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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DIVISION

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.

Case No. 22STCV08163

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JUDGE:
DEPT.:

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Plaintiff Opportunity Financial, LLC ("OppFi"), by and through its attorneys, brings this action for declaratory and injunctive relief against Defendant Clothilde Hewlett (the "Commissioner" or "Defendant"), in her official capacity as Commissioner of the Department of Financial Protection and Innovation ("DFPI") for the State of California[1] and alleges as follows:

INTRODUCTION

1. This action arises from the Commissioner's unlawful threatened enforcement of the Fair Access to Credit Act ("AB 539") against OppFi for allegedly originating consumer loans that provide for an interest rate in excess of the limit set by AB 539. AB 539, which became effective January 1, 2020, amended the California Financing Law ("CFL") to include an interest rate cap of 36% for covered loans between $2,500 and $10,000 made by "finance lenders" subject to the CFL. The Commissioner threatened to enforce AB 539 and other interest rate caps in the CFL even though the loans in question were and are originated by FinWise Bank ("FinWise" or the "Bank"), a federally-insured state-chartered bank located in Utah, which OppFi provides technology and other services to under a contractual arrangement (hereinafter the "Program"). The interest rate caps in the CFL do not apply to loans originated pursuant to the Program ("Program Loans").

2. The CFL's interest rate caps do not apply to Program Loans for several reasons. **First**, Program Loans are constitutionally and statutorily exempt from California's maximum interest rate caps because the loans are made by FinWise, a state-chartered bank located in Utah. **Second**, OppFi does not make loans under the Program in California. As such, it is not a "finance lender" under the CFL with respect to its Program-related activities, and, therefore, is not subject to the interest rate caps established by AB 539 for those activities. **Third**, even if AB 539 could arguably apply to OppFi, Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d (hereinafter "Section 27") preempts application of AB 539 to Program Loans.

[1] The Department of Business Oversight ("DBO") changed its name to the DFPI effective September 29, 2020. *See* www.dfpi.ca.gov. *See also* Cal. Gov. Code § 12895(a), (f) (eff. September 29, 2020) (There is . . . a Department of Financial Protection and Innovation."). Accordingly, all references in the Complaint to Defendant or Commissioner refer to the Commissioner in her official capacity as Commissioner of the DFPI, or, as applicable, to her in her official capacity as Commissioner of the DBO. Likewise, all references to the DFPI mean and include the DBO. Conversely, all references to the DBO mean and include the DFPI.

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3. The inapplicability of the CFL's interest rate caps to the Program is not controversial or new. Rather, it is rooted in long-existing constitutional and statutory exemptions under California law for loans made by state-chartered banks and decades of well-settled federal law, which permits state-chartered banks to export the interest rates allowed in their chartering state to any other state in the country. Federal law also preempts any efforts by state legislatures to apply their state's interest rate caps to loans made by state-chartered banks located in other states. Indeed, in passing AB 539 the Legislature expressly acknowledged what is obvious: AB 539 is not applicable to "nondepositories that partner with banks," like OppFi.[2]

4. The Commissioner is well-aware of these settled principles. For years prior to passage of AB 539, the Bank originated Program Loans that would have been subject to the interest rate caps of then existing law but for the statutory and constitutional exemptions and federal preemption. The Commissioner and her predecessors never objected to these pre-AB 539 activities, and thus, the Commissioner tacitly recognized that there was no basis to do so. However, as soon as AB 539 was signed into law, and despite knowing AB 539 could not apply to loans originated by state-chartered banks like FinWise and their technology services providers like OppFi, the Commissioner and other California officials began touting AB 539 as a weapon to use against nondepositories that contract with and provide services to state-chartered and federally-chartered banks. In doing so, the Commissioner is using the recent passage of AB 539 as a pretext to wage a war against nondepositories and technology services providers that is contrary to law and contrary to the prior positions and settled practice of the DFPI. In addition to its threatened action against OppFi, it announced investigations into other entities partnering with state banks,[3] and sued the

[2] *California Financing Law: Consumer Loans: Charges: Hearing on AB 539 Before the S. Comm. on Banking and Fin. Insts.*, 2019 Leg., Reg. Sess. 1 (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB539 (accessed by clicking on "06/24/19 - Senate Banking and Financial Institutions" hyperlink) (last visited March 4, 2022) ("Senate Banking Analysis").

[3] Press Release, DFPI, DBO Launches Investigation Into Possible Evasion of California's New Interest Rate Caps By Prominent Auto Title Lender, LoanMart (Sept. 3, 2020), 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).

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Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") in an attempt to invalidate formal federal regulations that they argue facilitate nondepository partners like OppFi to partner with federally-chartered and state-chartered banks located outside of California but which make valid loans to California residents.

5. Further, in a lawsuit against the FDIC, the State of California specifically singled out OppFi as an example of a company supposedly "engage[d] in a 'rent-a-bank' scheme" to "evade the law of…California."[4] As such, it is clear that the Commissioner has decided unequivocally to abuse her enforcement powers against OppFi in an effort to expand unlawfully the DFPI's regulatory reach and the scope of AB 539. Notably, California recently lost its lawsuit against the FDIC; the Court ruled that the challenged FDIC regulation, which confirmed that the interest charged by state-chartered banks remains permissible after any sale or assignment, was validly issued.[5]

6. On February 23, 2022, Johnny Vuong, Senior Counsel in the Enforcement Division of the DFPI, acting in his official position and by and at the direction of the Commissioner, informed OppFi that the Commissioner had concluded that OppFi's Program-related activities were subject to the CFL and violated AB 539 because, according to the Commissioner, OppFi is the "true lender" on Program Loans, and the interest rate on those loans exceeds the interest rate cap in AB 539. He also stated that the Commissioner had concluded (1) that OppFi had violated California Financial Code section 22303 because the interest rate on Program Loans in amounts under $2,500 exceed the interest rate cap set forth in the CFL; and (2) that OppFi's purported interest rate violations constitute unfair and deceptive practices under the California Consumer Financial Protection Law ("CCFPL"). Mr. Vuong, on behalf of the DFPI, threatened legal action to enforce the Commissioner's legal position.

7. By this Complaint, OppFi seeks a declaration that the CFL does not apply to its Program-related activities and that it is not in violation of AB 539 or Financial Code section 22303 because those laws do not apply to OppFi's Program-related activities, as a federal district court

[4] *People of the State of California, et al. v. Federal Deposit Insurance Corporation*, Case No. 20-5860 (N.D. Cal. Aug. 20, 2020), ECF No. 1, Complaint ¶ 89.

[5] *California v. FDIC*, No. 20-CV-05860-JSW, 2022 WL 377403 (N.D. Cal. Feb. 8, 2022).

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recently held with respect to the OppFi's Program-related activities specifically. It further seeks a declaration that it has not violated the CCFPL because it participates in a loan program that issues loans at lawful interest rates in California. Finally, OppFi seeks an injunction restraining the Commissioner from taking any further action to enforce the CFL's interest rate provisions or any derivative claims predicated on violations of those provisions against OppFi.

PARTIES

8. OppFi is a Delaware limited liability corporation with its headquarters located at 130 E Randolph St, Suite 3400, Chicago, IL 60601.

9. Defendant Clothilde Hewlett is the Commissioner of the DFPI, which is located at 2101 Arena Blvd., Sacramento, California 95834. The DFPI also has an office in Los Angeles, California.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to Code of Civil Procedure section 1060.

11. Venue for this action properly lies in this Court pursuant to Code of Civil Procedure sections 395(a) and 401.

12. The DFPI is headquartered in Sacramento, and the Commissioner resides in Sacramento as a matter of law. As a result, venue would be proper in Sacramento County. *See* Cal. Code Civ. Proc. § 395(a) (providing venue is proper "in the county where the defendants or some of them reside at the commencement of the action.")

13. Section 401 of the California Code of Civil Procedure provides, in turn, that "[w]henever it is provided by any law of this State that an action or proceeding against the State or a department, institution, board, commission, bureau, officer or other agency thereof shall or may be commenced in, tried in, or removed to the County of Sacramento, the same may be commenced and tried in any city or city and county of this State in which the Attorney General has an office." This lawsuit is an "action or proceeding against" an "officer" of the State of California that "may be commenced in . . . the County of Sacramento." Accordingly, in addition to Sacramento County, venue is also proper "in any city or city and county of this State in which the Attorney General has

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an office." The Attorney General has an office in Los Angeles County located at 300 South Spring Street, Los Angeles, CA 90013. Accordingly, venue is proper in Los Angeles County Superior Court.

BACKGROUND

A. OppFi Background

14. OppFi is a leading financial technology platform and service provider focused on helping middle income, credit-challenged consumers build a better financial path. It has helped over 500,000 consumers and has received over 10,000 5-star customer reviews online. It employs more than 500 people across the country. OppFi was selected as the winner of the "Best Consumer Lending Platform" award by FinTech Breakthrough, an independent market intelligence organization that recognizes top companies, technologies and products in the global FinTech market.[6]

15. OppFi's platform allows banks to provide access to simple short-term lending products for consumers who may otherwise be turned away by traditional lenders in light of their credit profile. In this regard, OppFi plays a critical, federally recognized, and approved market function: enabling consumers shut out from traditional credit markets to obtain access to credit. Access to credit is a critical asset to individuals seeking to build a better economic future. It allows consumers to make use of future resources for present use, and in so doing, facilitates wealth-building, enhances financial security, and provides a buffer for unforeseen emergencies. Further, it allows individuals in need who lack savings to pay emergency expenses.

16. Unfortunately, millions of Americans lack access to credit. These individuals struggle to qualify for traditional loans in light of their credit score, often cannot obtain credit cards, and generally lack the ability to obtain capital for present use. The New York Federal Reserve

[6] *OppLoans Wins 2020 FinTech Breakthrough Awards For Best Consumer Lending Platform,* PR Newswire (Mar 11, 2020), https://www.prnewswire.com/news-releases/opploans-wins-2020-fintech-breakthrough-awards-for-best-consumer-lending-platform-301021670.html (last visited March 4, 2022).

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recently estimated that as many as 60 million Americans lack access to credit.[7] Millions of these individuals, most of whom lack access to traditional credit markets and cannot obtain credit cards, let alone a traditional loan secured by collateral, reside in California.

17. Lenders such as the Bank have developed loan products that provide credit to serve this population in light of their high credit risk. The loan products offered by the Bank provide for transparent pricing, have no origination or late fees, are fully amortizing with no balloon payments, and allow borrowers to prepay at any time with no penalty. In light of the high credit risk posed by this population, the interest rates charged on these loans are often higher than traditional loans because the borrowers have no collateral to use as security and default at a high rate. Borrowers understand that high interest rates are necessary in light of their credit status. As one satisfied Program borrower stated in her online review: "I was very pleased with how easy it was to get approved. My credit is worse than poor but I still got the money. The interest is high but that was expected due to my credit."[8]

18. Because charging higher interest rates is necessary to make small-dollar lending to higher-risk borrowers economically viable, many national and state-chartered banks that engage in such lending lawfully incorporate and locate themselves in states that do not set low interest rate caps relative to credit risk. These states understand that if the legal small-dollar lending market is terminated, it will not end low-income borrowers' need for credit, but rather will lead to something more pernicious: increased reliance on "payday lending" and, even worse, black-market lending by persons and entities who operate wholly outside of the law.

19. The Bank uses the OppFi technology platform to provide its loan products to consumers throughout the United States. In this way, OppFi allows the Bank to compete against larger national banks with greater resources to develop their own technology platforms. As

[7] Jonnelle Marte, *U.S. Consumers' Access to Credit May Be Worse Than Previously Thought: Fed Study*, Reuters (Sept. 24, 2019, 2:46 PM), https://www.reuters.com/article/us-usa-fed-credit/u-s-consumers-access-to-credit-may-be-worse-than-previously-thought-fed-study-idUSKBN1W931O (last visited March 4, 2022).

[8] Carla, *Review of OppLoans*, Financier.com (Apr. 13, 2019), https://financer.com/us/company/opploans (last visited March 4, 2022).

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discussed further below, Section 27 was enacted to level the playing field between state banks and national banks. Pursuant to Section 27, state banks and national banks have a right to compete in interstate commerce on equal footing. By targeting technology services providers like OppFi, which provide assistance to state banks so that they can compete with national banks, the Commissioner is unlawfully discriminating against state banks. As a result of the Commissioner's conduct, national banks are exempt from the CFL's interest rate caps, but smaller state banks, who rely on others to assist them, are not. Section 27 was enacted to prevent such a result.

B. Overview of California's Usury Laws

20. California's usury laws, though "far from a model of clarity," regulate the charging of interest in the state.[9] Section 1 of Article XV of the California Constitution prohibits the charging of interest on a loan at a rate in excess of 10 percent.[10] It also enumerates several classes of lenders exempt from that prohibition and makes clear that none of its interest-rate restrictions apply "to any successor in interest to any" loan made by an exempted lender.[11] At the same time, it authorizes the California Legislature to create additional classes of lenders exempt from the maximum rate and to set alternative maximum interest rates applicable to the exempted lenders.[12]

21. Pursuant to its constitutional authority, the California Legislature created an exemption to the constitutional usury provision for state banks, like FinWise.[13] It also enacted the CFL to create an additional exemption for, among others, "[f]inance [l]enders."[14] The latter are subject to alternative maximum interest rates prescribed by the CFL, but the CFL expressly exempts banks from the definition of "finance lender."[15] Thus, as a matter of California law, a loan made by

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[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.

[11] Cal. Const., Art. XV, § 1.

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

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

[14] Cal. Fin. Code § 22002.

[15] Cal. Fin. Code § 22050.

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a state bank like FinWise is not subject to any maximum interest rate prescribed by California law.

22. Several courts have confirmed this reading of the law, including one that reviewed the legality of the Program at issue here. *Sims v. Opportunity Fin., LLC*, No. 20-cv-04730-PJH, 2021 WL 1391565 (N.D. Cal. Apr. 13, 2021) (dismissing claims against OppFi alleging loans exceeded CFL interest rate caps). In *Sims*, the plaintiff alleged that his Program Loan was subject to and violated the CFL's interest rate caps because OppFi, and not the Bank, was the true "finance lender" on his loan because OppFi acquired an interest in the loan shortly after origination.[16] Specifically, he alleged that OppFi and the Bank "conspire[d]" to "evade" California's interest rate caps by allowing OppFi to "rent" the Bank's state charter to make loans at rates permissible for the Bank, but not OppFi.[17] That is the exact same argument advanced by the Commissioner now. OppFi moved to dismiss, arguing that the loans were statutorily exempt from the CFL. After considering the parties' arguments, the *Sims* court rejected the plaintiff's argument, holding that under established case law, the Program Loan itself was statutorily exempt from the CFL's interest rate caps because the Bank was the lender, and loans made by state banks are exempt from California's interest rate caps. *Id.* at *4. *Sims* is dispositive here because it squarely considers and rejects a theory that is identical in all respects to the Commissioner's theory of liability.

23. In contrast to the Bank's loans, loans subject to the CFL must comply with alternative maximum interest rate caps. Prior to January 1, 2020, the CFL only set interest maximum interest rates for loans in amounts less than $2,500.[18] In 2019, California passed AB 539, which sets maximum interest rates for loans between $2,500 and $10,000. Under AB 539, which is codified in the CFL, the interest rate finance lenders may charge on loans in amounts between $2,500 and $10,000 is capped at "an annual simple interest rate of 36 percent per annum plus the Federal Funds Rate."[19]

[16] *Sims v. Opportunity Financial, LLC et. al.,* Case No. 4:20-cv-04730-PJH, First Amended Complaint, ¶¶ 21, 24, ECF No. 23 (September 1, 2020).

[17] *Id.* ¶¶ 21-22, 64-68.

[18] Cal. Fin. Code § 22303.

[19] Cal. Fin. Code § 22304.5(a).

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24. AB 539 did not purport to alter any existing exemptions to the California Constitution or CFL interest rate caps, or the long body of case law interpreting them. Further, as set forth in detail below, the legislative history of AB 539 reveals there was no intent to do so.

C. Overview of Federal Laws and Regulations Governing Interest Rates Federal and State Banks May Charge and Preempting Contrary State Laws

25. The Bank is a federally-insured, state-chartered bank located in Utah. As such, the FDIC is its prudential regulator, and the Bank's loans are subject to extensive federal regulation and supervision. As set forth below, Congress has enacted laws over the course of several decades that displace and preempt state laws that seek to impose interest rate caps on out-of-state banks that are lower than the rate allowed in their home state. Because the laws pertaining to state-chartered banks have substantially followed the laws pertaining to federally-chartered banks, an understanding of the law governing national banks is important.

1. National Banks' Interest Rate Authority

26. Title 12 U.S.C. § 85 ("Section 85") of the National Bank Act ("NBA") provides that a national bank "may take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located." Title 12 U.S.C. § 86, in turn, creates a private right of action for violations of the federal interest cap set forth in Section 85. These provisions were intended to protect national banks from discriminatory state banking laws and ensure "competitive equality" between state and national banks.[20]

27. In *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, the United States Supreme Court held that Section 85 permitted a national bank to "export" a favorable interest rate from the state in which it was located to customers in another state, without regard to state laws

[20] *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 826 n.6 (1st Cir. 1992); *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 314 (1978).

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to the contrary.[21] Accordingly, any state usury law to the contrary is preempted by the NBA.[22]

28. Notably, in *Marquette*, state regulators opposed this decision on the grounds that giving banks the ability to export their home states' interest rates would "significantly impair the ability of States to enact effective usury laws."[23] The United States Supreme Court considered and rejected the idea that courts should address these concerns, finding they are "'better addressed to the wisdom of Congress' than to the courts" in light of Congress's clear intent demonstrated in Section 85.[24]

2. The Parallel Interest Rate Authority of State-Chartered Banks

29. Just as Section 85 permits national banks to export their home interest rate to other states, the statute governing state banks—the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA")—has a parallel provision that entitles them to do the same: Section 27 of the FDIA, codified at 12 U.S.C. § 1831d ("Section 27").

30. In 1980, following a decade of inflation, soaring interest rates, and a credit crunch, "state lending institutions were constrained in the interest they could charge by state usury laws," while "[n]ational banks did not share this inhibition" in light of the protections of the NBA, leaving state banks "at an almost insuperable competitive disadvantage."[25]

31. Recognizing the need to "prevent discrimination against State-chartered" banks, Congress enacted Section 27 to grant the same protections to state banks.[26] The legislative history

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[21] 439 U.S. at 313-14, 317-19; *see also In re Late Fee and Over-Limit Fee Litigation*, 741 F.3d 1022, 1025 (9th Cir. 2014) (explaining that under Section 85, "national banks may 'export' the regulatory regime of the state in which they are located and impose it on customers residing in states with more consumer-friendly regulations").

[22] *Marquette,* 439 U.S. at 308, 315-18 (holding that national bank may charge home state's interest rate, regardless of more restrictive usury laws in borrower's state, and affirming order concluding NBA preempted Minnesota usury law); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003) ("Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.").

[23] *Id.* at 318.

[24] *Id.* at 319.

[25] *Greenwood Trust*, 971 F.2d at 826.

[26] 12 U.S.C. § 1831d.

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is clear that the purpose of Section 27 was to remedy this inequality and "level the playing field between federally chartered and state-chartered banks."[27] To achieve this objective, Congress "incorporated language from section 85" of the NBA into DIDMCA and granted "all federally insured financial institutions—State banks, savings associations, and credit unions—similar interest rate authority to that provided to national banks."[28] "The incorporation [of Section 85's authority] was not mere happenstance. Congress made a conscious choice to incorporate Section 85's standard."[29]

32. Like Section 85 of the NBA, Section 27 of the FDIA preempts any state-law usury caps other than those imposed by the bank's home state as to "any loan . . . made" by a state-chartered bank.[30] Because these two provisions are "virtually identical in substance, policy, and internal logic . . . the same express preemption analysis governing Section[] 85 . . . of the [NBA] applies to preemption of state usury laws under Section 27 of the FDIA."[31]

33. Thus, like Section 85, "Section 27 has been construed to permit a State bank to export to out-of-State borrowers the interest rate permitted by the State in which the State bank is located, and to preempt the contrary laws of such borrowers' States."[32]

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[27] *Greenwood Trust*, 971 F.2d at 826-27 (citing senators' statements confirming the intent of Section 27 was to provide "parity" or "competitive equality" between state and federal banks).

[28] FDIC, Final Rule, Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,147 (July 22, 2020) ("Interest Rate Authority Notice").

[29] *Id.*

[30] 12 U.S.C. § 1831d(a).

[31] *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1363 (D. Utah 2014) (internal marks omitted); *Greenwood Trust Co.*, 971 F.2d at 827 (holding that these provisions "should be interpreted the same way"); *Cross-County Bank v. Klussman*, No. C-01-4190-SC, 2004 WL 966289, at *4 (N.D. Cal. Apr. 30, 2004) ("The historical record clearly requires a court to read the parallel provisions of [DIDMCA] and the [NBA] *in pari materia*."); FDIC, Interpretive Letter No. FDIC-93-27, *12 U.S.C. § 1831d Preempts Contrary State Common Law Restrictions on Credit Card Loans,* 1993 WL 853492, at *1 (July 12, 1993), ("We have stated consistently that [Section 27] was intended to give state-chartered FDIC-insured banks the same 'most favored lender' status and right to export interest enjoyed by national banks under 12 U.S.C. 85.").

[32] Interest Rate Authority Notice, 85 Fed. Reg. at 44,147 (citing *Greenwood Trust Co.,* 971 F.2d at 827); *see also California v. Check 'n Go of Cal., Inc.*, No. C 07-02789 JSW, 2007 WL 2406888, at *2 (N.D. Cal. Aug. 20, 2007) (holding Section 27 preempted state usury claims against state-chartered bank).

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3. The FDIC Issues Regulations Confirming the Preemptive Force of Section 27 Applies to Loans Originated by Federally-Insured, State-Chartered Banks Regardless of Post-Origination Transactions

34. In 2020, the FDIC engaged in formal rulemaking to clarify that the permissible rate of interest on a loan originated by a state bank is determined as of the date of origination, and that the preemptive force of Section 27 applies throughout the life of such loans, regardless of secondary market transactions that result in the sale or assignment of the loans in whole or in part.

35. Specifically, in July of 2020, the FDIC issued its Interest Rate Authority Rule, which provides that "[w]hether interest [charged] on a loan is permissible under [S]ection 27 . . . is **determined as of the date the loan is made**," and that "**[i]nterest on a loan that is permissible under [S]ection 27 . . . shall not be not affected by . . . the sale, assignment, or other transfer of the loan, in whole or in part**."[33]

36. In the notice accompanying the publication of the Interest Rate Authority Rule, the FDIC explained that it issued this rule to address a "statutory gap" in the FDIA, which "expressly gives banks the right to make loans at the rates permitted by their home States, but does not explicitly list all the components of that right."[34]

37. The FDIC filled this statutory gap by concluding that "[o]ne such implicit component" of the right of state-chartered banks to make loans permitted by their home states "is the right to assign the loans under the preemptive authority of section 27."[35] In reaching this conclusion, the FDIC explained that "[b]anks' power to make loans has been traditionally viewed as carrying with it the power to assign loans," and therefore "a State bank's Federal statutory authority under section 27 to make loans at particular rates includes the power to assign the loans at those rates."[36]

38. Rejecting the alternative view, the FDIC explained that "[d]enying State banks the

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[33] 12 C.F.R. § 331.4(e) (emphasis added).

[34] Interest Rate Authority Notice, 85 Fed. Reg. at 44,146 (internal marks omitted).

[35] *Id.*

[36] *Id.*

ability to transfer enforceable rights in the loans they make under the preemptive authority of section 27 would undermine the purpose of section 27 and deprive State Banks of an important and indispensable component of their Federal statutory power to make loans at the rates permitted by their home state."[37]

39. The FDIC's interpretation of Section 27 is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

40. Apparently recognizing that the FDIC's regulation is fatal to its efforts to go after nondepositories like OppFi, the State of California led a coalition of states in an effort to invalidate the Interest Rate Authority Rule.[38] The effort failed. On February 8, 2022, Judge Jeffrey White rejected the State of California's challenge to the Interest Rate Authority Rule, granting summary judgment in favor of the FDIC and confirming that the FDIC's interpretation of Section 27 is reasonable and entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[39]

FACTUAL ALLEGATIONS

A. OppFi and Its Relationship with FinWise

41. As noted above, to realize its goal of helping middle income, credit-challenged consumers build a better financial path, OppFi and the Bank entered into an agreement pursuant to which the Bank uses OppFi's technology platform to make Program Loans to customers. The Bank, which was founded in 2000, is dedicated to helping its customers reach their financial goals by delivering exceptional products and surpassing expectations. OppFi's relationship with the Bank predates the passage of AB 539 by several years and thus was not created as a reaction to or any effort to evade AB 539.

42. The contracts between OppFi and the Bank delineate certain responsibilities with respect to the loans originated by the Bank. As set forth below, each party plays a role in the

[37] *Id.* at 44,149.

[38] *California v. FDIC*, United States District Court for the Northern District of California, Case No. 20-5860.

[39] *California v. FDIC*, No. 20-CV-05860-JSW, 2022 WL 377403 (N.D. Cal. Feb. 8, 2022).

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lifecycle of the loans originated under this contractual arrangement, but there is no doubt that credit is actually extended by the Bank, which retains ownership of the loan at all times.

43. **FinWise's Role and Responsibilities:** The Bank is the lender for all California borrowers who obtain loans through OppFi's online platform. Consistent with its role as lender, the Bank performs the following functions in connection with its relationship to OppFi:

a. Underwriting and Loan Approval: The Bank approves all underwriting criteria applied to Program Loans. Underwriting decisions on Program Loans are made primarily through an automated underwriting system that applies underwriting criteria approved by the Bank which cannot be modified without the Bank's express approval. As such, the Bank effectively sets all underwriting requirements and makes all underwriting decisions;

b. Funding: The Bank only uses its own funds to make the Program Loans;

c. Ownership: The Bank retains ownership of all loans made through OppFi's online platform for their entire lifecycle;

d. Marketing: The Bank reviews and approves all marketing materials before they are used;

e. Borrower Contracting: The Bank enters into contracts with borrowers for loans originated under the Program, which are between the borrower and the Bank only, define the Bank as the lender on the loan, and make clear the Bank is the entity extending credit.

44. **OppFi's Role and Responsibilities**: OppFi, on the other hand, provides technology-based services to allow the Bank to perform the above-referenced activities. Consistent with its role as a service provider, OppFi provides the following services to the Bank:

a. Website Services: OppFi maintains a website for receiving consumer inquiries regarding loan products;

b. Marketing Services: OppFi prepares a marketing strategy and marketing materials, which FinWise reviews and approves;

c. Technology-Enhanced Underwriting: OppFi processes the applications for Program Loans by applying the Bank's underwriting model to the information it collects from consumers' loan applications; that model uses an algorithm that applies underwriting criteria

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approved by the Bank to approve or reject loan applications;

d. Customer Support: OppFi provides consumer support services;

e. Servicing: OppFi services the Program Loans for the Bank and handles all servicing duties, including but not limited to, collecting and posting payments, engaging in loss mitigation, providing consumer support, and remitting payments.

45. Under the Program, OppFi receives certain servicing fees and the right to purchase a percentage of the beneficial interest in the loans that FinWise originates under the Program. FinWise also receives monthly fees from OppFi.

46. In addition, as discussed above, FinWise retains ownership of loans originated under the Program at all times, and also retains title to the loans and a beneficial interest in a portion of the principal and interest on loans originated under the Program.

B. California Legislature Enacts AB 539 and Recognizes That the CFL's Interest Rate Caps Do Not Apply to Bank Loan Programs

47. As set forth above, AB 539 went into effect in January 2020 and amended the CFL by imposing an interest rate cap on loans subject to the CFL in amounts between $2,500 and $10,000.

48. The legislative history of AB 539 demonstrates that the Legislature understood that it would not apply to third-party nondepositories who contract with state and federally-chartered banks.

49. Specifically, in passing AB 539 the California Senate Committee on Banking and Financial Institutions prepared an analysis of the implications of the law. Among other things, the analysis explained that AB 539 would not apply to nondepositories, like OppFi, that work with state-chartered banks like FinWise:

> ***Lenders That Will Not Be Subject to AB 539***. An unknown amount of installment credit is currently available to Californians from lenders that are not lending under the CFL. Lenders who are legally able to offer installment loans to Californians without having to be licensed under the CFL include state- and federally-chartered banks and credit unions, nondepositories that partner with banks (the so-called bank partnership model, in which the nondepository markets and underwrites the loan, but a bank technically originates the loan), and tribal lenders. All of these types of lenders are likely to continue lending in California if AB 539 is enacted, and it is

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> possible that some lenders which currently lend under the CFL at interest rates above those allowed under AB 539 will switch to bank partnership lending in California, if AB 539 is enacted.

Senate Banking Analysis, at 6. This analysis confirmed what is inevitably the case: Program Loans are not subject to the CFL's interest rate caps, and neither are OppFi's Program-related activities.[40]

C. The Commissioner, the California Attorney General, and Assemblymember Limón Tout AB 539 as Weapon to Use Against Nondepositories With Bank Partnerships.

50. As soon as AB 539 was signed into law, and despite knowing it did not apply to bank loan programs under the plain language of the CFL and in light of federal preemption, the Commissioner of the DFPI, the California Attorney General, and Assemblyperson Monique Limón began touting AB 539 as a weapon to use against nondepositories that contract with state and federally-chartered banks.

51. Indeed, Assemblymember Limón expressly singled out OppFi in a written statement before the United States House of Representatives Committee on Financial Services claiming that "at least two privately-held companies appear to be breaking California law today. . . . OppLoans is marketing loans of 160% to California consumers through a rent-a-bank scheme with FinWise Bank."[41]

52. The California Attorney General similarly stated that his office would "aggressively enforce AB 539, including in the face of 'rent-a-bank' schemes."[42]

53. The Commissioner likewise quickly expressed concern regarding "reports of

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[40] Elsewhere in this analysis, the author explains that the DBO claimed that OppLoans would be subject to AB 539. That is further evidence that the Commissioner decided OppLoans was subject to AB 539 long ago.

[41] *Rent-a-Bank Schemes and New Debt Traps: Assessing Efforts to Evade State Consumer Protections and Interest Rate Caps: Hearing on H.R. 5050 Before the H. Comm. on Financial Services*, 116th Cong. 8 (2020) (statement of Monique Limón, Chair, California Assembly Committee on Banking and Finance), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-limnm-20200205.pdf.

[42] *Lenders are using banks to skirt a CA interest rate law,* Sacramento Bee, Dec. 18, 2019, https://www.sacbee.com/news/politics-government/capitol-alert/article238501288.html (registration required) (last visited March 4, 2022).

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companies using rent a bank schemes to avoid usury limits."[43]

54. Following up on those purported concerns, the Commissioner launched an "investigation into whether prominent auto title lender Wheels Financial Group, LLC, which does business as LoanMart, is evading California's newly-enacted interest rate caps through its recent partnership with an out-of-state bank."[44]

55. In launching this investigation, the Commissioner stated that "[t]he ball is now in the DBO's court to enforce the Fair Access to Credit Act [i.e. AB 539]. We will not sit idly if the same exorbitant-interest credit is being marketed, processed, and serviced by the same company as before, distributed through the same channels as before, and to the same target customers as before."[45]

56. The Commissioner's statements are contrary to law. As set forth above, loans originated by state-chartered banks are not subject to any of the CFL's interest rate caps, including those set forth in AB 539. The California Legislature confirmed as much in the above-quoted Senate Committee analysis.

57. Further, the Commissioner's statements are contrary to the DFPI's past positions. For years before the enactment of AB 539, the Bank originated Program Loans in amounts less than $2,500 that would have been subject to interest rate caps if the CFL applied to loans originated by the Bank. Despite knowing about these loans, the DFPI never sought to enforce the CFL's interest rate limits, tacitly recognizing that existing statutory exemptions and federal preemption precluded it from doing so. AB 539 did not and could not change any of that. Instead, the Commissioner and the DFPI are using the recent passage of AB 539 as a pretext to wage a war against nondepositories that contract with banks that has no basis in the law. The Commissioner's public comments demonstrate that the Commissioner had prejudged OppFi before the DFPI began an informal inquiry into the actual facts and circumstances of OppFi's Program-related activities.

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[43] *Id*.

[44] Press Release, DFPI, DBO Launches Investigation Into Possible Evasion of California's New Interest Rate Caps By Prominent Auto Title Lender, LoanMart (Sept. 3, 2020), 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).

[45] *Id*.

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D. The Commissioner Investigates OppFi and Concludes That OppFi Violated the CFL's Interest Rate Caps

58. On February 24, 2020, after the public comments described above, the Commissioner, through Mr. Vuong, contacted OppFi and requested information "relating to OppLoan's apparent partnership with a bank in the making of loans in California above the rate limit set forth in the recent Fair Access to Credit Act (AB 539)."

59. On April 3, 2020, OppFi wrote back to the Commissioner providing it with the information requested and explaining, in detail, why AB 539 does not apply to its California business with the Bank. As set forth above, the information provided to the Commissioner established that the loans the Bank makes are not subject to the CFL, that OppFi is not a lender under the CFL, and that, in any event, federal law preempts any attempt to enforce the CFL's interest rate caps with respect to loans originated under the Program.

60. On September 18, 2020, in response to the Commissioner's informal request, OppFi provided documents to the DFPI regarding the Program, which support its position that AB 539 does not apply to its Program-related activities.

61. On February 12, 2021, Mr. Vuong wrote to OppFi's counsel requesting additional documents and information. On April 30, 2021, OppFi provided the requested information.

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

FIRST CAUSE OF ACTION

(DECLARATORY JUDGMENT)

63. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 62 as if fully set forth herein.

64. An actual controversy has arisen and now exists between OppFi and the Commissioner. As described above, the Commissioner contends that the CFL and AB 539 are applicable to and govern OppFi's Program related activities and has threatened immediate enforcement action against OppFi to prohibit OppFi from providing its technology-based services

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to the Bank in California.

65. The Commissioner's threatened action poses a potentially fatal threat to OppFi's business in California. Its entire California-based business consists of providing its technology-based services to the Bank. Further, given that the Commissioner has reached and communicated her conclusion that the Program Loans are unlawful, and stated that she intends to enforce that position, there exists a ripe, actual controversy related to the legal rights and duties of the parties that the Court can adjudicate.

66. As set forth above, it is clear that the CFL's interest rate caps do not apply to Program Loans because OppFi is not making the loans—the Bank is. Program Loans originated by the Bank are statutorily exempt from the CFL because they were made by a federally-insured, state-chartered bank. Further, OppFi is not a "lender" within the meaning of the CFL for any of the loans because the Bank is the entity that extended credit, entered into contracts with the borrowers for repayment, and remains the title owner of the loans until they are repaid or otherwise extinguished. And finally, even if AB 539 or California Financial Code section 22303 applied to Program Loans, which they do not, they would be expressly and impliedly preempted by Section 27 of the FDIA, which permits state-chartered banks to lend up to the rates permitted in the state in which they are located and preempts all contrary laws in other states. As relevant here, the state in which the Bank is located—Utah—has no interest rate cap. Instead, it permits parties to contract for "any" interest rate.[46] Accordingly, Section 27 preempts any attempt by California to impose an interest rate cap on loans which, as is this case here, were originated by a state-chartered bank located in Utah.

67. Further, as explained above, the Commissioner has stated that she intends to assert a claim for violation of section 90003(a) of the CCFPL based on the alleged interest rate violations. This theory fails for a simple reason: as explained above, AB 539 does not apply to Program Loans, and even if it did, it would be preempted. Because this unfair practice claim is wholly derivative of

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

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the invalid interest rate claim, it fails for the same reasons.

68. For the foregoing reasons, a judicial determination of whether OppFi has violated California Financial Code section 22303, AB 539 (Cal. Fin. Code § 22304.5), and/or section 90003(a) of the CCFPL is appropriate at this time.

SECOND CAUSE OF ACTION

(INJUNCTIVE RELIEF)

69. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 68 as if fully set forth herein.

70. As set forth above, an actual controversy has arisen and now exists between OppFi and the Commissioner because the Commissioner has concluded that OppFi is in violation of laws that OppFi contends do not apply.

71. As such, an injunction, including temporary and preliminary relief, should issue prohibiting the Commissioner from enforcing California Financial Code section 22303, AB 539 (Cal. Fin. Code § 22304.5), and/or section 90003(a) of the CCFPL against OppFi based on its Program-related activities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

A. For a declaration that the interest rate caps set forth in the CFL, including those set forth in AB 539, do not apply to Program Loans, and that these interest rate claims cannot support a claim for violation of section 90003(a) of the CCFPL;

B. For a declaration that Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d preempts application of AB 539 and California Financial Code section 22303 to Program Loans;

C. For an injunction prohibiting the Commissioner from enforcing California Financial Code section 22303, AB 539 (Cal. Fin. Code 22304.5), and/or section 90003(a) of the CCFPL against OppFi based on its Program-related activities;

D. For costs of the suit;

E. For attorneys' fees pursuant to the Code of Civil Procedure section 1021.5; and

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F. For such other and further relief that the Court deems just and proper.

DATED: March 7, 2022

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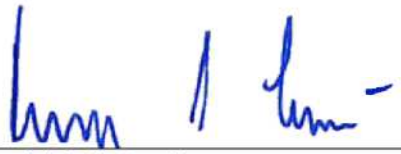
By: 

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