code § 11342.600.

27 ³⁵ *Capen v. Shewry*, 155 Cal.App.4th 378, 383 (2007) (citation omitted).

28 ³⁶ *Tidewater Marine W., Inc.*, 14 Cal. 4th at 571.

³⁷ *Id.* (quoting Gov’t Code § 11342.600) (emphasis added).

1 invalid and cannot be enforced.³⁸

2 H. DFPI's Underground Regulation

3 44. As demonstrated by the former Commissioner's public comments, Mr. Vuong's
4 accusations, the Commissioner's allegations in the Cross-Complaint, and her arguments in opposition
5 to OppFi's demurrer, DFPI has taken the position that to determine the lender of a loan for purposes of
6 the CFL's interest rate caps and/or for purposes of determining the application of the CFL's
7 exemptions, it is necessary to apply the "true lender doctrine." According to the Commissioner, this
8 requires looking to the substance of the transaction, rather than its form, and considering the totality of
9 the circumstances. The primary factor in the analysis is "which entity—bank or non-bank—has the
10 predominant economic interest in the transaction."³⁹

11 45. DFPI has not expressly stated which provision of the CFL it interpreted in adopting the
12 true lender doctrine. Section 22009 *extends* the CFL's interest rate caps to any "finance lender,"
13 which the statute defines to mean "any person who is engaged in the business of making consumer
14 loans or making commercial loans."⁴⁰ Section 22050 expressly *excludes* from CFL's interest rate caps
15 "any person doing business under any law of any state or of the United States relating to banks."⁴¹
16 The APA's rulemaking requirements do not apply where a regulation "embodies the only legally
17 tenable interpretation of a provision of law."⁴² DFPI's interpretation of either provision to require
18 application of its true lender doctrine to determine the applicability of the CFL's interest rate caps,
19 however, is not "plainly ineluctable."

20 46. DFPI's adoption of the true lender doctrine meets the first requirement of a regulation
21 because its construction of the CFL means that all entities that are the "true lender" under the DFPI's
22 test are subject to the statute's interest rate limitations. As demonstrated by the DFPI's actions against
23

24 ³⁸ *Tidewater Marine W., Inc.*, 14 Cal.4th at 576; *Morning Star Co.*, 38 Cal.4th at 333.

25 ³⁹ Commissioner's Cross-Compl. ¶ 18.

26 ⁴⁰ Cal. Fin. Code § 22009.

27 ⁴¹ Cal. Fin. Code § 22050(a).

28 ⁴² Gov't Code § 11340.9(f); *Morning Star Co.*, 38 Cal.4th at 328 (agency cannot avail itself of the APA exception where interpretation "is reasonable, but not plainly ineluctable").

1 OppFi and LoanMart, the DFPI’s policy decides a class of cases, not just whether OppFi is subject to
2 the CFL on the Program Loans. In other words, DFPI has adopted a generally applicable rule of
3 interpretation, which among other things, provides that applicability of the bank exemption turns on
4 which entity has the predominant economic interest. DFPI’s adoption of the true lender doctrine also
5 meets the second requirement because an agency’s interpretation of the law it is charged with
6 enforcing is a regulation.⁴³ Accordingly, DFPI’s use of the true lender doctrine is a regulation within
7 the meaning of the APA.

8 47. OppFi is informed and believes that DFPI has not complied with any of the APA’s
9 required rulemaking procedures for its regulation interpreting Section 22009 and/or Section 22050 of
10 the CFL.

11 **FIRST CAUSE OF ACTION**

12 **(Writ of Mandate, Code of Civil Procedure § 1085(a) -- Violation of the California**
13 **Administrative Procedure Act, Gov’t Code § 11340 et seq.)**

14 48. OppFi incorporates by reference as if fully set forth all of the allegations in the
15 preceding paragraphs.

16 49. DFPI’s adoption of the “true lender doctrine” to construe the CFL and/or its
17 exemptions is a regulation and subject to the rulemaking provisions of the APA. OppFi has been
18 injured by the DFPI’s underground rulemaking because its enforcement position is based on
19 application of its true lender doctrine.

20 50. As an administrative agency, DFPI had a clear, present, and ministerial duty to provide
21 notice of the proposed regulation, provide a public hearing if requested, provide for an opportunity for
22 interested persons to submit written comments if no hearing was held, and to respond in writing to
23 those comments.⁴⁴ The Commissioner likewise had a clear, present, and ministerial duty to ensure
24 DFPI’s compliance with the APA’s rulemaking provisions.

25 51. Cross-Respondents violated their clear, present, and ministerial duty to comply with the
26

27 ⁴³ See Cal. Fin. Code §§ 300, 326 (DFPI charged with enforcing the CFL).

28 ⁴⁴ Gov’t Code §§ 11346.8, 11346.9.

1 rulemaking procedural requirements set forth in the APA or abused their discretion by refusing to
2 comply with the rulemaking procedural requirements set forth in the APA. Cross-Respondents’
3 violation of the APA was a “substantial failure” and rendered the DFPI’s adoption of the true lender
4 doctrine invalid.⁴⁵

5 52. OppFi has a direct and substantial beneficial interest in the issuance of a writ of
6 mandate, apart from that of the public at large, in that if this Cross-Complaint and Cross-Petition is
7 granted, OppFi will be able to continue to offer its technology platform to FinWise to enable the Bank
8 to make loans to California consumers. DFPI seeks to use its true lender doctrine to enjoin OppFi’s
9 business, require OppFi to make restitution to borrowers and disgorge payments of interest, and
10 obligate OppFi to pay penalties, which will have a severe and immediate effect on OppFi’s business in
11 California.

12 53. OppFi does not have a plain, speedy, and adequate remedy in the ordinary course of
13 law other than the relief sought by this Cross-Complaint and Cross-Petition, because no damages or
14 legal remedy could compensate it for the harm it will suffer if Cross-Respondents continue to evade
15 their clear, present, and ministerial duty to comply with the APA and continue to seek to enforce the
16 CFL and CCFPL against OppFi on the basis of the true lender doctrine.

17 **SECOND CAUSE OF ACTION**

18 **(Declaratory Relief, Code Civ. Proc. § 1060; Gov’t Code § 11350—Violation of the**
19 **California Administrative Procedure Act, Gov’t Code § 11340 *et seq.*)**

20 54. OppFi incorporates by reference as if fully set forth all of the allegations in the
21 preceding paragraphs.

22 55. An actual controversy has arisen and now exists between OppFi and Cross-
23 Respondents concerning the obligations and duties of Cross-Respondents under the APA. As set forth
24 more fully above, OppFi contends that DFPI’s adoption of the true lender doctrine constitutes an
25 illegal underground regulation that DFPI has enforced in violation of the APA. OppFi is informed and
26 believes, and on that basis alleges, that Cross-Respondents contend in all respects to the contrary.

27 _____
28 ⁴⁵ Gov’t Code § 11350(a).

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OppFi and Cross-Respondents are therefore entitled to a judicial determination of the parties' rights and duties with respect to the true lender doctrine.

PRAYER FOR RELIEF

WHEREFORE, OppFi prays for relief as follows:

1. For a peremptory writ of mandate setting aside and rendering invalid use of the true lender doctrine to determine the applicability of the interest rate caps in the CFL for DFPI's failure to comply with the rulemaking requirements of the APA;
2. For a declaration that DFPI's adoption of the true lender doctrine to determine the applicability of the interest rate caps in the CFL violated the rulemaking requirements of the APA and is therefore invalid;
3. For a declaration that DFPI's use of true lender doctrine to enforce the interest rate caps in the CFL is invalid;
4. For reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.5;
5. For costs of suit incurred herein; and
6. For such other and further relief as the Court may deem proper.

DATED: October 17, 2022

BUCKLEY LLP

By: 

Fredrick S. Levin
Attorneys for Plaintiff and Cross-Defendant
Opportunity Financial, LLC

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VERIFICATION

I, Todd Schwartz, declare:

1. I have read the foregoing Cross-Complaint and Cross-Petition for Writ of Mandate and know its contents.
2. I am authorized to make this verification for and on behalf of Opportunity Financial, LLC (“OppFi”) and make this verification for that reason.
3. The facts stated herein are true and correct, except as to those facts which are stated on information and belief, and as to those facts, I believe them to be true.

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

Executed on October 17th, 2022 at Pacific Palisades, California.

Todd Schwartz
Todd Schwartz

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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 17, 2022, I served true copies of the following document(s) described as **PLAINTIFF, CROSS-DEFENDANT AND CROSS-COMPLAINANT OPPORTUNITY FINANCIAL, LLC'S VERIFIED 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	
Daniel O'Donnell, Assistant Chief Counsel	
Johnny O. Vuong, Senior Counsel	
Francis N. Scollan, Senior Counsel	
Allard C. Chu, Senior Counsel	
DEPARTMENT OF FINANCIAL	
PROTECTION AND INNOVATION	
320 West 4th Street, Suite 750	
Los Angeles, CA 90013-2344	
Tel: (213) 503-4164	
Fax: (213) 576-7181	
Email: Johnny.Vuong@dfpi.ca.gov	
Email: Frank.Scollan@dfpi.ca.gov	
Email: Allard.Chu@dfpi.ca.gov	

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 17, 2022, at Carlsbad, California.

Kathleen McFarland-Ramirez
Kathleen McFarland-Ramirez