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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

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-Actions.

[PUBLIC-REDACTS MATERIALS FROM CONDITIONALLY SEALED RECORD]

Case No. 22STCV08163

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

OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

[Filed Concurrently with Declarations of Fredrick S. Levin, J. Duross O'Bryan, Christopher James and Chris McKay; and [Proposed] Order]

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I. INTRODUCTION

FinWise Bank ("FinWise") is a Utah state-chartered bank, regulated by the Utah Department of Financial Institutions ("Utah DFI") and the Federal Deposit Insurance Corporation ("FDIC"). Federal and Utah law permit FinWise to charge any interest rate and California law exempts FinWise's loans from its interest rate caps. FinWise uses strategic relationships with service providers like Opportunity Financial, LLC ("OppFi") to offer lending products to borrowers in California and throughout the nation (the "Program Loans"). These strategic relationships allow FinWise to manage liquidity, maintain safe and sound practices, and compete with national banks.

The Commissioner of the California Department of Financial Protection and Innovation ("DFPI") seeks, for loans with rates above 36%, to enjoin OppFi from (i) providing marketing and other services to FinWise in connection with new FinWise loans to California residents, (ii) purchasing receivables on new FinWise loans made to California residents, and (iii) transmitting new loan applications to FinWise (the "Motion"). The DFPI's sole basis for seeking this extensive injunction is her claim that OppFi is the "true lender" of FinWise's loans using her newly formulated "true lender" doctrine, which, in her view, defeats FinWise's exemption from California's interest rate caps and, presumably, avoids federal preemption.

The DFPI is wrong on the law and wrong on the facts. As discussed in Sections III.A. – III.C. Federal and California law both independently prohibit application of the DFPI's "true lender" doctrine. Federal law preempts its application. California law does not recognize it, and the DFPI cannot enforce it without first complying with the Administrative Procedure Act ("APA"), Gov't Code § 11340 *et seq*. And, as discussed in Section III.D, even if such an analysis could apply, OppFi is not the "true lender" by any measure. The concurrently filed declarations of Simon Darchis, Vice President, Director of Specialty Lending at FinWise ("Darchis"), and Chris McKay, Chief Risk and Analytics Officer at OppFi ("McKay"), establish that the DFPI's description of FinWise's relationship with OppFi is simply incorrect. McKay, ¶¶28-43; Darchis, ¶¶1-43.

Contrary to the DFPI's assertions, FinWise independently underwrites all Program Loans from Utah using its own proprietary process, FinWise funds all Program Loans using its own money from accounts that it solely controls, FinWise holds title to all Program Loans throughout their

lifecycle and, as such, maintains all of the traditional rights of a lender and assumes regulatory risk. Further, FinWise maintains a substantial economic interest in the loans it originates, and, at origination, bears what the DFPI calls the "predominant economic interest" ("PEI"), by any measure. McKay, ¶¶8a-d, 9, 13a-e, 17-27; Darchis, ¶¶14-20, 31-35. Moreover, FinWise maintains and exercises complete control over all aspects of its relationship with OppFi, including the application process, marketing, servicing, and credit policy and is supervised by the FDIC and Utah DFI for each loan and the entire loan program. McKay, ¶¶9-11; Darchis, ¶¶21-27, 36.

Finally, while FinWise owns the loans for their life, OppFi's interest in the loan receivables is transient—receivables purchased by OppWin, LLC ("OppWin") are, ***within days***, transferred again to special purpose entities ("SPE"), which automatically pledge the receivables to third-party lenders. McKay, ¶¶13-27. As explained by Dr. Christopher James ("James"), former Senior Economic Advisor to the Comptroller of the Currency and FDIC consultant, this chain of secondary market transactions is common across consumer lending and is necessary for banks to manage risk. James, ¶¶19-23. Further, as explained by J. Duross O'Bryan ("O'Bryan"), a forensic accountant, these transactions effectively transfer the economic upside and risk of loss to each SPE's lender within days of OppWin's purchase. O'Bryan, ¶¶36-38.[1] While the DFPI concedes that the receivables are assigned and pledged to third parties, its analysis otherwise ignores these facts entirely—it offers no explanation for why or how, OppFi still, supposedly, maintains the PEI when loan receivables, including the right to borrower payments, have been transferred to third parties, unaffiliated with OppFi or FinWise, within days of funding. Moreover, as shown by Mr. O'Bryan, among economic interest holders in the loans, FinWise places the largest sum of money at risk.

II. LEGAL STANDARD

To obtain a preliminary injunction, the DFPI must demonstrate: (1) a "likelihood that [it] will prevail on the merits at trial," *White v. Davis*, 30 Cal.4th 528, 554 (2003), and (2) irreparable injury that outweighs the harm caused by the injunction, *City of Torrance v. Transitional Living Centers for L.A., Inc.*, 30 Cal.3d 516, 526 (1982). If the DFPI establishes a reasonable probability

[1] References to "Darchis," "O'Bryan," "James," and "Levin," are to declarations filed concurrently with this Opposition. Darchis is attached to the Levin declaration as Exhibit K.

of success on the merits, it is entitled to a rebuttable presumption of irreparable injury. *IT Corp. v. Cnty. of Imperial*, 35 Cal.3d 63, 72 (1983). OppFi may rebut the presumption by demonstrating grave or irreparable harm would arise from the injunction. ***Id.***

III. THE DFPI CANNOT ESTABLISH A REASONABLE PROBABILITY OF PREVAILING ON THE MERITS.

A. Federal Law Preempts the DFPI's CFL Claim.

A state-chartered bank has the right under Section 27 of the Federal Deposit Insurance Act ("FDIA") to charge interest "on any loan" "at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. § 1831d(a). FinWise is located in Utah, which allows FinWise to contract for "any" interest rate. Utah Code Ann. § 15-1-1. Because FinWise underwrites, funds, holds title to, and subjects its loans to FDIC supervision, Section 27 preempts California's usury rates. Instead, Utah's law governs. *Hudson v. Ace Cash Express, Inc.*, 2002 WL 1205060 (S.D. Ind. May 30, 2002), and *Sawyer v. Bill Me Later, Inc*., 23 F.Supp.3d 1359 (D. Utah 2014), are instructive.

In *Hudson*, the borrower obtained a loan through Ace Cash Express ("Ace"), which named Goleta, a national bank, as the lender. 2002 WL 1205060, at *3-*4. By prearrangement, Ace purchased 95% of the loan receivable, leaving Goleta with ownership of the loan and a 5% interest. *Id.* The borrower sued claiming that the note was usurious under Indiana law and that Ace was true lender. *Id*. Applying Section 85, the national bank counterpart to Section 27,[2] the court held that federal law governed the interest rate and preempted contrary Indiana usury law because even after the sale of 95% of the receivables to a non-bank, the bank retained ownership of the loan and an economic interest. As a result, the borrower's allegations that the "lending arrangements [were] designed for the sole purpose of circumventing Indiana usury law" were irrelevant. *Id*. *4.

In *Sawyer*, the court reached the same conclusion where the program loans were funded by a bank and the receivable interest was sold two days later to a non-bank in a prearranged transaction, leaving the bank with title to the loan. 23 F.Supp.3d at 1360-61. In holding that Section 27 preempted California's usury rates, the court explained that the bank's "role in originating the loan subjects the program and [the non-bank] to regulatory scrutiny and accountability [by the FDIC]

[2] Notice, 85 Fed. Reg. 44,146-147 ("Because section 27 was patterned after section 85 . . . courts and the FDIC have consistently construed section 27 in *pari materia* with section 85.").

under the FDIA." 23 F.Supp.3d at 1368. As a result, the FDIA applies and "results in extensive FDIC supervision of the loan program and examination for compliance with all applicable federal and state laws." *Id*. Under these circumstances, as *Sawyer* explained, "arguments that the [bank is] not the true lender . . . are unavailing and cannot overcome [the] fundamental prudential argument" underlying Section 27. *Id*. at 1368.

Here, as in *Hudson* and *Sawyer*, the Program loans qualify as "any" loans under Section 27 and FinWise has a ***federal*** right to charge interest according to Utah law; no "doctrine" of California law can condition or define the terms of FinWise's ***federal*** right. The DFPI's "true lender" doctrine, like any other rule of California law, is expressly preempted.

That federal right extends expressly to the sale of FinWise's loan receivables under the FDIC's Interest Rate Authority Rule (the "Rule"). While the Rule does not expressly preempt all forms of the true lender doctrine, it preempts the DFPI's version. The Rule provides that "whether interest on a loan is permissible under section 27 . . . **is determined *as of* the date the loan was made**" and "shall not be **affected by . . . the sale, assignment, or other transfer of the loan, in whole or in part**." 12 C.F.R. § 331.4(e) (emphasis added). Here, the DFPI argues that OppFi is the "true lender" "primarily" because an affiliate purchases receivables "within three days **after** FinWise funds the loan." Mot. at 5:22-24 (emphasis added). This argument, focused on the purchase of receivables, violates the Rule in two ways. First, it looks to events occurring after the date the loan was made. Second, it purports to "affect[]" the "permissible" interest rate by taking into account a subsequent "sale . . . of the loan, in whole or in part." 12 C.F.R. § 331.4(e). Neither is permissible.

Peterson v. Chase Card Funding, LLC, 2020 WL 5628935, *3-7 (W.D.N.Y. Sept. 21, 2020) is instructive. In *Peterson*, the court examined preemption under the National Bank Act. The national bank sold 100% of the program loan receivables to a non-bank in a prearranged transaction but retained ownership of the loan. Under these circumstances, as in *Hudson* and *Sawyer*, the *Peterson* court held that the bank's ownership of the loans is a "substantial interest," which is sufficient for express preemption to apply. *Id*. *7. The court explained that even if Section 85 did not expressly preempt application of state usury laws, the OCC's equivalent to the Rule made clear that it "preempts state-law usury claims on any loans sold, assigned, or transferred." *Id*. *5, *7; *see*

also Cohen v. Capital One, Funding, LLC, 489 F.Supp.3d 33, 42, 49-50 (E.D.N.Y. 2020) (same); *Krispin v. v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000) (state law usury claims preempted where bank sold 100% of receivables to non-bank in a prearranged transaction). The same is true here. Even if Section 27 did not expressly preempt California's usury law before the FDIC promulgated the Rule, it is clear that it is preempted now.

Finally, even if the Court concludes that Section 27, as implemented by the Rule, does not ***expressly*** preempt the Commissioner's claim, it is nonetheless impliedly preempted because it poses a direct obstacle to Congress's purposes and objectives in enacting Section 27. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.* 471 U.S. 707, 712-13 (1985) (conflict preemption occurs when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Congress enacted Section 27 to (1) "level the playing field" between state and national banks, (2) provide state banks with the same uniform set of rules governing the interest they may charge, (3) ensure that state banks can manage "safety and soundness" concerns, (4) ensure that state banks have the "ability to manage their liquidity," and (5) ensure that state banks have the "ability to use loan sales and securitization to diversify their funding sources and address interest-rate risk." *See, e.g., Greenwood Trust Co. v. Commw. of Mass.*, 971 F.2d 818, 827-29 (1st Cir. 1992); Notice, 85 Fed. Reg. at 44,147-44,148; 44,155.

Here, the DFPI's particular "true lender" doctrine, with its PEI test, interferes with these objectives. To start, it discriminates against state banks and impairs regulatory certainty by permitting 50 different states to apply "a diverse or duplicative patchwork" of multi-factor and complex true lender tests pegged to an idiosyncratic view of who holds the "predominant economic interest." *Parks v. MBNA Am. Bank, N.A.*, 54 Cal. 4th 376, 389 (2012); James ¶¶ 33-37. If applied, state banks will lose the protection of the "uniform rules" Section 27 intended for them to enjoy and their authority to export their home-state's interest rates will be "significantly impaired." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003). Further, by conditioning a state bank's ability to sell a loan on whether the state bank maintains the "predominant economic interest," the DFPI's PEI-focused true lender test significantly impairs a state bank's ability to manage safety and soundness concerns, manage liquidity, and use loan sales to manage risk. James, ¶¶ 35-37.

B. The DFPI's "True Lender" Doctrine Has No Basis in California Law.

Under article XV, section 1 of the California Constitution and under California Finance Code section 22050(a), loans issued, funded and held by state-chartered banks are exempt from California's usury law. Under multiple controlling decisions, Program Loans are exempt.[3]

Nevertheless, the DFPI posits the "core issue" here to be whether "FinWise is the true lender for purposes of [Section 22050's] exemption." Mot. at 8:14-16. Section 22050 contains only one requirement—that FinWise be a "person doing business under any law of any state or of the United States relating to banks." Cal. Fin. Code § 22050. The DFPI does not dispute that FinWise meets that test, especially when it originates, funds and holds loans. DFPI Cross-Compl. ¶5; Darchis, ¶¶3, 31. The DFPI's framing of the "core issue" presupposes that FinWise must jump an additional hurdle—that it be the "true lender" measured by the DFPI's "true lender" doctrine. DFPI Cross-Compl. ¶18. The DFPI has not, and cannot, cite any authority for imposing the extra-statutory hurdle much less setting the test for jumping it. Nor can this Court adopt such a test. *People v. Connor*, 115 Cal.App.4th 669, 692 (2004) ("[C]ourts may not add provisions to a statute or rewrite it to conform to an assumed intent that does not appear from its plain language.").

The DFPI claims that its "true lender test" follows from California usury caselaw. Mot. at 8:17-18. But the cases the DFPI cites involve transactions designed to disguise interest charges. None provide a basis for the sweeping true lender doctrine that the DFPI applies here.[4] To the extent that *Anderson v. Lee*, 103 Cal.App.2d 24 (1951) and *Janisse v. Winston Inv. Co.*, 154 Cal.App.2d 580 (1957) speak to identification of the lender, these cases were markedly different than those presented here. In those cases, the courts looked past the "dummy" lenders because *they paid nothing* to the borrowers and *were paid nothing* to assign the notes to the loan funder. In contrast, over a period of years, FinWise has underwritten and funded millions in loans under the supervision

[3] *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal.App.4th 525, 536, 540 (2007); *Jones v. Wells Fargo Bank*, 112 Cal.App.4th 1527, 1538-39 (2003); *see also Strike v. Trans-W. Disc. Corp.*, 92 Cal.App.3d 735, 745 (1979) (exemption continues in the hands of assignee).

[4] *Terry Trading Corp. v. Barsky*, 210 Cal. 428 (1930) presents no issue regarding the identity of the lender. Terry Trading was indisputably the lender, but improperly conditioned the loan on the purchase of ancillary services the excessive cost of which were disguised interest. *Id*. at 432-33.

of the FDIC and Utah DFI. FinWise continues to own the loans. OppWin purchases, and FinWise sells, a ***loan receivable at par***, i.e., for full consideration. Further, neither case involved a bank or a statutory or common law bank exemption. Thus, they do not address or answer the very question that the DFPI has posed—who is the "lender for purposes of the exemption." Mot. at 8:14-16. Specifically, they do not address whether a Section 22050 lender must (like FinWise) fund 100% of the loan using its own money, whether after funding the loan, it must retain all or some portion of the loan, and if so, how much. These cases do not address whether a Section 22050 bank may, in offering a loan, take into account its liquidity needs and risk management concerns, and, if so, whether it must only consider these issues after it has loaned the money and the loans sit on its books, lest it be accused of "pre-arranging." *Cf*., James, ¶¶24-28 (prearranging is common and expected for banks). These cases cannot be read to support the DFPI's "true lender" doctrine.[5]

C. The DFPI's Adoption of the "True Lender" Doctrine Violated the APA.

The DFPI's adoption of its "true lender" doctrine violates the APA.[6] It is a regulation because it is a rule of general application. The DFPI adopted the "true lender" doctrine to determine whether ***any*** "entity named as the 'lender'" is the true lender. DFPI Cross-Compl. ¶18. It has applied it to other bank partnerships. Compl. ¶54; Levin, Ex. J. Further, the DFPI's policy interprets or implements the CFL's bank exemption. Mot. at 8:13-15 (doctrine exists to determine if Section 22050 applies). Yet, as demonstrated in Section III.B above, the DFPI's "true lender" doctrine, and, particularly, its focus on a predominant economic interest factor, is cut from whole cloth. While an agency may "construe the words" of a statute without violating the APA, it cannot create "new conditions" or "new rules" that apply generally without complying with the APA. *Aguilar v. Association for Retarded Citizens*, 234 Cal.App.3d 21, 28 (1991). Accordingly, the DFPI's "true lender" doctrine is a regulation that it cannot enforce without proper rulemaking. Gov't Code § 11340.5(a).

[5] The DFPI cites a "comment" from Star & Miller. Mot. at 9. But the comment says nothing about any required level of economic interest, let alone the "predominant economic interest."

[6] It is far from clear that the DFPI has the authority under the CFL to adopt a regulation; it less clear that such a Regulation if adopted could be applied retroactively.

D. FinWise Is the "True Lender" Under Any Test.

As set forth in the Declarations of Simon Darchis, Chris McKay, and Dr. Christopher James, FinWise is the lender. Program Loans are independently underwritten in Utah by FinWise using its own proprietary process, made in FinWise's name, using FinWise's own funds, and are held by FinWise throughout their life. McKay, ¶¶8-9; Darchis, ¶¶7, 14, 17, 18, 31. Accordingly, FinWise remains responsible for Program Loans at all relevant times, including to consumers and to FinWise's own regulators, the Utah DFI and the FDIC. Darchis, ¶¶16, 31. Because FinWise retains title and ownership of Program Loans as well as the servicing rights, FinWise retains all of the traditional rights of a lender. Darchis, ¶27.d; McKay, ¶8.c; James, ¶10.

FinWise also bears substantial financial risk. FinWise funds Program Loans with money belonging to FinWise. Darchis, ¶8; McKay, ¶8.b; James, ¶¶16-18. FinWise is required to fund any loan it approves regardless of whether OppFi or its affiliates purchase the receivables. Darchis, ¶34; McKay, ¶35. Accordingly, at origination, FinWise is exposed to 100% of the economic upside and risk of loss. O'Bryan, ¶¶17, 41. While FinWise typically sells a 95% interest in each loan receivable to OppWin, LLC ("OppWin"), FinWise maintains a substantial interest in Program Loans even after the sale of the receivable. James, ¶ 16. To start, FinWise retains a 5% interest in each and every loan in the Program. Darchis. *Id*. ¶32. In addition, FinWise is entitled to a percentage fee for each loan it funds, and it is entitled to a servicing fee. *Id*. ¶34. Ultimately, FinWise places the largest sum of money at risk in the lifecycle of a loan. O'Bryan, Fig. 2, at 13.

In addition, FinWise maintains control over the entire program, including the application process, underwriting, marketing, and compliance. With respect to the application process, although hosted by OppFi's OppLoans website, FinWise maintains and exercises complete and sole control. Darchis, ¶¶22-23 ("[T]he application process is subject to the Bank's sole control. . . . FinWise has sole discretion over whether to authorize any [] proposed changes. . . . [a]ll application disclosures are approved by the Bank prior to be[ing] included in the application flow[.]").

While OppFi assists FinWise with Program Loan underwriting by performing an initial screening, FinWise exercises control over the underwriting criteria and FinWise independently performs the final underwriting for all Program Loans **using its own proprietary process**. Darchis,

¶¶14-17. In controlling the first screening, FinWise reviews, modifies as appropriate, and approves all underwriting criteria used by OppFi. *Id.* This process ensures that the model is commercially fit for use and involves a review by the bank's internal compliance team and a third party consultant that specializes in validation of underwriting models. *Id.* Ultimately, "the credit model is, at all times, subject to the Bank's review, approval, and control and treated as if it were its own." *Id.* ¶16.

With respect to marketing, FinWise controls all aspects of marketing and marketing strategy, which includes the OppLoans.com website, direct mail campaigns, social media campaigns, search engine optimization, and the retention of third-party lead generators. Darchis, ¶¶24-26; McKay, ¶10.a. FinWise maintains and continuously exercises control over both the substantive content of the marketing materials and the look and feel of marketing materials. Darchis, ¶¶24-26.

FinWise also exercises control of OppFi. FinWise requires OppFi to put in place a Bank-grade Compliance Management System and holds OppFi to the same level of requirements a bank is held to by its prudential regulators. Darchis, ¶27. In addition, FinWise exercises control over OppFi by maintaining daily oversight and access to real-time loan data, leading weekly calls with relevant personnel from both FinWise and OppFi, requiring monthly reporting to FinWise on a variety of topics, performing quarterly examinations of OppFi, and requiring annual reporting and auditing of OppFi. *Id.*; McKay, ¶11a-g.[7]

E. The Wu Declaration Is Riddled With Errors and False Assumptions.

The DFPI's factual record is based on the Declaration of Kenneth Wu, an employee of the DFPI, who purports to summarize OppFi's and FinWise's relationship. Mr. Wu's representations are unreliable. He misstates, misrepresents, and ignores critical aspects of the program.

First, Mr. Wu provides no basis to conclude that OppFi receives "nearly all of the [financial] benefits of the [FinWise] loans." Wu, ¶5. To the contrary, FinWise holds nearly all of the economic benefit and assumes nearly all of the financial risk when it funds the Program Loans and holds those

[7] While OppFi reimburses FinWise for some discreet expenses, it does not reimburse FinWise for the most substantial aspects of its efforts, such as employee salaries and reviewing marketing. Darchis, ¶13. These costs are borne by FinWise. The DFPI claims that FinWise's expenses are capped at $10,000 and paid by OppFi. Mot. at 6:26-27. However, it is OppFi's obligation to reimburse FinWise that is capped at $10,000, not FinWise's expenses. McKay, ¶37.

loans in their entirety for several days after origination. O'Bryan, ¶¶17, 41; McKay, ¶30. In addition, for the life of each Program Loan, FinWise retains a substantial economic interest through the retention of a receivable interest and fees that it is entitled to. *Id*. Further, although Mr. Wu admits that OppWin assigns its interest in loan receivables to one of several SPEs and that each SPE pledges their respective rights to third-party lenders, Wu, ¶8, **Mr. Wu fails to account for the impact that the SPE assignment has on risk allocation**. This was no oversight. The SPE assignment destroys the DFPI's PEI test. As discussed in the McKay and O'Bryan declarations, each SPE lender bears significant risk with respect to Program Loans as the receivable interest serves as collateral for up front financing. McKay, ¶¶17-26; O'Bryan ¶¶36-37. As a result, SPE lenders and related parties (unaffiliated with OppFi or FinWise) effectively control the stream of borrower payments by maintaining control over the accounts to which borrower payments are placed and by maintaining a priority right to payments. McKay, ¶24; O'Bryan, ¶37. In exchange, once pledged, OppFi may count between [redacted] percent of the face amount of each assigned receivable to meet its coverage ratio on its existing outstanding balance on the credit line or to secure additional draws on the credit line. McKay, ¶¶25, 26; O'Bryan, ¶36. For example, if FinWise originates a $1,500 loan and 95% of the receivable respecting that loan is purchased by OppWin, OppWin may assign its 95% interest in the receivable to one of several SPEs. *Id*. Once assigned, in general, the SPE could count [redacted] toward its collateral obligations under one of its credit lines. *Id*. That would, in turn, permit OppFi to draw approximately [redacted] from the credit line from the applicable SPE lender (i.e., [redacted]). *Id*. At that point, until repaid, the SPE lender bears the risk of loss on the [redacted] amount advanced, which at this point in the life cycle of the loan, is the largest economic risk of any party. *Id*.

Second, Mr. Wu is similarly mistaken when he asserts that "FinWise is shielded from financial risk in funding OppLoans." Wu, ¶5. This assertion is based on a manipulation of the record and an unfounded assumption: (1) that FinWise is only obligated to fund loans if a minimum security amount is maintained by OppWin and (2) that OppWin's collateral is sufficient to secure all of FinWise's funding obligations. Neither is true. FinWise is obligated to fund any loan it approves regardless of the amount of collateral it holds (Darchis, ¶35), and OppWin's collateral is a mere fraction of its funding obligations (McKay, ¶15). Mr. Wu's contrary assertion is based on a

manipulation of the record. Rather than quote the operative provision, located in the Third Amendment to the Loan Receivables Sales Agreement (Wu, Ex. G), Mr. Wu quotes a prior iteration of that section. Wu, ¶5, citing Ex. D, § 4.1 rather than Ex. G, § 4.1. The amended provision makes clear that FinWise is obligated to fund any loan for which it has communicated an approval decision. Wu, Ex. G. And Mr. Wu's assumption that OppWin's collateral is sufficient to secure all of FinWise's funding obligations is simply incorrect. McKay, ¶¶13(e)-15.

Third, Mr. Wu is mistaken when he asserts that OppFi "[c]ontrols the [u]nderwriting [p]rocess." Wu, p. 6 (Heading C). Mr. Wu's Declaration largely relies on a single sentence, taken out of context, from OppFi's 10-K for this conclusion.[8] The quoted sentence states "OppFi's bank partners *benefit* from its turnkey, outsourced marketing, data science, and proprietary technology to digitally acquire, underwrite and service these everyday consumers." Wu, ¶16. That a principal benefits from the performance of its agent under a contractual agreement is to be expected. That says nothing about who controls the underwriting process. Moreover, Mr. Wu ignores the parties' agreements. These agreements define FinWise as the principal and OppFi as the service agent, recite that every material action taken by OppFi must be approved by FinWise, make clear that OppFi's "duties and responsibilities" for loan underwriting are subject to FinWise's control and approval at every step, and that FinWise independently performs all final underwriting from its offices in Utah. McKay, ¶39. Mr. Wu also ignores the parties' course of performance. *Id.*, ¶40. As discussed above, FinWise ***continuously exercises*** its contractual right to control the underwriting process. *Id.*, ¶9.

Fourth, Mr. Wu erroneously asserts that OppFi "is responsible for all marketing in association with OppLoans." Wu, ¶¶17, 27. Mr. Wu's conclusion is untrustworthy for the same reasons as the assertions above—it is based on a selective reading of the parties' agreements, while failing to address their actual course of performance.[9] It cherry-picks the term "responsible" from

[8] Mr. Wu's conclusion about underwriting is also based on misquoting an SEC filing, which states that "Banks originate finance receivables based on criteria provided by OppFi-LLC." Without explanation, Mr. Wu inserts into that sentence the word "underwriting" and, on that basis, falsely claims that the "underwriting criteria" for Program Loans are supplied by OppFi.

[9] The DFPI makes much hay of the fact that OppFi owns the OppLoans website. *See, e.g.*, Mot. at 4:17-5:4. This is unremarkable given that FinWise has retained OppFi to provide and maintain the website. And, as noted, FinWise retains control over relevant aspects of the website.

the program documents without including language that clarifies that OppFi is acting as an agent subject to the approval of its actions by FinWise, as principal. McKay, ¶¶10-11. For example, sub-paragraph (a) of Section 3.1 makes clear that OppFi, as [redacted]." *Id*., citing LPA, § 3.1(a). Moreover, by requiring its approval for all consumer-facing marketing materials through daily and weekly meetings and monthly, quarterly, and yearly compliance auditing, FinWise ***actually and continuously*** exercises its contractual right to control all aspects of OppFi's performance as agent with respect to the marketing of FinWise loans. *Id*.

F. OppFi Is Not The "True Lender" Under the Factors Considered By the Court.

In overruling OppFi's demurrer, the Court examined the tribal lending program in *CFPB v. CashCall, Inc*., 2016 WL 4820635 (C. D. Cal. 2016). Dem. Order at 6-7. The CashCall program stands in stark contrast to FinWise's program. To begin, unlike CashCall, the FinWise program does not involve a "structure [where] the loans would not be regulated," which was the case for CashCall's tribal loans. Dem. Order at 6. Here, FinWise's loans are heavily regulated by the FDIC and the State of Utah, and FinWise assumes full regulatory risk. Darchis, ¶¶31; James, ¶17. Unlike CashCall, OppFi does not fund the loans. Instead, FinWise funds Program Loans using its own money. Further, unlike CashCall, OppFi does not purchase "all the loans" (Dem. Order at 6); it purchases none of them. Instead, it purchases a portion of the receivables. FinWise also retains substantial risk, unlike the tribes at-issue in *CashCall*. On a daily basis, FinWise is under-secured by millions of dollars (McKay, ¶15), FinWise retains regulatory and credit risk by holding title to the loans (James, ¶17), and its aggregate interest in receivables and loans held for sale is material to its financial statements (O'Bryan,¶¶29-30).

Further, unlike CashCall, OppFi makes no promise to indemnify FinWise for "civil, criminal, or administrative claims." Instead, FinWise represents that performing under the Loan Program Agreement is "[redacted]." McKay, Ex. A, LPA, § 9.2(d). FinWise also promises to indemnify OppFi if this representation is untrue. *Id*., § 10.1(b). McKay, Ex. E, LRSA, § 5.1.10 (representing that [redacted]").

After discussing the factors set out in *CashCall*, the Court applied them to the allegations of the Commissioner's cross-complaint, concluding, "as alleged, the substance is that OppFi is the lender." Dem. Order at 7. However, the Commissioner's allegations and the record adduced on this Motion are very different. Here, the Commissioner has utterly failed to carry her burden of establishing a likelihood that any, or even most, of her allegations are true.

IV. OPPFI WILL SUFFER IRREPARABLE HARM IF ENJOINED.

Because OppFi will suffer irreparable harm if the Court enters the requested injunction, the DFPI is not entitled to a presumption that public harm will result if an injunction does not issue. *See supra* § II; *IT Corp.*, 35 Cal.3d at 72. The Court must therefore "examine the relative actual harms to the parties." *Id.* OppFi faces irreparable harm. The DFPI has demonstrated none. OppFi has spent almost a decade and invested millions of dollars in cultivating expertise in the underbanked lending market, including developing and implementing strategies to assist banks with providing credit access to individuals that otherwise lack access to traditional credit products. McKay, ¶¶43-44. If OppFi is prohibited from assisting banks that charge more than 36%, it would be forced to cease all operations in California. *Id.* ¶44. OppFi knows this risk because it (i) currently permits California borrowers to apply for loans with interest rates at 36% or below and almost none of the applicants qualify and obtain such loans, and (ii) previously offered a credit product at less than a 36% interest rate directly but was forced to terminate the program as the losses exceeded revenue. *Id.* ¶45.

Accordingly, the DFPI is mistaken that the only harm OppFi will suffer if the injunction issues is "temporarily lessened economic profitability for the loans it issues to consumers in California." Mot. at 12:22-23. To the contrary, OppFi would be forced to cease operations in California, which would have an irreparable impact on OppFi's business as a whole. OppFi would be forced to consider a potential reduction in staff, would suffer a loss of associated talent, its goodwill and regulation would be impacted, and, critically, OppFi would lose invaluable data regarding California borrowers, which would impact its ability to reenter the market. *Id.* ¶¶50-52. OppFi's expertise is based on its real-world experience and the information it collects while operating. *Id.* ¶52. If compelled to terminate its operations, the information that OppFi would have

otherwise obtained will be unattainable. *Id.* This is irreparable harm.[10] In addition, OppFi would not be able to recover any of its lost profits, which is further irreparable harm. *California Retail Portfolio Fund GmbH & Co. KG v. Hopkins Real Estate Group*, 193 Cal.App.4th 849, 857 (2011).

V. THE DFPI FAILED TO DEMONSTRATE IRREPARABLE HARM.

The DFPI needed to demonstrate "actual harms" from the status quo that cannot be sufficiently remedied upon final judgment. *IT Corp.*, 35 Cal.3d at 72. The DFPI argues that if a preliminary injunction is not granted, consumers will take out additional loans from FinWise, which creates the risks of inability to pay, harm to credit scores, and default on other financial obligations.[11] Mot. at 12:24-13:5. This does not meet the DFPI's burden. To start, the DFPI's delay in seeking a preliminary injunction confesses a lack of irreparable harm. The State of California first publicly accused OppFi of operating a "rent-a bank scheme" in August 2020. Compl., ¶5; Levin Decl. Ex. L. Even after it filed its Cross-Complaint seeking injunctive relief, DFPI waited another eight months to pursue a preliminary injunction. This delay alone demonstrates that there is "no harm" in delaying relief until after trial. *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"). If the Court ultimately concludes that the interest rate on the challenged loans is usurious, the core harm to consumers is the overpayment of interest, which may be recovered later. This is not an irreparable harm. *See, e.g.*, *Friedman v. Friedman*, 20 Cal.App.4th

[10] *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (the "threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm"); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business [] establish[es] irreparable harm."); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124, 125–26 (2d Cir. 1984) ("loss of . . . an ongoing business representing many years of effort . . . constitutes irreparable harm . . . [that] cannot be fully compensated by subsequent monetary damages"); *Facebook, Inc. v. BrandTotal Ltd.*, 499 F.Supp.3d 720, 736 (N.D. Cal. 2020) (layoffs "are comparable to intangible injuries . . . that courts have held sufficient" to constitute irreparable harm, as was being "forced to suspend a major portion of its operations"); *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099, 1105 (N.D. Cal. 2017) (inability to operate current business model was irreparable harm).

[11] The DFPI's argument that its requested injunction will "maintain[] the status quo" is incorrect. Mot. at 14:21. It is undisputed that FinWise, underwrites, approves and funds loans under or at rates greater than 36%. The DFPI's proposed injunction would require that new loans only issue if they bear interest at 36% or less. That is not the status quo.

876 (1993) ("[M]ere monetary loss does not constitute irreparable harm . . . .").

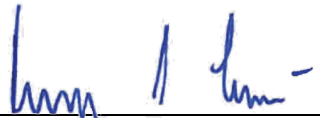
As to the purported attendant risks of additional loans with an interest rate above 36%, the DFPI relies on speculation about what *might* befall consumers. The DFPI fails—as it must—to submit any admissible evidence of non-monetary harm. *See People v. Pac. Land Rsch. Co.*, 20 Cal.3d 10, 21 (1977) ("To secure a preliminary injunction the People were required to show, by evidence which would be admissible in open court, that . . . defendants should be restrained from exercising the right claimed[.]"). The DFPI first points to OppFi's report of net charge-offs as a percentage of average receivables for three months in 2022, Mot. at 13:5 (citing Wu, Ex. Q at 32), but the report is not limited to receivables from California FinWise loans, and, in any event, the existence of charge-offs is not evidence of harm to borrowers; it is an accounting concept used to track performance. The DFPI next cites a blog article, Mot. at 13 n.6, which OppFi objects to as inadmissible hearsay, Evid. Code § 1200, and, in any event, speculates about what a lender "may" do if a consumer is delinquent. Finally, the DFPI notes that OppFi reports consumers' payment histories to the credit bureaus. *Id.* at 13 n.5. But the DFPI did not submit any evidence of how this *harms* consumers. *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1181 (9th Cir. 2021) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). The DFPI ignores that credit reporting is not a one-way street. If the requested injunction issues, consumers who could obtain a FinWise loan, make payments, and improve their credit scores will be unable to do so. The DFPI offered no evidence that FinWise customers can qualify for and obtain personal loans with interest rates at or below 36%. In OppFi's experience, they can't. Ninety-nine percent of applicants that apply for a loan on the OppLoans platform do not qualify for and receive funding for such loans. McKay, ¶46.

VI. CONCLUSION

An injunction "should issue only if—after consideration of both (1) the degree of certainty of the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief—the trial court concludes that an injunction is proper." *IT Corp.*, 35 Cal.3d at 72. Because the DFPI has not established a reasonable probability of success on the merits and the balance of harm favors OppFi, the Court should deny the Motion.

DATED: April 26, 2023

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

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Opportunity Financial, LLC v. Clothilde Hewlett
Los Angeles County Superior Court, Case No. 22STCV08163

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 April 26, 2023, I served true copies of the following document(s)**:**

SEE ATTACHED LIST OF DOCUMENTS SERVED

on the interested parties in this action as follows:

Clothilde V. Hewlett, Commissioner Mary Ann Smith, Deputy Commissioner Sean M. Rooney, 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	Attorneys for Defendant, Cross-Complainant, and Cross-Defendant Clothilde Hewlett, in her official capacity as Commissioner of Financial Protection and Innovation for the State of California; and Cross-Defendant Department of Financial Protection and Innovation

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address kmcfarlandramirez@orrick.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 April 26, 2023, at Santa Monica, California.

Kathleen McFarland-Ramirez

Kathleen McFarland-Ramirez

Opportunity Financial, LLC v. Clothilde Hewlett
Los Angeles County Superior Court, Case No. 22STCV08163

DOCUMENTS SERVED

Copies of Documents efiled with the Court:

OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF FREDRICK S. LEVIN IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF J. DUROSS O'BRYAN IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF CHRIS MCKAY IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF CHRISTOPHER M. JAMES, PH.D. IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

NOTICE OF LODGMENT IN SUPPORT OF MOTION TO SEAL CONFIDENTIAL DOCUMENTS SUBMITTED IN CONNECTION WITH OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

[PROPOSED] ORDER DENYING COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION

Copies of Documents lodged with the Court:

OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION [Unredacted]

DECLARATION OF J. DUROSS O'BRYAN IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION [Unredacted]

DECLARATION OF CHRIS MCKAY IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION [Unredacted]

Exhibits A-H, J-O, R-S [Unredacted]

EXHIBIT K IN SUPPORT OF DECLARATION OF FREDRICK S. LEVIN IN SUPPORT OF OPPORTUNITY FINANCIAL, LLC'S OPPOSITION TO COMMISSIONER CLOTHILDE HEWLETT'S MOTION FOR PRELIMINARY INJUNCTION [Unredacted]