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County of Los Angeles

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David W. Slayton, Executive Officer/Clerk of Court
By: M. Carino, Deputy

Opportunity Financial, LLC v. Clothilde Hewlett, Commissioner
22STCV08163

The court issues its rulings regarding the Commissioner's motion for a preliminary injunction.

I. RELEVANT PROCEDURAL BACKGROUND

On March 7, 2022, Plaintiff Opportunity Financial, LLC ("OppFi") filed this action against Clothilde V. Hewlett in her official capacity as Commissioner of California's Department of Financial Protection and Innovation (the "Commissioner").

On April 8, 2022, the Commissioner filed a Cross-Complaint against OppFi.

On September 30, 2022, the Court overruled OppFi's demurrer to the Commissioner's Cross-Complaint.

On October 17, 2022, OppFi filed a Cross-Complaint against the Commissioner and California's Department of Financial Protection and Innovation ("DFPI").

II. FACTUAL BACKGROUND

A. Allegations in OppFi's Complaint

OppFi is a leading financial technology platform and service provider focused on helping middle-income, credit-challenged consumers build a better financial path. (Compl., ¶ 14.)

Specifically, OppFi's platform allows banks to provide access to simple short-term lending products for consumers whom traditional lenders may

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otherwise turn away in light of their credit profile. (Compl., ¶ 15.) In this regard, OppFi plays OppFi plays a critical, federally recognized, and approved market: enabling consumers to be shut out of traditional credit markets to obtain access to credit. (Compl., ¶ 15.) Moreover, access to credit is a critical asset to individuals seeking to build a better economic future. (Compl., ¶ 15.)

Lenders such as FinWise Bank (the "Bank"), a federally-insured state-chartered bank located in Utah, have developed loan products that provide credit to this population in light of their high credit risk. (Compl., ¶ 17.) The loan products offered by the Bank provide 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. (Compl., ¶ 17.)

However, 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. (Compl., ¶ 17.) Borrowers understand that high interest rates are necessary in light of their credit status. (Compl., ¶ 17.)

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. (Compl., ¶ 18.) These states understand that if the legal small-dollar lending market is terminated, it will not end low-income borrowers' need for credit, but instead 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. (Compl., ¶ 18.)

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The Bank uses OppFi's platform to provide loan products to consumers throughout the United States. (Compl., ¶ 19.)

This action arises from the Commissioner of California's Department of Financial Protection and Innovation's (the "Commissioner") threatened enforcement of the Fair Access to Credit Act ("AB 539") against OppFi. (Compl., ¶ 1.)

AB 539, which became effective on January 1, 2020, amended the California Financing Law ("CFL") to cap interest rates to 36% for covered loans between $2,500 and $10,000 made by "financial lenders." (Compl., ¶ 1.)

The Commissioner accuses OppFi of originating consumer loans with interest rates above those allowed by AB 539. (Compl., ¶ 1.)

However, the loans in question originated from the Bank, not OppFi. (Compl., ¶ 1.) OppFi only provides the Bank with technology and other services under a contractual arrangement (the "Program"). (Compl., ¶ 1.)

Moreover, the interest rate caps in the CFL should not apply to loans originated under the Program ("Program Loans") for the following reasons.

- First, Program Loans are constitutionally and statutorily exempt from California's maximum interest rate caps because the loans are made by the Bank, 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 the application of AB 539 to Program Loans.

(Compl., ¶ 2.)

The inapplicability of the CFL's interest rate caps to the Program is not controversial or new, but 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. (Compl., ¶ 3.) Federal law permits state-chartered banks to export the interest rates allowed in their chartering state to any other state in the country. (Compl., ¶ 3.) Federal law also preempts any efforts by state legislatures to apply their state's interest rate caps to loans made by state-chartered banks in other states. Indeed, in passing AB 539, the Legislature expressly acknowledged what is obvious: AB 539 does not apply to "nondepositories that partner with banks," like OppFi. (Compl., ¶ 3.) The Commissioner is well aware of these settled principles. (Compl., ¶ 4.) Indeed, before AB 539, the Bank originated Program Loans

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that would have been subject to the interest caps under AB 539, but the Commissioner and her predecessors never objected to those loans. (Compl., ¶ 4.)

The Complaint asserts the following causes of actions.

1. Declaratory Judgment
2. Injunctive Relief

B. Allegations in the Commissioner's Cross-Complaint

The Commissioner's Cross-Complaint against OppFi asserts two causes of action:

1. Violation of the California Financing Law
2. Violation of the California Consumer Financial Protection Law

The Commissioner alleges the following.

OppFi is not a bank, but a publicly traded company that originates consumer installment loans called "OppLoans" through its website. (Commissioner's XC, ¶ 3.) Consumers apply for a loan on OppFi's website, and OppFi uses an automated underwriting model where loans can be instantly approved or denied with most funds available the next business day. (Commissioner's XC, ¶ 3.)

The Bank is a Utah-chartered bank that has essentially "rented" its charter to OppFi to charge higher interest rates to consumers through the "OppLoans" product. (Commissioner's XC, ¶ 4.) State-chartered banks that are federally insured are exempt under Section 27 from state interest rate caps. (Commissioner's XC, ¶ 4.) The State of Utah does not have a state interest cap, making its state-chartered banks attractive to non-bank lenders like OppFi. (Commissioner's XC, ¶ 4.)

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To address predatory lending (a national problem causing consumers to become trapped in a cycle of debt due to high interest installment loans that are difficult to pay off), approximately 45 states passed laws capping the interest rates lenders can charge on consumer loans. (Commissioner's XC, ¶ 1.)

In 2019, California passed AB 539, capping interest rates on most consumer loans at 36%. (Commissioner's XC, ¶ 1.)

In response, non-bank lending companies partner with various state-chartered banks in the few remaining states without interest rate caps to benefit from the exemption that the state-chartered banks have under federal law from other states' interest rate cap laws (also known as usury laws). (Commissioner's XC, ¶ 1.)

These "rent-a-bank" partnerships, like the one between OppFi and the Bank, are typically structured so that a state-chartered bank (here, the Bank) in a state without interest rate caps appears on paper to be the "lender" on high interest loans to consumers in another state where rates are capped, while the non-bank lending company (here, OppFi) performs the actual duties of a real lender such as marketing, underwriting, and servicing. (Commissioner's XC, ¶¶ 2, 5.) Although the state-chartered bank purports to originate the exorbitant interest loan, it immediately sells the loan to the non-bank lending company or the bulk of the receivables (meaning the right to interest and principal payments). (Commissioner's XC, ¶ 2.) From this point forward, the state-chartered bank has no financial stake in the performance of the loan, and the non-bank lending company, the "true lender," reaps the economic benefits of the loan. (Commissioner's XC, ¶ 2.) Because a state-chartered bank is the "lender" on paper, the non-bank lending company purports to "rent" the state-chartered bank's exemption and charge consumers interest rates exorbitantly higher than those legally permitted in the consumer's state. (Commissioner's XC, ¶ 2.)

In enacting a 36% interest rate cap on consumer loans between $2,500 and $9,999, California has made a public policy determination regarding the appropriate balance between affording consumers fair access to credit and the protection of its most vulnerable citizens. (Commissioner's XC, ¶ 7.) Far from an effort to remove financial barriers for underserved communities, OppFi's predatory "rent-a-bank" ruse is an overt attempt to evade the state interest rate cap and must be recognized as an illegal sham that has no place in California's innovative financial marketplace. (Commissioner's XC, ¶ 5.)

Through this rent-a-bank ruse, OppFi uses the Bank as a straw lender in a gambit to circumvent interest rate limits that the State of California deemed reasonable and necessary to curb predatory lending abuses. (Commissioner's XC, ¶ 5.)

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However, regardless of which entity the loan documents proffer as the purported "lender," OppFi is the true lender of the OppLoans, and the loans OppFi makes are illegal in California. (Commissioner's XC, ¶ 5.) The Commissioner alleges: "The primary factor is which entity–bank or non-bank–has the predominate economic interest in the transaction. (Commissioner's XC, ¶ 18.)

Therefore, the Commissioner filed the Cross Complaint seeking to enjoin OppFi's unlawful predatory lending scheme, provide restitution to exploited borrowers, and impose penalties of at least $100 million against OppFi, and those acting in concert, for the financial harm inflicted on at least 38,000 California borrowers. (Commissioner's XC, ¶ 8.)

C. Allegations in OppFi's Cross-Complaint

The DFPI is an agency of the State of California that is legally charged to execute any laws relating to finance lenders. (OppFi's XC, ¶ 10.)

OppFi's Cross-Complaint against the Commissioner and DFPI (collectively, "Cross-Defendants") challenges DFPI's adoption of the so-called "true lender doctrine" to determine the applicability of the interest rate caps under the CFL. (OppFi's XC, ¶ 1.)

As outlined in OppFi's Complaint, the Commissioner threatened to enforce AB 539's interest cap against OppFi for loans originated by the "Bank." (OppFi's XC, ¶ 3.) However, the CFL's interest rate caps only apply to "finance lenders," which does not include state-chartered banks like the Bank. (OppFi's XC, ¶ 3.) Nonetheless, the Commissioner has sued OppFi for violating those interest rate caps. (OppFi's XC, ¶ 3.)

The DFPI's underground adoption of its "true lender doctrine" is a significant departure from Cross-Respondents' enforcement of the CFL's interest rate caps before AB 539. (OppFi's XC, ¶ 6.)

In addition, the Administrative Procedure Act ("APA"), Gov't Code § 11340 et seq. was designed to provide regulated entities notice of a regulation's requirements so that they could conform their activities accordingly and, if necessary, test the authority of the agency to implement such a rule beforehand. (OppFi's XC, ¶ 7.)

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Therefore, the true lender doctrine is subject to the notice and comment rulemaking procedures of the APA because it is intended to "apply generally, rather than in a specific case," and "implement[s], interpret[s], or make[s] specific the law enforced or administered by" Cross-Respondents. (OppFi's XC, ¶ 6, citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 566, 571 in a footnote.)

Instead of complying with the APA, DFPI adopted the true lender doctrine without any formal notice at all, much less fair or adequate notice, and without complying with the APA. (OppFi's XC, ¶ 7.) As a result, service providers like OppFi now face an existential threat to their businesses and significant monetary penalties based on an interpretation of the CFL adopted by the DFPI without complying with the APA. (OppFi's XC, ¶ 7.) They also face the challenge of complying with a vague and amorphous test that leaves the applicability of the CFL's interest rate cap to the regulator's discretion. (OppFi's XC, ¶ 7.) At base, this renders the CFL's exemption for state-chartered banks meaningless. (OppFi's XC, ¶ 7.) The APA's rulemaking procedures are intended to prevent these unfair results. (OppFi's XC, ¶ 7.)

Therefore, because DFPI did not submit its "true lender doctrine" to the APA's rule-making process, it is invalid as an "underground regulation" and cannot be enforced. (OppFi's XC, ¶ 8.)

OppFi's Cross-Complaint asserts the following causes of action.

1. Writ of Mandate, Code of Civil Procedure § 1085(a) -- Violation of the California Administrative Procedure Act, Gov't Code § 11340 et seq.)
2. Declaratory Relief, Code Civ. Proc. § 1060; Gov't Code § 11350—Violation of the California Administrative Procedure Act, Gov't Code § 11340 et seq.)

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III. MOTION FOR PRELIMINARY INJUNCTION

A. Moving Papers

The Commissioner filed the instant motion for preliminary injunction, arguing:

- The Court should issue an order enjoining OppFi from:

- (1) Marketing, offering, making, collecting on, and/or servicing new consumer loans under its OppLoans program to California residents that have interest rates in excess of the interest rate caps defined in the California Financing Law ("CFL") and California usury law.
- (2) Purchasing loans or receivables of loans made to California residents under OppFi's OppLoans program that have interest rate in excess of the interest rates defined in the CFL and California usury law.
- (3) Providing applications from California residents to FinWise (aka the Bank) for the issuance of loans with interest rates in excess of the interest rate caps defined in the CFL and California usury law.

- Under the above injunction, OppFi can still operate in California and collect interest up to the CFL allowable interest rates.
- In addition, the Commissioner does not seek to enjoin OppFi from collecting on existing loans issued to California consumers where it has already purchased loan receivables.
- Enjoining OppFi from issuing additional high interest loans merely preserves the status quo by preventing ensnaring of additional California consumers.
- The California Supreme Court has held that the standard for a government entity to enjoin violations of a statutory scheme which expressly authorizes injunctive relief is whether it is "reasonably probable" the government entity will prevail on the merits. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72 ("*IT Corp*").)
    - That standard is different from the one used for private litigants.
    - In addition, for government entities, there is a presumption that the potential harm to the public outweighs the potential harm to the defendant.
    - The CFL authorizes the Commissioner to seek injunctive relief.
    - The Commissioner is also exempt from any requirement of a bond per Code of Civil Procedure section 995.220.

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- The evidence uncovered so far demonstrates that the Commissioner has a "reasonable probability" of prevailing on the merits.
    - First, OppFi is not an exempt lender under the CFL or California Constitution.
    - Second, there is substantial evidence that OppFi's prearrangement with FinWise Bank establishes that OppFi is the actual lender of money under California law.
        - Background.
            - OppFi has held a CFL lender license issued by the Commissioner since 2014. (Wu Decl., ¶ 35.)
            - With its CFL license, OppFi used to directly originate loans to California residents through its website, www.OppLoans.com, without the involvement of an out-of-state bank.
            - In 2016, for example, OppFi reported that it originated, under its CFL license authority, at least 3,000 consumer loans, above $2,500, through its website. (Wu Decl., ¶ 35.)
            - Following the enactment of AB 539, instituting rate caps in question into the CFL, "OppFi ceased directly funding OppLoans in California."
            - Instead, the OppLoans issued through the same OppLoans.com website was funded by FinWise. (Wu Decl., ¶ 36.)
            - According to OppFi, OppLoans funded through FinWise typically range between $500 and $4,000 and carry an APR between 59 and 160 percent. (Wu Decl., ¶ 36; Exhibit P.)
            - FinWise does not carry the financial risk.
            - OppFi represents on its website that FinWise also does not service OppLoans. (Wu Decl., ¶ 28; Exhibit M.)
            - OppFi undertakes the servicing obligations of OppLoans. (Wu Decl., ¶ 28.)
        - The "true lender" doctrine.

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- For nearly a century, California law has recognized the principle of looking at substance over form in evaluating potentially usurious transactions. (*See Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 432 ["it is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade [usury laws]"].)

- Application of substance over form requires looking beyond the proffered lender to identify who the actual lender of money is, not just who is proffered on the face of loan documents.

- One cannot hide a usurious transaction simply by routing a loan through an intermediary lender and then purchasing the loan to create a façade of legality. (See *Janisse v. Winston Inv. Co.* (1957) 154 Cal.App.2d 580, 586-587 ("*Janisse*"); *Anderson v. Lee* (1951) 103 Cal.App.2d 24, 26 ("*Anderson*").)

- In *Janisse*, the lender of record served the role of dummy in an arrangement designed to conceal a usurious transaction by a later "assignee" of the loan. (*Janisse*, *supra*, 154 Cal.App.2d at p. 587.) In an act of subterfuge in the *Janisse* case, the named lender was put on the note as an "intermediary assignor" instead of the true lender assignee because "to sell the note it had to be made to a third party." The Court of Appeal found the assignee to be the true lender, with the named lender serving as a straw lender to conceal usury.

- Similarly, in *Anderson*, the Court of Appeal found the loan and its sale were a sham designed to hide the real lender. (*Anderson*, *supra*, 103 Cal. App. 2d at pp. 27-28.)

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- Here, OppLoans process point to OppFi (not Finwise) as being the actual lender of the loans.
    - The process ranges from control of the website to how underwriting is conducted to OppFi's collateral guarantee and, finally, to OppFi's taking over of nearly all OppLoans receivables within days of the loans funding and reaping the majority of their economic benefit.
        - OppFi owns the OppLoans website, https://www.opploans.com, not FinWise. (Wu Decl., ¶ 12.)

    The landing page of the website markets OppLoans as "OppLoans by OppFi." (Wu Decl., ¶ 15; Ex. M.) "OppFi" or "Opportunity Financial, LLC" are mentioned at least five times on the landing page for OppLoans. Finwise is not mentioned even once on the landing page. To the extent that OppFi mentions that loans may be originated by "one of several lenders," including OppFi or a lending partner, the landing page states that "[a]ll loans originated by our lending partners will be serviced by OppLoans."

    - OppFi also provides the underwriting criteria for OppLoans to FinWise. (Wu Decl., ¶ 16.) The OppLoans website continues to operate, marketing such personal loans to California consumers. (Wu Decl., ¶ 38; Ex. R.)

  - Therefore, all of the hallmarks of the actual lender of money point to OppFi.

    - The usage of FinWise as a lender on paper is simply a ruse designed to circumvent CFL's interest-rate caps.

    - OppFi and Finwise are not engaged in arm's-length loan sales on the secondary market.

    - Rather, they have carefully and systematically structured a business relationship designed to ensure that the lending transaction starts and ends with OppFi.

    - FinWise, as an exempt lender, does precisely the one thing OppFi cannot do itself–make loans at over 36 percent interest.

  - Therefore, with a presumption of harm to the public, the Commissioner has shown reasonably probability of prevailing on the merits.

- Enforcement injunctions do not require a weighing of equitable considerations or a balancing of interests. However, even if the court were to balance the competing interests, that balance favors granting the motion.

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- For those reasons, the court should issue a preliminary injunction enjoining OppFi from offering OppLoans with interest rates that exceed the CFL interest rate caps.

B. Opposition

In opposition, OppFi argues,

- Background
    - 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 OppFi to offer lending products to borrowers in California and throughout the nation (the "Program Loans").
    - These type of strategic relationships allow FinWise to manage liquidity, maintain safe and sound practices, and compete with national banks.
    - The Commissioner of the DFPI seeks to enjoin Oppi from, among other things, providing services to FinWise in connection with new FinWise loans to California residents.
    - The Commissioner's sole basis for seeking this extensive injunction is based on her argument 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 Commissioner is wrong on the law and facts because (1) federal and California law prohibit application of the true lender doctrine, (2) federal law preempts that application, California does not recognize it, and (3) the DFPI cannot enforce it without first complying with the APA.
    - Federal law preempts the Commissioner's CFL claim.

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- 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.)

- Therefore, 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.

- The following cases are instructive.

    - In *Hudson v. Ace Cash Express, Inc.* 2002 WL 1205060 (S.D. Ind. May 30, 2002) ("*Hudson*"), the borrower obtained a loan through Ace Cash Express ("Ace"), which named Goleta, a national bank, as the lender. By prearrangement, Ace purchased 95 percent of the loan receivable, leaving Goleta with ownership of the loan and a 5 percent interest. The borrower sued claiming that the note was usurious under Indiana law and that Ace was the "true lender." Applying Section 85, the National Bank Act counterpart of Section 27, the federal court held that federal law governed the interest rate and preempted contrary Indiana usury law because even after the sale of 95 percent 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." (*Hudson*, *supra*, at *4.)

    - In *Sawyer v. Bill Me Later, Inc.* (D. Utah 2014) 23 F.Supp.3d 1359 ("*Sawyer*"), a federal court reached the same conclusion. The program loans at issue in that case 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. (*Id.* at pp. 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

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and [the non-bank] to regulatory scrutiny and accountability [by the FDIC] under the FDIA." (*Id.* at p. 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." (*Ibid.*) 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 p. 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 Commissioner's "true lender" doctrine, like any other rule of California law, is expressly preempted.
- FinWise's federal rights extend to the sale of its 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. s 331.4(e).)
  - Here, the DFPI argues that OppFi is the "true lender" "primarily" because an affiliate purchases receivables within three days "after" FinWise funds the loan. (Motion, p. 5:22-24.)
    - That argument 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."

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- o Neither of those approaches is permissible. In *Peterson v. Chase Card Funding, LLC, 2020 WL 5628935*, *3-7 (W.D.N.Y. Sept. 21, 2020) ("*Peterson*") is instructive. In that case, the federal court examined preemption under the National Bank Act. The national bank sold 100 percent 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. 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* (E.D.N.Y. 2020) 489 F.Supp.3d 33, 42, 49-50 [same]; *Krispin v. May Dep't Stores Co.* (8th Cir. 2000) 218 F.3d 919, 924 [state law usury claims preempted where bank sold 100 percent 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 preempted because it acts as an obstacle to Congress's purposes and objectives in enacting Section 27.

  - o 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, ensure that state banks have the "ability to manage their liquidity," and ensure that state banks have the "ability to use loan sales and securitization to diversify their funding sources and address interest rate risk."

  - o Here, the true lender doctrine interferes with those objections in the following ways.

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    - First, it discriminates against state banks and impairs regulatory certainty be 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.* (2012) 54 Cal.4th 376, 389.)

    - Second, 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* (2003) 539 U.S. 1, 10-11.)

    - Third, 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 loans to manage risk.

- The Commissioner's true lender doctrine has no basis in California law.

    - Under article XV, Section 1 of the California Constitution and 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, the Program Loans are exempt.

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

    - Nevertheless, the Commissioner posits as the "core issue" to be whether FinWise is the true lender for purposes of Section 22050's exemption.

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- 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 Commissioner does not dispute that FinWise meets that test, especially when it originates, funds, and holds loans.
- The Commissioner's framing of the "core issue" presupposes that FinWise must jump an additional hurdle–that it be the "true lender" measured by the agency's "true lender" doctrine.
- However, the Commissioner 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. (See *People v. Connor* (2004) 115 Cal.App.4th 669, 692 ["[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 Commissioner claims its true lender test follows from California usury case law.

- However, the cases that the Commissioner cites involve transactions designed to disguise interest charges.
- None of them provide a basis for the sweeping true lender doctrine that the Commissioner applies here.
- To the extent that *Anderson* and *Janisse* speak to identification of the lender, these cases were markedly different than those presented here.
- In *Anderson* and *Janisse*, 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 to *Anderson* and *Janisse*, over a period of years, FinWise has underwritten and funded millions in loans under the supervision 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

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case involved a bank or a statutory or common law bank exemption.

        - Thus, *Anderson* and *Janisse* do not address or answer the very question that FinWise has posed–who is the "lender for purposes of the exemption." Specifically, those two cases do not address whether a Section 22050 lender (like FinWise) must retain all or some portion of the loan, and if so, how much. Those 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."

        - Therefore, *Anderson* and *Janisse* cannot be read to support the Commissioner's true lender doctrine.

    - The Commissioner's adoption of the doctrine violated the APA.

        - The doctrine is subject to the APA because it is a regulation for general application.

        - The Commissioner adopted the true lender doctrine to determine whether any "entity named as the 'lender'" is the true lender.

        - The Commissioner has applied the doctrine to other bank partnerships. (Levin, Ex. J.)

        - Further, the Commissioner interprets and implements the CLF's bank exemption.

        - 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.

        - Therefore, the DFPI's true lender is a regulation that it cannot enforce without proper rulemaking.

- Even if the "true lender doctrine" applied in this case, FinWise is the true lender under any test and the declarations OppFi has filed in support of its opposition show that the Commissioner's description of FinWise's relationship with OppFi is simply incorrect.

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- Contrary to the Commissioner's 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 account 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.

- Finwise maintains a substantial economic interest in the loans it originates and, at origination, bears what the Commissioner calls the predominant economic interest ("PEI") by any measure.

- 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 DPI for each loan and the entire loan program.

- In addition, 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.

    - As explained by Dr. Christopher James, former Senior Economic Advisor to the Comptroller of the Currency and FDIC consultant, this chain of secondary market transaction is common across consumer lending and is necessary for banks to manage risk.

    - 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 of SPE's lender within days of OppWin's purchase.

    - 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 borrow payments, have been transferred to third parties, unaffiliated with OppFi or FinWise, within days of funding.

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    - Moreover, as shown by O'Bryan, among economic interest holders in the loans, FinWise places the largest sum of money at risk.

  - Therefore, FinWise retains all of the traditional rights of a lender.

  - FinWise also exercises control of OppFi by:

    - Requiring 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.

    - 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.

- The Wu declaration is riddled with errors and false assumptions.

  - The Commissioner's "factual record" is based on Wu's declaration. Wu is an employee of the DFPI, who purports to summarize OppFi's and FinWise's relationship. Wu's representations are unreliable and misstate, misrepresent, and ignore critical aspect of the OppFi-FinWise program.

  - For example, Wu provides no basis to conclude that OppFi receives "nearly all of the [financial] benefits of the [FinWise] loans." (Wu Decl., 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 loans in their entirety for several days after origination. (O'Bryan, ¶¶ 17, 41; McKay, ¶¶ 30.)

  - Wu also concludes that Oppfi "controls the underwriting process," based on the following sentence in OppFi's 10-K: "OppFi's bank partners benefits from its turnkey, outsourced marketing, data science, and proprietary technology to digitally acquire, underwrite and service these everyday consumers." (Wu Decl., ¶ 16.) However, a principal is expected to benefit from the performance of its agent. That fact says nothing about who controls the underwriting process. Wu ignores the parties' agreements which 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

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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.) Wu also ignores the parties' course of performance which shows that FinWise continuously exercises its contractual right to control the underwriting process. (McKay, ¶ 9.)

- OppFi is not the "true lender" under the factors considered by the court in overruling OppFi's demurrer to the Cross-Complaint.
  - The court examined the tribal lending program in *CFPB v. CashCall, Inc.* (C.D. Cal. 2016) 2016 WL 4820635.
  - The CashCall program stands in stark contrast to FinWise's program.
  - To begin with, 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.
  - Here, FinWise's loans are heavily regulated by the FDIC and the State of Utah, and FinWise assumes full regulatory risk. 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"; it purchases none of them.
  - Instead, it purchases a portion of the receivables. FinWise also retains substantial risk.
  - Further, unlike CashCall, OppFi makes no promise to indemnify FinWise for "civil, criminal, or administrative claims."
  - FinWise also promises to indemnify OppFi if this representation is untrue.
- The applicable standard.
  - To be entitled to preliminary injunction, the Commissioner must first 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

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injunction, *City of Torrance v. Transitional Living Centers for L.A., Inc.*, 30 Cal.3d 516, 526 (1982).

  - If the Commissioner establishes a reasonable probability of success on the merits, then it is entitled to a rebuttable presumption of irreparable injury.

  - OppFi may rebut the presumption by demonstrating grave or irreparable harm would arise from the injunction.

- OppFi will suffer irreparable harm if enjoined and, therefore, the Commissioner is not entitled to a presumption that public harm will result if an injunction does not issue.

  - OppFi has spent almost a decade and invested millions of dollars in cultivating expertise in the underbaked lending market, including developing and implementing strategies to assist banks with providing credit access to individuals and otherwise lack access to traditional credit products.

  - If OppFi is prohibited from assisting banks that charge more than 36 percent, it would be forced to cease all operations in California.

  - OppFi knows this risk because it (i) currently permits California borrowers to apply for loans with interest rates at 36 percent 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 percent interest rate directly but was forced to terminate the program as the losses exceeded revenue.

  - Accordingly, the DFPI is mistaken that the only harm OppFi will suffer is "temporarily lessened economic profitability for the loans it issues to consumers in California." On the contrary, OppFi will be forced to cease operations in California, which would be an irreparable impact on OppFi's business as a whole. Consequently, OppFi will be forced to consider staff reduction, lose associated talent, and lose invaluable data regarding California borrowers, which would impact its ability to reenter the market.

- The Commissioner has not demonstrated irreparable injury that outweighs the harm OppFi will suffer as a result of the injunction.

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- The Commissioner'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.
  - Even after it filed its Cross-Complaint, the Commissioner waited another eight (8) months or pursue a preliminary injunction.
  - That delay alone demonstrates that there is "no harm" in delaying relief until after trial. (See *Oakland Tribune, Inc. v. Chronicle Pub. Co. Inc.* (9th Cir. 1985) 762 F.2d 1374, 1377 ["Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"].)
- In addition, if the court ultimately concludes that the interest rates at issue are usurious, the core harm to consumers is overpayment of interest, which may be recovered later. That is not an irreparable harm. (See *Friedman v. Friedman* (1993) ["[M]ere monetary loss does not constitute irreparable harm . . ."].)
- As to the purported attendant risks of additional loans with an interest above 36 percent, the Commissioner relies on speculation about what "might" befall consumers.
  - The Commissioner first points to OppFi's report of net charge-offs as a percentage of average receivables for three months in 2022. (Motion, at p. 13:5, citing Wu Decl., Exhibit Q at p. 32.) However, that report is not limited to receivables from California FinWise loans. In addition, the existence of charge-offs is not evidence of harm to borrowers; it is an accounting concept used to track performance.
  - The Commissioner next cites a blog article, which OppFi objects to as inadmissible hearsay and, in any event, speculates about what a lender "may" do if a consumer is delinquent.
  - The Commissioner notes that OppFi reports consumers' payment histories to the credit bureaus, but the Commissioner does not submit evidence of how the credit reporting "harms" consumers; the Commissioner ignores that if the injunction issues, it will affect the consumers who could obtain a FinWise loan, make payments, and improve their credit scores.

- The Commissioner offers no evidence that FinWise customers can qualify for and obtain personal loans with interest rates at or below 36 percent. In OppFi's experience, they cannot. 99 percent of applicants that apply for a loan on the OppLoans platform do not qualify for and receive funding for such loans.

- Therefore, the court should deny the motion because the Commissioner has not established a reasonable probability of success on the merits and the balance of harm favors OppFi.

C. Reply

In her reply, the Commissioner contends:

- OppFi's preemption claims fail as a matter of law.

  - Congress has rejected OppFi's position that the "lender" named in a loan document is determinative.

  - OppFi cannot establish express preemption.

  - OppFi's implied preemption arguments also fail.

- The cases cited by OppFi support the Commissioner's position.

  - *Hudson* put form over substance in evaluating loans, while California requires evaluating substance over form in loan transactions to root out usury. Indeed, *Hudson* has been distinguished and rejected by states that like California, evaluate substance over form. (Cf. *BankWest, Inc. v. Oxendine* (2004) 266 Ga. App. 771, 776 ["We do not find *Hudson* persuasive because Georgia courts apply a different analysis to the examination of an allegedly usurious transaction. To determine if a contract is usurious, we critically examine the substance of the transaction. . . ."].

  - In *Sawyer,* the court considered true lender in evaluating preemption, but dismissed such allegations "under the *Twombly* and *Iqbal* standards." (*Sawyer v. Bill Me Later, Inc.*, 23 F.Supp. 3d at p. 1370.) Here, the Commissioner has adequately pled and now supported a claim that OppFi is the actual lender.

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- OppFi's refusal to recognize California law requiring the identification of the actual lender of money is fatal to its claims.
  - Despite ample California case law establishing that all potentially usurious transactions are evaluated for substance because of the ingenuity of usury evaders, OppFi continues to hide its OppLoans program behind claims of exemption from substantive evaluation.
  - OppFi and FinWise employ lawyerly crafted language suggesting that FinWise has some meaningful role in the OppLoans loan approval process. But in FinWise's own words, there are two phases of underwriting, both of which involve OppFi's input.
  - While OppFi plays up FinWise's role in the loan process to this court, OppFi tells the SEC and OppFi's investors in SEC filings that "Banks originates finance receivables based on criteria provided by OppFi-LLC and 82% of OppFi's underwriting decisions are automated, with next business day funding."
  - In addition, even though OppFi contends that FinWise, not OppFi, controls and manages the application process, that process is done on OppLoans website and every page in the process has branding for Opportunity Financial, LLC. FinWise is not mentioned until the required disclosures at the end of the application process. Therefore, there is no indication to consumers that FinWise is involved during the application process let alone in control.
  - In sum, the substance of the prearrangement shows OppFi is the actual lender of money. Within days of funding, OppFi gets rid of 95 percent of the receivables by selling them to the sole buyer which is an OppFi affiliate. OppFi provides OppFi-developed underwriting that is owned by OppFi, provides input to FinWise's underwriting process, and even gets to reevaluate and resubmit applications that FinWise rejects.
  - But for prearrangement with OppFi-guaranteeing that FinWise will immediately offload these loans to OppFi-FinWise would not be participating at all in the loan process.
- Identification of the actual lender of money to establish validity of a loan when made is distinct from secondary market sales of valid loans.

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    - OppFi's opposition takes inconsistent positions about the roles of OppFi and FinWise.
        - On one hand, OppFi argues that, for a split second in time, FinWise is on the hook for funding a loan, freezing the clock at a snapshot.
        - On the other hand, OppFi argues that a series of prearranged downstream sales of loan receivables over time means that OppFi is off the hook.
        - FinWise's true status is as a rented bank charter for OppFi.
    - "The Commissioner contends that these OppLoans were illegal at the time of issuance because OppFi was the actual lender of money through its prearrangement with FinWise and that it is illegally attempting to circumvent California law when OppFi is not subject to an exemption." (Reply, p. 9:9-11.)

- OppFi cannot escape enforcement in a specific case by claiming underground regulation.
- OppFi incorrectly states the standard for granting of the Commissioner's motion for preliminary injunction and fails to show irreparable harm.
- For those reasons, the Commissioner asks the Court to issue a preliminary injunction enjoining OppFi from offering OppLoans with interest rates that exceed the California Financing Law interest rate caps.

D. <u>Supplemental Briefing</u>

1. <u>Commissioner</u>

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On July 19, 2023, the Commissioner filed Supplemental Briefing in Support of Cross-Complainant's Motion for Preliminary Injunction, arguing:

- The Court requested supplemental briefing on this question: Does a finding of underground regulation impair this court's power to review whether OppFi is the actual lender of money under long-standing California common law?

- o The answer is no.
- o *Armistead v. State Pers. Bd.* (1978) 22 Cal.3d 198 (“*Armistead*”) and *Tidewater* make clear that this court is empowered to apply the law, including common law, regardless of finding of underground regulation.
- o The Commissioner’s brief proceeds under the assumption, but not admission, that the true lender doctrine is an underground regulation.

- Therefore, the court has authority to issue a preliminary injunction based on California law, regardless of whether a claim alleging an underground regulation is maintained.

2. <u>OppFi</u>

On August 2, 2023, OppFi filed Supplemental Briefing in Opposition of Cross-Complainant’s Motion for Preliminary Injunction, arguing:

- The Commissioner cannot enforce her True Lender Doctrine (“TLD”) as an interpretation of the California Financing Law (“CFL”) if the TLD is an underground regulation, i.e., a regulation not adopted in compliance with the APA.
- Instead, under the APA, the Commissioner may only enforce interpretations of the CFL that are “essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the [applicable] statute’s plain language.” (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 336- 37.)
- Here, the Commissioner relied on its TLD to determine “whether FinWise is the true lender for purposes of [the CFL’s bank] exemption.” Mot. at 8:14-16
  - o However, the Commissioner lacks authority to enforce anything but a “rote or ministerial” application of the plain language of the statute, which exempts “any person doing business under any law of any state or of the United States relating to banks.” (Fin. Code, § 22050, subd. (a).)

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- In addition, because the Commissioner's Cross-Complaint admits that FinWise comes within the plain language of this exemption, the motion fails.
- Rather than acknowledge this fatal law, the Commissioner argues she can enforce a different interpretation of the CFL's bank exemption–its fallback "substance over form" approach.
- However, there are material differences between the TLD (including the predominant economic interest metric as the primary factor in the analysis) and the substance over form approach.
- *Armistead* and *Tidewater* do not change the conclusion that the Commissioner cannot enforce her statutory interpretation without going through the APA because in both cases, in addition to an invalid underground regulation, there was a validly issued regulation.
- *Armistead* is also distinguishable because it was not an agency enforcement action.

- This court should follow *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324 (decided after *Armistead* and *Tidewater*), in which the California Supreme Court refused to enforce an underground regulation, the Department of Toxic Substances Control's alternative interpretation, and the underlying statute.

IV. <u>REQUEST FOR JUDICIAL NOTICE–MOTION FOR PRELIMINARY INJUNCTION</u>

On May 2, 2023, the Commissioner filed a request for judicial notice of the following:

- Exhibit A – Opportunity Financial, LLC's Quarterly Report (Form 8-K) filed on March 23, 2023, with the Securities and Exchange Commission ("SEC").
- Exhibit B – An excerpt (126 Cong. Rec. 6893-913) from the Congressional Record relating to discussion of Section 27, which is codified at 12 U.S.C. § 1831d(a).

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- Exhibit C – The Office of the Comptroller of the Currency's National Banks and Federal Savings Associations as Lenders final rule as published in the Federal Register.

- Exhibit D – The Joint Resolution S.J. Res. 15 passed by the 117th Congress in 2021.

On May 12, 2023, OppFi filed an opposition to the request for judicial notice, arguing that the Court should not take judicial notice of Exhibits A, C, and D because they are irrelevant. OppFi further argues that Exhibit A is not subject to judicial notice because it is not an "official act" of the legislative, executive, and judicial departments of the United States and of any state of the United States under Evidence Code section 452, subdivision (c).

The court finds all documents relevant contrary to OppFi's arguments.

The court grants judicial notice of Exhibit A (i.e., OppFi's Form 8-K filed with the SEC), as to the existence of the document but not the truth of the matters asserted therein. (See *Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 241 [finding that the trial court's ruling in granting limited judicial notice of the '"existence and content . . ."' of SEC filings and making no finding as to '"the truth of statements in [those] documents"' was "consistent with the general rule that judicial notice of a document does not extend to the truthfulness of its contents or the interpretation of statements contained therein, if those matters are reasonably disputable"]; Evid. Code, § 452, subd. (h) [stating that a court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"].)

The court also grants judicial notice of Exhibits B, C, and D. (Evid. Code, § 452, subd. (c) [stating that a court may take judicial notice of "[o]fficial acts of legislative, executive, and judicial departments of the United States . . ."].)

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V. EVIDENTIARY OBJECTIONS – MOTION FOR PRELIMINARY INJUNCTION

Parties can raise evidentiary objections to evidence submitted in connection with a motion for preliminary injunction. (Cf. *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1297-1298 ("*Alliant*")

["Defendant also made evidentiary objections to hearsay statements in plaintiffs' declarations about plaintiffs' clients being solicited by defendant. The trial court sustained the evidentiary objections (and we [the Court of Appeal] therefore disregard that evidence)"].)

In ruling on a motion for preliminary injunction, a trial court need not consider evidence which it has sustained an evidentiary objection. (*Alliant*, *supra*, 159 Cal.App.4th at p. 1307 [stating "we [the Court of Appeal] disregard plaintiffs' evidence to which the trial court sustained defendant's evidentiary objections" in discussing a trial court's order granting a preliminary injunction].)

Bearing those principles in mind, the court rules on OppFi's objections (filed on April 26, 2023) to the declaration of Kenneth Wu (filed January 30, 2023) as follows.

- Objection Nos. 2-6, 10-14, 18-31, and 33, 34, 36: sustained.
- Objection Nos. 1, 7, 8-9, 15-17, and 32, 35, 37-39: overruled.

An affiant must "provide the requisite preliminary facts to show she had personal knowledge about what she said in those paragraphs. (See Evid. Code, §§ 403, subd. (a)(2), 702, subd. (a) ["'[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.'"].) [Footnote Omitted.]" (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 169.)] The various agreements and filings are properly authenticated, but the documents speak for themselves. Wu lacks personal knowledge regarding the dealings between FinWise and OppFi. Many of Wu's statements are incomplete. Therefore, the court sustains the objections regarding his characterization of the relationship between FinWise and OppFi.

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The court rules on OppFi's objections (filed May 12, 2023) to the declaration of Jennifer Marks (filed May 2, 2023) as follows: Objection Nos. 1-5: overruled.

VI. DISCUSSION

Cross-Complainant Commissioner Clothilde Hewlett, in her official capacity as Commissioner of Financial Protection and Innovation (the

"Commissioner") moves for a preliminary injunction, enjoining Plaintiff and Cross-Defendant Opportunity Financial ("OppFi") from:

(1) Marketing, offering, making, collecting on, and/or servicing new consumer loans under its OppLoans program to California residents that have interest rates in excess of the interest rate caps defined in the California Financing Law and California usury law;

(2) Purchasing loans or receivables of loans made to California residents under OppFi's OppLoans program that have interest rates in excess of the interest rate caps defined in the CFL and California usury law; and

(3) Providing applications from California residents to FinWise for the issuance of loans with interest rates in excess of the interest rate caps defined in the CFL and California usury law.

Before reaching the merits of the Commissioner's motion, it is helpful to lay a groundwork for the motion by understanding California's usury law, the CFL as it relates to this case, federal preemption of state law, what "OppLoans" are, and the legal standard when a public agency is moving for a preliminary injunction.

A. <u>California's Usury Law</u>[1]

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1 According to the California Supreme Court, "the usury law is complex and is riddled with so many exceptions that the law's application itself seems to be the exception rather than the rule." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 807; see also *Wishnev v. The Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199, 206 ["California's usury laws, which regulate the charging of interest, are far from a model of clarity. Their sources include (1) an uncodified, voter-approved initiative (9C West's Ann. Civ. Code (2010 ed.) foll. § 1916.12, pp. 187–238), (2) voter-approved constitutional provisions currently found in article XV, and (3) statutes scattered throughout various codes regulating lenders considered exempt under article XV. [Citation.] Administrative provisions, federal law, and state common law also play a role. [Citation.] The interplay among these sources continues to generate confusion"].) The tentative is limited to those principles the Court has found most relevant for the instant motion.

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"A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." (Civ. Code, § 1912; *Boerner v. Colwell Co.* (1978) 21 Cal.3d 37, 44, fn. 7 ("*Boerner*").)

"A transaction is usurious if there is a loan at greater than the legal rate of interest or an exaction at more than the legal rate for the forbearance of a debt or sum of money due." (*O'Connor v. Televideo System, Inc.* (1990) 218 Cal.App.3d 709, 713; *Boerner*, *supra*, 21 Cal.3d at p. 44, fn. 7 [defining "[a] 'forbearance' of money [as] the giving of further time for the repayment of an obligation or an agreement not to enforce a claim at its due date"].)

"Liability for usury is not a common law cause of action but is instead statutory in nature." (*Bisno v. Kahn* (2014) 225 Cal.App.4th 1087, 1097

"The law of usury in this state is based upon the provisions of article XV, section 1 (formerly art. XX, s 22) of the state Constitution." (*Boerner*, supra, 21 Cal.3d at p. 43; *Wishnev v. The Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199, 206-210 [providing a brief history of California's usury laws].)

According to the California Constitution: "'The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent per annum. [¶] No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 percent per annum upon any loan or forbearance of any money, goods or things in action.' [Footnote omitted.]" (*Boerner*, supra, 21 Cal.3d at pp. 43-44.)

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"Article XV, section 1 [of the California Constitution] . . . exempt[s] from its restrictions certain types of institutional lenders, including (generally speaking) state-chartered banks . . .." (*Boerner*, *supra*, 21 Cal.3d 37, at p. 44, fn. 6.)

"'The essential elements of usury are: (1) The transaction must be a loan or forbearance; (2) the interest to be paid must exceed the statutory maximum; (3) the loan and interest must be absolutely repayable by the

borrower; and (4) the lender must have a willful intent to enter into a usurious transaction. [Citation.] The element of intent is narrow. "[T]he intent sufficient to support the judgment [of usury] does not require a conscious attempt, with knowledge of the law, to evade it. The conscious and voluntary taking of more than the legal rate of interest constitutes usury and the only intent necessary on the part of the lender is to take the amount of interest which he receives; if that amount is more than the law allows, the offense is complete.'" [Citation.]" (*Korchemny v. Piterman* (2021) 68 Cal.App.5th 1032, 1043 ("*Korchemny*").)

As the Commissioner argues, "'[i]n determining whether a particular transaction is usurious, courts look to its substance rather than to its form. The key question is whether the transaction has as its true purpose the hire of money at an excessive interest rate.'" (*Roodenburg v. Pavestone Co., L.P.* (2009) 171 Cal.App.4th 185, 193, quoting *Sheehy v. Franchise Tax Bd.* (2000) 84 Cal.App.4th 280, 282–283.) "It is a question of fact as to whether a particular transaction is or is not usurious. (Citation.) Where the form of the transaction makes it appear to be nonusurious, it is for the trier of the fact to determine whether the intent of the contracting parties was that disclosed by the form adopted, or whether such form was a mere sham and subterfuge to cover up a usurious transaction. (Citations.) The trial court may look beyond the form of the transaction and ascertain its substance. (Citation.)'" (*Forte v. Nolfi* (1972) 25 Cal.App.3d 656, 678, citing among other cases, *Janisse v. Winston Investment Co.* (1957) 154 Cal.App.2d 580 ("*Janisse*").)

In 1932, the California Supreme Court considered the following question: "What is the period to be considered when testing a transaction for the presence of usury?" (*Sharp v. Mortgage Sec. Corp. of America* (1932) 215 Cal. 287, 290 ("*Sharp*").) After discussing some cases (including those from other jurisdictions), the California Supreme Court reached this conclusion: "It is . . . elementary that the contract must in its inception require a payment of usury or it will not be held a violation of the statute . . .." (*Ibid.*)

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Therefore, "[t]o be usurious [under California law], a contract 'must in its inception require a payment of usury'; subsequent events do not render a legal contract usurious." (*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 533; see also *O'Connor v. Televideo System, Inc.* (1990) 218 Cal.App.3d 709, 714 ["a debtor by voluntary act cannot render an otherwise valid transaction usurious. '[A] debtor cannot bring his creditor to the penalties of the Usury Law by his voluntary default in respect to the obligation involved where no violation of law is present at the inception of the contract.' [Citation]"].)

California's "[u]sury restrictions do not restrict the assignment of loans." (*Montgomery v. GCFS, Inc.* (2015) 237 Cal.App.4th 724, 732 ("*Montgomery*"), citing *WRI Opportunity Loans II LLC v. Cooper*, *supra*, 154 Cal.App.4th at p. 533.) "The California Constitution exempts from its usury restrictions . . . 'any successor in interest to any loan or forbearance exempted under this article.' (Cal. Const. art. XV, § 1.) The Constitution does not require successors in interest to be independently exempt from usury restrictions." (*Montgomery*, *supra*, 237 Cal.App.4th at p. 732.) "The Constitutional provisions supersede[] any provisions of the Usury Law which are in conflict therewith." (*Barnes v. Hartman* (1966) 246 Cal.App.2d 215, 220.)

"Whether a transaction violates the usury law does not depend on the margin by which the maximum rate is exceeded. There is no such thing as a little usury." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 807.)

The consequences of finding a transaction usurious are severe. "'"'When a loan is usurious, the creditor is entitled to repayment of the principal sum only. He is entitled to no interest whatsoever. [Citations.]' [Citation.]" [Citation.] "The attempt to exact the usurious rate of interest renders the interest provisions of a note void. [Citations.]" [Citation.] Furthermore, interest payments that were made at the usurious rate should be credited against the principal balance in any action to collect on the note. [Citations.]' [Citation.]" (*Korchemny*, *supra*, 68 Cal.App.5th at pp. 1042–1043.)

Nonetheless, "[t]he purpose of the usury law is '"to protect the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs."' [Citation.]" (*G Companies Management, LLC v. LREP Arizona, LLC* (2023) 88 Cal.App.5th 342, 352.)

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B. <u>California Financing Law</u>

In 2017, the California legislature passed a bill renaming the "California Finance Lenders Law" to California Financing Law (the "CFL") (Fin. Code, § 22000 et seq.). (See 2017 Cal. Legis. Serv. Ch. 475 (A.B. 1284) (WEST) ["This bill would rename the 'California Finance Lenders Law' the 'California Financing Law' . . ."].)

The CFL defines a "finance lender" as including "any person who is engaged in the business of making consumer loans or making commercial loans." (Fin. Code, § 22009.)

It specifies that "[t]he business of making consumer loans or commercial loans may include lending money and taking, in the name of the lender, or in any other name, in whole or in part, as security for a loan . . .." (Fin. Code, § 22009.) "The [CFL] requires all persons 'engaged in the business of making consumer loans' be licensed. ([Fin. Code] § 22009, see § 22100, subd. (a).)" (*Montgomery v. GCFS, Inc.* (2015) 237 Cal.App.4th 724, 729.)

"The law establishes permissible charges and fees on loans (Fin. Code, § 22306), prohibits false, misleading or deceptive statements (Fin. Code, § 22161), and provides that unconscionable loans violate the statute (Fin. Code, § 22302)," among other things. (*Black v. Financial Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 930.)

The CFL "does not apply to any person doing business under any law of any state or of the United States relating to banks . . .." (Fin. Code, § 22050.)

C. Preemption

"In determining whether federal law preempts state law, '[a court's] sole task is to ascertain the intent of Congress.' [Citation.] Moreover, this intent must be 'clear and manifest.' [Citation.]" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567 ("*Tidewater*").)

The California Supreme Court "has identified 'four species of federal preemption: express, conflict, obstacle, and field.'" (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 758 ("*Qualified*").)

"'First, express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." [Citations.]'" (*Qualified*, *supra*, 187 Cal.App.4th at p. 758; see also (*California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 280 ("*Guerra*") ["when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms"].)

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"'Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.]'" (*Qualified*, *supra*, 187 Cal.App.4th at p. 758; see also *Guerra*, *supra*, 479 U.S. at p. 281 ["[I]n those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict . . . [can occur] because 'compliance with both federal and state regulations is a physical impossibility,' [citation] . . ."].)

"'Third, obstacle preemption arises when "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citations.]" (*Qualified*, *supra*, 187 Cal.App.4th at p. 758; see also *Guerra*, *supra*, 479 U.S. at p. 281 ["federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict . . . [can also occur] . . . because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (citations removed)].)

"'Finally, field preemption, i.e., "Congress' intent to pre-empt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." [Citations.]' [Citation.]" (*Qualified*, *supra*, 187 Cal.App.4th at p. 758; *Guerra*, *supra*, 479 U.S.at pp. 280-281 ["[C]ongressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation"].)

Regulations promulgated by federal administrative agencies "have the same preemptive effect as a statute, [citation] . . . ." (*Durnford v. MusclePharm Corp.* (9th Cir. 2018) 907 F.3d 595, 602 [holding that regulations by the Food and Drug Administration have the same preemptive effect as a statute]; see also *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta* (1982) 458 U.S. 141, 153 ["Federal regulations have no less pre-emptive effect than federal statutes"]; *Atay v. County of Maui* (9th Cir. 2016) 842 F.3d 688, 700 ["'[A]n agency regulation with the force of law [also] can pre-empt conflicting state requirements.' [Citation.] Only specific agency rules carrying the force and effect of federal law may give rise to conflict preemption . . . .' [Citation]"].)

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D. <u>OppLoans</u>

In her motion, the Commissioner defines "OppLoans" as the high-interest consumer loan product issued through OppFi's OppLoans program. (Motion, p. 1:16-17.) OppLoans are the loans at issue in this motion.

The Commissioner moves for a preliminary injunction, arguing the following (among other things). "The gravamen of OppFi's Complaint in this matter is that its consumer loans with over 150% annual interest rates are exempt from California usury interest rate caps because it routes the loans through an out-of-state-bank straw lender, FinWise Bank ["FinWise"], and therefore OppFi is not subject to the CFL's consumer protections." (Motion, p. 1:20-23.) "The Commissioner filed her cross-complaint against OppFi, asserting that because the substance of the transaction controls, not the form, OppFi is the actual maker of exorbitant-interest loans to California borrowers and, as the lender, is violating the CFL." (Motion, p. 1:24-27.) "The Commissioner now seeks appropriate injunctive relief as authorized by the CFL and requested in the Cross-Complaint in order to protect California consumers from OppFi's loan products with excessive interest rates while this litigation is pending." (Motion, pp. 1:27-2:2.)

E. <u>Legal Standard for Preliminary Injunction</u>

"'[W]hether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.' [Citation.]" (*People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1158 ("*People ex rel. Feuer*").)

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However, "[w]hen the plaintiff is a governmental entity seeking to enjoin illegal activity, a more deferential standard applies: '*Where a governmental entity seeking to enjoin the alleged violation of an ordinance* which specifically provides for injunctive relief [1] *establishes that it is reasonably probable it will prevail on the merits,* [2] *a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant.* [3] *If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties.*" (*People ex rel. Feuer*, *supra*, 2 Cal.App.5th at pp. 1158-1159 [emphasis added].)

“Once the defendant has made such a showing [i.e., it would suffer grave or irreparable harm from the issuance of the injunction], 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. v. County of Imperial* (1983) 35 Cal.3d 63, 72.)

“‘Reasonable’ probability means merely a reasonable chance that is more than an abstract possibility; it does not mean more likely than not.” (*In re L.O.* (2021) 67 Cal.App.5th 227, 247.)

F. Analysis

After considering all papers filed in connection with the motion for preliminary injunction, the court finds that at this point in the litigation and on the present record, the Commissioner has failed to show a reasonable probability of prevailing on the merits on her first cause of action for violation of the CFL. Therefore, the court does not find the rebuttable presumption that the potential harm to the public outweighs the potential harm to OppFi has arisen. Accordingly, the court does not need to determine whether OppFi has shown it would have suffered grave or irreparable harm from the issuance of the preliminary injunction. The court notes that the Commissioner did not advance arguments showing why she may be entitled to preliminary injunction under her second cause of action for violation of the Consumer Financial Protection Law.[2]

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[2] The CFL makes it illegal for a finance lender to “[m]ake a materially false or misleading statement or representation to a borrower about the terms or conditions of that borrower’s loan, when making or brokering the loan.” (Fin. Code, § 22161, subd. (a)(1).) It also prohibits a finance lender from “[a]dvertis[ing], print[ing], display[ing], publish[ing], distribut[ing], or broadcast[ing], or cause or permit to be advertised, printed, displayed, published, distributed, or broadcast in any manner, any statement or representation with regard to the business subject to the provisions of [the CFL], including the rates, terms, or conditions for making or negotiating loans, or for making or negotiating assessment contracts, that . . . omits material information that is necessary to make the statements not false, misleading, or deceptive . . ..” (Fin. Code, § 22161, subd. (a)(3).) Here, beyond alleging that OppFi violated the CFL by charging excessive interest

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For those reasons (supported by the court's findings discussed below), the court denies the motion for preliminary injunction.

1. On This Motion, Whether the True Lender Doctrine Is An Underground Regulation Under the Administrative Procedure Act Is Not Determinative[3]

"The APA establishes the procedures by which state agencies may adopt regulations." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 ("*Tidewater*").) "The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3)." (*Tidewater, supra*, 14 Cal.4th at p. 568.)

"One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]." (*Tidewater, supra*, 14 Cal.4th at pp. 568-569.) "The Legislature wisely perceived that the party subject to regulation is often in

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rates, the Cross-Complaint also alleges that OppFi violated Financial Code section 22161 by advertising OppLoans on its website with interests rates up to 160% and implying that it could lawfully make such loans in California despite knowing California prohibits finance lenders from charging interest rates in excess of the statutory rate caps. (Compl., ¶ 45.)

[3] As explained below, on the present record, the court denies this motion based on reasons other than underground regulation issues. Therefore, the court does not reach on this motion a determination whether the true lender doctrine is an underground regulation. Also, on this motion and the present record, the court finds that even if OppFi established that the true lender doctrine were an impermissible underground regulation, the court would nonetheless proceed to evaluate the substantive usury issues.

the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." (*Id.* at p. 569.)

In *Tidewater*, operators of maritime firms that transported workers and supplies to off-shore drilling platforms sought injunction against enforcement of Industrial Welfare Commission ("IWC") wage orders governing overtime pay. (*Tidewater*, *supra*, 14 Cal.4th at p. 563.) The crew members who worked for the operators of the maritime firms were on duty 12 hours during a 24-hour period, but the demands of their work were inconstant, and crew members were allowed to spend part of their duty period engaging in leisure activities. (*Id.* at p. 561.) The operators of maritime firms would pay the crew members a flat daily rate without special compensation for "overtime." (*Ibid.*)

The wage orders at issue in *Tidewater*, "Nos. 4-80 and 4-89 . . . bar work in excess of eight hours in any twenty-four-hour period unless the employer pays 'overtime,' which is generally '[o]ne and one-half (1½) times the employee's regular rate of pay,' increasing to '[d]ouble the employee's regular rate of pay for all hours worked in excess of twelve (12) hours.' (Cal. Code Regs., tit. 8, §§ 11040, subd. (1), (2), 11090, subd. (1), (2).)" (*Tidewater*, *supra*, 14 Cal.4th at p. 562.) The "Division of Labor Standards Enforcement ["DLSE"] . . . is the state agency empowered to enforce California's labor laws, including IWC wage orders." (*Id.* at pp. 561-562.)

"Starting about 1978, employees in the maritime industry began filing claims with the DSLE." (*Tidewater*, *supra*, 14 Cal.4th at p. 562.) At first, "[t]he DLSE determined on a case-by-case basis whether state labor laws applied to these employees, considering such factors as the type of vessel, the nature of its activities, how far it traveled from the California coast, how long it was at sea, and whether it left from and returned to the same port." (*Tidewater*, *supra*, 14 Cal.4th at p. 562.) "The DLSE also considered contacts, if any, between the employees and California, such as whether the employees entered into their employment contracts in California, resided in California, owned property in California, paid taxes in California, made regular purchases in California, sent their children to California schools, or spent significant time in California." (*Ibid.*)

However, "[t]he DLSE . . . replaced this case-by-case adjudication with a written enforcement policy, which provide[d]: 'IWC standards apply to crews of fishing boats, cruise boats, and similar vessels operating exclusively between California ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of California." (*Tidewater*, *supra*, 14 Cal.4th at p. 562.) "In the early 1980's this written policy existed only in a draft policy manual . . .," but in 1989, "the DLSE prepared a formal 'Operations and Procedures Manual' incorporating the same policy and made that manual available to the public on request." (*Ibid.*) "The manual reflected 'an effort to organize . . . interpretive and enforcement policies' of the agency and 'achieve some measure of uniformity from one office to the next.' The DLSE prepared its policy manuals internally, without input from affected employers, employees, or the public generally." (*Ibid.*)

One question at issue in *Tidewater* was whether the DLSE's Operations and Procedures Manual was "an 'underground regulation' that was not issued in accordance with the APA and [was] therefore void." (*Tidewater*, *supra*, 14 Cal.4th at p. 563.) The California Supreme Court answered yes; the Operations and Procedures Manual was an underground regulation, therefore void. (*Tidewater*, *supra*, 14 Cal.4th at p. 572.) In so holding, the Supreme Court explained that "[a] regulation subject to the APA . . . has two principal identifying characteristics." (*Tidewater*, *supra*, 14 Cal.4th at p. 571.)

The first characteristic of a regulation under the APA is that "the agency must intend its rule to apply generally, rather than in a specific case." (*Tidewater*, *supra*, 14 Cal.4th at p. 571.) "The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided." (*Ibid.*) For example, in *Tidewater*, the California Supreme Court found that "[t]he policy at issue . . . was expressly intended as a rule of general application . . . [because it was meant to] guide deputy labor commissioners *on the applicability of IWC wage orders to a particular type of employment*." (*Id.* at p. 572 [emphasis added].) As stated above, the policy at issue was a formal Operations and Procedures Manual, which provided: "'IWC standards apply to crews of fishing boats, cruise boats, and similar vessels operating exclusively between California ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of California.'" (*Id.* at p. 562.) Therefore, the policy pertained to all members of a class, kind, or order, i.e., crews of fishing boats, cruise boats, and similar vessels operating exclusively between

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California ports or returning to the same port that entered their contracts in California and were California residents.

The second characteristic of a regulation under the APA is that "the rule must [1] 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . [2] govern [the agency's] procedure.' Gov. Code, § 11342, subd. (g).)" (*Tidewater*, *supra*, 14 Cal.4th at p. 571.) In *Tidewater*, the California Supreme Court found the DLSE'S formal Operations and Procedures Manual also satisfied the second characteristic of a regulation under the APA because the manual "interpret[ed] the law that the DLSE enforce[d] by determining the scope of the IWC wage orders." (*Id.* at p. 572.) In addition, "the record [did] not establish that the policy [or manual] was, either in form or substance, merely a restatement or summary of how the DLSE had applied the IWC wage orders in the past." (*Ibid.*)

Here, OppFi argues that the Commissioner's true lender doctrine fits the first characteristic of a regulation under the APA because the agency is applying it generally rather than only in OppFi's case. (See Opposition, p. 11:13-16 ["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."].)

As evidence, OppFi submits a news release by the California Department of Business of Oversight ("DBO") dated September 3, 2020 ("DBO News Release"). (See Declaration of Fredrick S. Levin, filed April 26, 2023 ("Levin Decl."), ¶ 16; Exhibit J – a copy of the DBO News Release.) The DBO was renamed to the DFPI. (See Fin. Code, § 321, subd. (d) ["Upon the operative date of this section [i.e., January 1, 2021]. . . the [DBO] shall be renamed the office of the Commissioner of Financial Protection and Innovation and the [DFPI]. All powers, duties, responsibilities, and functions of the Commissioner of Business Oversight and the [DBO] shall be the powers, duties, responsibilities, and functions of the Commissioner of Financial Protection and Innovation and the [DFPI], respectively"].)

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According to the DBO News Release, the DBO "launched a formal investigation into whether prominent auto title lender Wheels Financial Group, LLC, which does business as LoanMart, [was] evading California's newly-enacted interest rate caps through its recent partnership with an out-of-state bank." (Levin Decl., Exhibit J, p. 1, the first paragraph.)

The DBO News Release reads in part:

[S]tarting in 2020, rather than continuing to make loans with rates that comply with the Fair Access to Credit Act, LoanMart stopped making state-licensed auto title loans in California. *Instead, using its existing lending operations and personnel, LoanMart commenced 'marketing' and 'servicing' auto title loans purportedly made by CCBank, a small Utah-chartered bank operating out of Provo, Utah. This new loan program is advertised under the brand 'ChoiceCa$h, Serviced by LoanMart' and had been marketed directly from the LoanMart website at www.loanmart.com, until recently when marketing was switched to www.choicecash.com.*

CCBank, as an out-of-state bank, is not regulated or supervised by the DBO. And, unlike state-licensed lenders, loans legitimately made by banks are not subject to state interest rate limits like those enacted in the Fair Access to Credit Act. As a result, auto title loans now 'marketed' and 'serviced' by LoanMart in California continue to bear interest rates greater than 90 percent.

Following an informal inquiry, the DBO today issued a subpoena to LoanMart requesting financial information, emails, and other documents relating to the genesis and parameters of the arrangement between LoanMart and CCBank in California. *The DBO is investigating whether LoanMart's role in the arrangement [with CCBank] is so extensive as to require compliance with California's lending laws. In particular, the DBO seeks to learn whether LoanMart's arrangement with CCBank is a direct effort to evade the Fair Access to Credit Act [i.e., AB 539], an effort which the DBO contends would violate state law.*

(Levin Decl., Exhibit J, pp. 1-2 [emphasis added].)

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The news release suggests that the DFPI will look at the substance over the form of (i.e., it will utilize its true lender doctrine to look at) the loan transaction between LoanMart and CCBank, a state-chartered bank based in Utah, to determine whether the transaction between those two entities evade AB 539's interest rate limits.

In her reply, the Commissioner neither objects to the court's consideration of the DBO News Release nor disputes that her

Department is using her true lender doctrine to investigate whether other so-called rent-a-bank partnerships violate AB 539 or CFL provisions. Instead, she only argues the following in her Reply: "To the extent that OppFi contends that the Commissioner's claim is blocked by virtue of being an underground regulation, the Commissioner has extensively briefed why this is inaccurate in her Demurrer to OppFi's Cross-Complaint and Cross-Petition. [November 18, 2022, Demurrer and February 8, 2023, Reply]. More importantly here, a finding that there is an underground regulation does not impair a regulator's authority to pursue individual violations of law. See *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996). That is, even if OppFi were successful on its claim, nothing would change in this action." (Reply, p. 9:15-23.)

OppFi also argues that the true lender doctrine embodies the second characteristic of a regulation under the APA because the Commissioner is using it to interpret whether the CFL's bank exemption under Finance Code section 22050 applies to the partnership between OppFi and FinWise. (Opposition, p. 11:16-18 ["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)"].)

Indeed, in her moving papers, the Commissioner argues that "the core issue here is whether FinWise is the true lender for purposes of an exemption, or whether it is merely a straw lender for OppFi." (Motion, p. 8:14-16.) Further, the Commissioner's Cross-Complaint alleges that California passed AB 539 to "address" the issue of predatory lending, which it then accuses OppFi of doing by partnering with FinWise to originate loans. (Evid. Code, § 452, subd. (d) [courts may take judicial notice of court records]; Commissioner's XC, ¶ 1 ["Predatory lending is a national problem causing consumers to become trapped in a cycle of debt due to high interest installment loans that are difficult to pay off. To address this issue, approximately 45 states have passed laws capping the interest rates that lenders can charge on consumer loans. In 2019, the State of California passed Assembly Bill 539 (Limón), capping interest rates on most consumer loans at 36%. In response, non-bank lending companies are partnering with various state-chartered banks located in the few remaining states without interest rate caps in an effort to benefit from the exemption that state-chartered banks have under federal law from other states' interest rate cap laws, also known as usury laws"].)

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In its supplemental brief, OppFi argues that this court should follow the California's Supreme Court decision in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324 ("*Morning Star*") (decided after *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198 and *Tidewater*), in which the Court refused to enforce an underground regulation, the Department of Toxic Substances Control's alternative interpretation, and the underlying statute.

In *Morning Star*, the plaintiff ("Morning Star Co."), was a California corporation that offered labor services to companies involved in the tomato processing business. (*Morning Star*, *supra*, 38 Cal.4th at p. 328.) From 1993 to 1996, the company paid a "hazardous materials" fee pursuant to Health and Safety Code section 25206.6, subdivision (a). (*Morning Star*, *supra*, 38 Cal.4th at p. 328.) That statute required "the Department of Toxic Substances Control . . . provide the State Board of Equalization with a list of business classification codes that identifie[d] the 'types of corporations that use, generate, store, or conduct activities in this state related to hazardous materials.'" (*Morning Star*, *supra*, 38 Cal.4th at p. 327 [footnote omitted].) "If a corporation [had] 50 or more employees in this state and [fell] within one of the listed codes, it [had to] pay an annual fee correlated to its employee head count." (*Ibid.*)

"The Department [of Toxic Substances Control] t[ook] the view that corporations with 50 or more employees within California invariably 'use, generate, store, or conduct activities in this state related to hazardous materials.' (§ 25205.6, subd. (a).)" (*Morning Star*, *supra*, 38 Cal.4th at p. 327.) Specifically, the department "reason[ed] that materials it regard[ed] as inherent in everyday business activity, such as fluorescent light bulbs, batteries, inks, correction fluid, and toner used in printers and facsimile machines, constitute 'hazardous materials,' and that all qualifying companies 'use, generate, store, or conduct activities' related to these items." (*Ibid.*) "Thus, each year the schedule submitted by the [department] . . . included the codes for all corporations, except for one type of nonprofit business that the law specifically exempts from the assessment." (*Ibid.*) "This practice . . . meant that virtually all corporations with 50 or more employees in this state [had to] pay the hazardous materials charge." (*Id.* at p. 328.)

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Morning Star Co. "believe[d] that it should not have to pay the hazardous materials charge. The company acknowledge[d] that it utilize[d] computers, printers, fluorescent lights, and other items that the [department] classifie[d] as (or regard[ed] as containing) 'hazardous materials.' But Morning Star assert[ed] that the Legislature did not consider companies in

the firm's position as 'us[ing], generat[ing], stor[ing], or conduct[ing] activities . . . related to hazardous materials,' and that the Department, therefore, has promulgated overly expansive lists of codes." (*Morning Star*, *supra*, 38 Cal.4th at p. 328.)

The California Supreme Court found that the Department of Toxic Substances Control's "actions–specifically, determining that all corporations with 50 or more employees in this state 'use, generate, store, or conduct activities in this state related to hazardous materials,' and submitting all nonexempt SIC codes to the [State Board of Equalization]–amount[ed] to a 'regulation' under the APA." (*Morning Star*, *supra*, 38 Cal.4th at p. 334.) The department's actions fit the first characteristic of a regulation under the APA because they "appl[ied] 'generally, rather than in a specific case' (*Tidewater*, *supra*, 14 Cal.4th at p. 571, 59 Cal.Rptr.2d 186, 927 P.2d 296), because the [department's] construction and application of the law mean that all nonexempt businesses are subject to the hazardous waste fee." (*Morning Star*, *supra*, 38 Cal.4th at p. 334.) "The [department's] actions also embod[ied] the second characteristic of a regulation [because] . . . 'regulations' include agency 'interpretations' of the law. (See Gov. Code, § 11342.600.) The Department's conclusions 'interpret[ed] . . . the law enforced or administered by [the agencies]' [citation] by deciding what items and substances constitute 'hazardous materials' and specifying what it means to 'use, generate, store, or conduct activities in this state related to' these materials." (*Morning Star*, *supra*, 38 Cal.4th at p. 334.)

Therefore, the California Supreme Court concluded, the Department of Toxic Substances Control "should have complied with the APA, unless an exception applies." (*Morning Star*, *supra*, 38 Cal.4th at p. 334.) "[A]bsent an express exception, [the high court stated] the APA applies to all generally applicable administrative interpretations of a statute." (*Id.* at p. 335.) An exception to complying with the APA (e.g., that the agency's interpretation of a statute represented the "only legally tenable interpretation" of the law) did not apply in *Morning Star*.[4] (*Morning Star*, *supra*, 38 Cal.4th at pp. 336-340.)

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4 "The agencies emphasize[d] that the APA's procedural requirements [did] not apply where an agency's interpretation of a statute represents 'the only legally tenable interpretation of a provision of law.' (Gov. C ode, § 11340.9, subd. (f).)" (*Morning Star*, *supra*, 38 Cal.4th at p. 336.) That "exception codifies the principle that '[i]f certain policies and procedures . . . are . . . "essentially [ ] a reiteration of the extensive statutory scheme which the Legislature has established" . . . then there is obviously no duty . . . to

Here, the Commissioner has not argued that the true lender doctrine fits an exception to APA compliance.

Instead of interpreting the underlying statute at issue in *Morning Star*, the California Supreme Court decided to remand the case, distinguishing its ruling in that case from its decision in *Tidewater* (in which the Supreme Court chose to interpret the underlying wage order) as follows.

> "The invalid regulation in *Tidewater* was a simple interpretive policy. [Therefore, the Supreme Court] was in as good a position

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enact regulations to cover such reiterations, since the sixth commandment of "nonduplication" prescribes "that a regulation does not serve the same purpose as a state . . . statute. . . ." [Citation.] But to the extent any of the contents of the [statement of policy or procedure] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations.' [Citation.]" (*Ibid.*) However, after reviewing the statutory interpretation, language, and purpose of the relevant statutes to discern whether the Department of Toxic Substances Control "adopted the sole 'legally tenable' reading of the statutes . . .," the Court concluded: "As the APA establishes that 'interpretations' typically constitute regulations, it cannot be the case that *any* construction, if ultimately deemed meritorious after a close and searching review of the applicable statutes, falls within the exception provided for the sole 'legally tenable' understanding of the law. Were this the case, the exception would swallow the rule. Rather, the exception for the lone 'legally tenable' reading of the law applies only in situations where the law 'can reasonably be read only one way' [citation], such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. [Citations.] ¶ We conclude that the [department's] construction of the law does not fall within the parameters of this exception." (*Id.* at pp. 336-337.) The California Supreme Court emphasized that "the issue before [the Court was] whether the [department] . . . adopted the only 'legally tenable' interpretation of the law, not whether its interpretation is or is not consistent with the law." (*Id.* at p. 340.) Because the agencies did not establish that their interpretation of Health and Safety Code section 25206.6, subdivision (a), "follow[ed] directly and inescapably from the pertinent provisions of law. . . . the agencies [could not] avail themselves of the exception set forth at Government Code section 11340.9, subdivision (f), and the [department's] regulation [was] therefore invalid." (*Ibid.*)

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as the DLSE, or almost so, to interpret the underlying IWC wage order." (*Morning Star*, *supra*, 38 Cal.4th at pp. 340-341.)

However, in *Morning Star*, the statutory scheme at issue "call[ed] for the application of administrative expertise in the first instance." (*Morning Star*, *supra*, 38 Cal.4th at p. 341.) Specifically, "[t]he agencies urge[d] [the Supreme Court] to uphold the charge levied on [Morning Star Co.] by identifying as 'hazardous materials' items the firm concede[d] it utilize[d], [however] it [was] unclear whether that would be the proper way to proceed under [Health and Safety Code] section 25205.6, for it may [have] be[en] the case that the practices of other types of businesses in [Morning Star Co.'s] SIC code . . . [were] more relevant for purposes of deciding whether to include that code on the [department's] schedule." (*Ibid.*) "As the record provide[d] little to no indication what [those] other businesses are, let alone their potential connection to 'hazardous materials,' [the California Supreme Court was] in no position to rule upon [Morning Star Co.'s] specific case. . . .. The [department], and not [the Supreme Court], [was] in the best position to determine whether and in what circumstances given materials satisfy these standards. To transfer to the courts what are properly agency responsibilities as to these and similar matters would frustrate the intent of the Legislature in enacting the APA. [The Supreme Court] therefore decline[d] to interpret and apply the hazardous materials law . . . at [that] juncture." (*Id.* at p. 341.)

Here, on the present record and for purposes of this motion, this case seems more like *Tidewater,* than *Morning Star* because it does not require the court to step into the DFPI's shoes and apply administrative expertise. As the California Supreme Court "was in as good a position as the DLSE, or almost so, to interpret the underlying IWC wage order" in *Tidewater* (*Morning Star*, *supra*, 38 Cal.4th at p. 341), so is this court in as good position as the DFPI to interpret the relevant CFL provisions and the other applicable law in light of the facts. Courts regularly make these sort of determinations. Thus, regardless of the outcome of the APA/underground regulation issues, for purposes of this motion and on the present record, *Tidewater* nonetheless requires the court to consider whether the Commissioner's "interpretation" of the CFL is "correct" even if the Commissioner's true lender doctrine could be declared void for failure to comply with the APA (i.e., failure to go through the APA's procedures of adopting the true lender doctrine as a regulation before applying the doctrine generally). As it regularly does in countless similar situations, the court can apply the law to the facts as presented by this motion. (See *Tidewater*, *supra*, 14 Cal.4th at p. 577 ["The DLSE's policy

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may be void, but the underlying wage orders are not void. Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy. Thus, in [*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 205-206], although we [the California Supreme Court] determined not to give weight to an agency interpretation, we nevertheless considered whether that interpretation was correct"].)

Accordingly, the court does not need to resolve the APA/underground regulation issues on this motion. Regardless of the outcome of these issues, on the present record and for purposes of this motion, the court would nonetheless proceed to evaluate the merits of the Commissioner's positions. The court therefore will analyze the substance of this motion.

2. The Commissioner Has Not Shown a Reasonable Probability of Prevailing on this Motion and the Present Record

(a) On this motion, the Commissioner has not sufficiently shown the OppLoans were usurious at inception

As stated, it is true that California courts look at substance over form to determine whether a transaction is usurious. However, it is also true that "[t]o be usurious [under California law], a contract 'must in its inception require a payment of usury'; subsequent events do not render a legal contract usurious." (*WRI Opportunity Loans II, LLC v. Cooper*, *supra*, 154 Cal.App.4th at p. 533.) Therefore, if OppLoans were not usurious at inception, the fact that FinWise assigned, sold, or otherwise transferred the loans to OppFi should not make the loans usurious.

To urge that OppLoans were usurious at inception, the Commissioner argues that OppFi's 10-K filings state that OppFi (not FinWise) underwrites OppLoans through its proprietary software. (See Motion, p. 5:6-19, citing Declaration of Kenneth Wu, filed January 30, 2023 ("Wu Decl."), Exhibit H [that exhibit is not redacted and filed publicly in the court records].)

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The Commissioner does not cite the specific page or part in the 10-K on which she is relying. Nevertheless, the court has gathered the following statements from OppFi's 10-K filings relevant to the underwriting issue.

> OppFi is a leading mission-driven financial technology platform that powers banks to offer accessible lending products and a top-rated experience to everyday consumers.

OppFi partners with banks to facilitate short-term lending options for everyday consumers who lack access to mainstream financial products. OppFi's Al-enabled financial technology platform focuses on helping these everyday consumers who lack access to traditional credit products to build a better financial path. Consumers on OppFi's platform benefit from higher approval rates and a highly automated, transparent, efficient, and fully digital experience. OppFi's bank partners benefit from its turn-key, outsourced marketing, data science, and proprietary technology to digitally acquire, underwrite and service these everyday consumers. Since inception, OppFi has facilitated more than $3.3 billion in gross loan issuance covering over 2 million.

OppFi's 'Everyday Consumers' are median U.S. consumers, who are employed, have bank accounts, and earn median wages.

Some have experienced a hardship or emergency and need a loan; others are struggling to make ends meet; while others have unplanned expenses, like buying a computer for their child who is in remote school due to COVID-19, for which they did not have money budgeted. When they apply for a loan through a bank, they are often rejected due to their credit score.

The OppFi solution begins with an approximately 5-minute mobile-optimized online application which, at the applicant's request, feeds into its "TurnUp" process, which performs a search for mainstream lower cost credit products that offer an annual percentage rate, or APR, of less than 36%. Approximately 90% of the time, no offers of lower credit are returned. If no mainstream credit options are available, the application is processed through OppFi's proprietary underwriting platform. OppFi's Al-enabled underwriting platform utilizes alternative metrics to determine customers' creditworthiness. OppFi's proprietary algorithms are validated by bank partners to facilitate their underwriting processes. These algorithms ignore traditional credit scores, which are typically not the most accurate predictor of this consumer's ability and willingness to repay. OppFi's solution

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is based on the belief that everyday consumers can be provided credit in a way that is both accessible and affordable.

> OppFi collects and calculates over 500 attributes on loan applications for uses in loan decisions. These attributes are based on data from credit bureaus, bank transactions and loan applications. Using this information, OppFi generates a proprietary score in combination with scores generated from third party providers. Scores are shared with applicants, along with the relevant factors for the score calculation. The proprietary score determines the exact loan terms to be offered to an applicant.

(Wu Decl., Exhibit H, p. 6 [emphasis added].)

The 10-K filings provide more details regarding the loan application process as follows:

> Once a customer's application has been submitted, OppFi's 'TurnUp' process voluntarily performs a search on the customer's behalf to find superior credit offers from mainstream credit providers. If any lower cost products are identified, OppFi displays the offers from the applicable lenders and consumers can choose to click over to finish their application on the other lender's website. At that point, the customer leaves OppFi's website. If no mainstream credit options are available with an affordable APR of less than 36%, the application is processed through OppFi's underwriting platform which utilizes Al-enabled, bank-approved, proprietary algorithms. This process ensures maximum value and benefit is realized by all parties. Approximately 90% of the time, no offers of lower credit are returned.)

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(Wu Decl., Exhibit H, p. 11, Hybrid funding model section [emphasis added].)

The 10-K filings explain that OppFi has two models: bank partner origination model (like the one it has with FinWise) and a direct original model (where OppFi directly underwrites, approves, and funds the loan):

> OppFi employs both a bank partner origination model and direct origination model. In its bank partner origination model, applicants who apply and obtain a loan through OppFi's online platform are underwritten, approved, and

> funded by the applicable bank partner. In the direct origination model, applicants who apply and obtain a loan through OppFi's online platform are underwritten, approved, and funded directly by OppFi.

(Wu Decl., Exhibit H, pp. 13-14.)

The 10-K filings state the following regarding the bank partner origination model:

> OppFi's bank lending product leverages its marketing and servicing expertise and its partner bank's broad national presence to enable improved credit access to 35 states or approximately 70% of the U.S. population. This relationship operates much akin to the 'Managing General Agent' relationship with an insurance carrier; additionally, this model has been tested in the credit card and mortgage industries and is a key growth enabler for the business. Similar to the Managing General Agent insurance relationship, OppFi manages many aspects of the loan life cycle on behalf of its bank partners, including customer acquisition, underwriting and loan servicing. This relationship allows OppFi's bank partners to leverage OppFi's digital acquisition, AI-powered underwriting and highly rated customer service capabilities, which they would otherwise need to develop in-house. OppFi's bank partners use their own capital to originate loans. OppFi's bank partners are Finwise, FEB and CB.

(Wu Decl., Exhibit H, pp. 13-14 [emphasis added].)

The court finds that on this motion the statements in the 10-K filings do not sufficiently support the Commissioner's implied arguments that (1) OppFi "underwrites" the loans at issue and (2) that OppFi's involvement in the underwriting process is sufficient evidence to render the loans at issue usurious at inception.

While the 10-K filings state that OppFi uses its AI-underwriting platform to determine an applicant's creditworthiness for loans under the bank partner origination model, they also state that the algorithm used by the AI is "bank-approved." The 10-K emphasizes that "OppFi's proprietary

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algorithms are validated by bank partners to facilitate their underwriting processes." (Wu Decl., Exhibit H, p. 6.)

Therefore, on the present record, the fact that the 10-K filings state OppFi uses its technology to provide underwriting services to FinWise is insufficient for the court to conclude such service makes the loans at issue usurious at inception.

(b) On this motion and the present record, the cases the Commissioner relies on to base the true lender doctrine do not sufficiently support a reasonable probability that OppFi is the "true lender" of OppLoans at issue

(i) Janisse and Anderson

The Commissioner relies on *Janisse, supra,* 154 Cal.App.2d 580, and *Anderson v. Lee, supra,* 103 Cal.App.2d 24 to support the true lender doctrine against OppFi.

In *Janisse,* the "[p]laintiffs brought [that] action for an accounting and other relief, alleging that a promissory note signed by them was usurious. Defendants claimed to be bona fide purchasers of the note. The trial court found that the transaction was usurious and that defendants knew that it was, and entered its judgment reducing the principal of the note by the amount of the interest paid and by treble the amount of interest paid during the year preceding the filing of this action." (*Janisse*, *supra*, 154 Cal.App.2d at p. 581.) The *Janisse* "[d]efendants appeal[ed], contending that plaintiffs [were] estopped from urging the usury, that evidence was improperly admitted, and that the trial court erred in finding the transaction to be usurious." (*Janisse*, *supra*, 154 Cal.App.2d at pp. 581-582.)

The California Court of Appeal disagreed with the *Janisse* defendants, finding that "[t]he evidence, and the reasonable inferences therefrom, overwhemingly [sic] support[ed] the [trial court's] findings." (*Janisse*, *supra*, 154 Cal.App.2d at p. 584.) "It [was] obvious from the record that [the] defendants engaged in a thinly veiled scheme to make it appear that they were the purchasers of the note at a big discount, when in fact they were the lenders of the money." (*Id.* at p. 586.) "It [was] too obvious to require detailed demonstration that [B. Scott Gudmundsen ("Gudmundsen")], the individual that the plaintiffs had executed the promissory note for a loan was a dummy; that defendants knew it; that defendants determined whether a

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loan should be made to plaintiffs and for how much; that defendants then determined the figure to be inserted in the Gudmundsen note; and that defendants, in fact, made the loan to plaintiffs." (*Id.* at p. 587.) Indeed, Gudmundsen "testified that he did not understand the nature of the transaction and did not receive any money out of it." (*Id.* at p. 586.)

As in *Janisse*, the loan instruments in *Anderson* were executed in favor of an individual that "had no interest in the transaction or in the moneys to be acquired by respondents . . .." (*Anderson*, *supra*, 103 Cal.App.2d at p. 26.) That individual "was an innocent dupe of appellant and his broker and was their dummy for the purposes of effectuating the unlawful purpose and of creating an aura of legality for the usurious loan." (*Ibid.*) According to the Court of Appeal, "[p]arties are free to buy and sell promissory notes as they may sell and buy other property. When the bona fides of the purchaser of a promissory note is established the extent of his profit is of no concern to the usury law. But when the facts indicate that the purchaser of a security had knowledge of an infirmity, or a grave suspicion thereof, his transaction is closely scrutinized to find the requisite good faith. It is the substance, not the form, that is controlling." (*Id.* at pp. 27-28.) "Piercing the trappings of the transaction in [that] cause it [was] manifest that its essence was an attempt to evade the usury laws and to exact a $2,500 bonus from the needy respondents on a $5,000 loan." (*Id.* at p. 28.)

Here, unlike *Anderson* and *Janisse*, on this motion and the present record, there is not sufficient evidence that FinWise is merely a dummy. For example, the 10-K filings state and OppFi's witnesses testify that FinWise uses its own funds to originate the loans under the Bank's agreement with OppFi also.

OppFi's Chief Risk and Analytics Officer, Chris McKay ("McKay"), testifies to the following, among other things. He is responsible for managing and supervising the services that OppFi provides to banks, and is directly involved in OppFi's relationship with FinWise and the services that OppFi provides to FinWise with respect to California loans. (See Declaration of Chris McKay ("McKay Decl."), ¶ 1.) According to McKay, FinWise and OppFi have entered into a Loan Program Agreement (the "LPA") which allows FinWise to use OppFi's technology to provide loans to borrowers across the country. (McKay Decl., ¶ 4.) Pursuant to the LPA, OppFi, as service agent, assists FinWise by hosting OppLoans platform on its website, by developing and suggesting changes to, among other things, underwriting criteria and marketing strategy. (McKay Decl., ¶ 5.) "FinWise funds each loan, in its

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name, with its own funds . . . ." (McKay Decl., ¶ 8 [bold emphasis removed; underline added].) Specifically, once FinWise completes its underwriting process and approves a loan for funding, it initiates an ACH transfer for the loan amount to the borrower's bank account. OppFi does not provide [those] funds to FinWise, and it did not provide FinWise with the initial capital used to fund loans. Put simply, FinWise funds Program Loans using money that belongs to FinWise, from accounts controlled solely by FinWise, and uses funds in which OppFi has neither a possessory nor a beneficial interest." (McKay Decl., ¶ 8(b).) "FinWise retains title and ownership of the loans throughout the program and life of the loan." (McKay Decl., ¶ 8(c).) FinWise sells receivables (i.e., the right to payments of principal and interest and other proceeds from the loans) to OppWin, LLC (OppFi's subsidiary), not the loans; the bank retains title to and ownership of the loans, including servicing rights. (McKay Decl., ¶ 8(d); Darchis Decl., ¶¶ 14, 17, 24, 31-34.)

The evidence is also undisputed that FinWise gains something from its partnership with OppFi unlike in *Janisse* and *Anderson* where the straw lenders did not gain anything from the transactions. According to McKay, FinWise (1) retains five percent of the receivables for each loan, (2) is entitled to a percentage fee for each loan it funds, (3) is entitled to a servicing fee based on the total outstanding monthly loan balance, and (4) is obligated to fund any loan it approves regardless of the sufficiency of the security. (McKay Decl., ¶ 13(a)-(d); Darchis Decl., ¶¶ 32, 34.)

OppFi also submits the declaration of Duross O'Bryan, who testifies that he is a licensed Certified Public Accountant for more than 40 years and has performed audits and other accounting engagements in connection with Sarbanes-Oxley Act of 2002 compliance reports, SEC Comment Letters, 10-K filings, and other related securities filings. (See Declaration of Duross O'Bryan ("O'Bryan Decl."), ¶ 1.) O'Bryan has worked in numerous industries, including financial services, and is currently a Partner in the Financial advisory Services practice of Resolution Economics, LLC, where he provides expert witness testimony in matters involving (among other things) generally accepted auditing standards and SEC investigations. (O'Bryan Decl., ¶ 4.) Based on his review and analysis of all of the information referred to in his declaration, as well as his auditing experience, FinWise, OppWin, LLC, SPE V, SPE IX, and the lenders to those entities, all have a financial interest in the economic upside, as well as exposure to the downside risk of loss, with respect to the FinWise loans. (O'Bryan Decl., ¶¶ 13, 16.) With respect to FinWise specifically, at the funding stage, the Bank maintains 100 percent of the economic upside and downside risk with respect to the loans it funds.

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(O'Bryan Decl., ¶ 17.) "Further, across the life cycle of each loan, FinWise places the largest amount of funds at risk when funding and it continues to be exposed to economic upside and downside risk through its retention of a receivable interest." (O'Bryan Decl., ¶ 17.) "Moreover, the Loan Program [i.e., the loan program between FinWise, OppFi, OppWin, SPE V and SPE IX] . . . is a material source of FinWise's revenues, funding, and assets and FinWise substantially benefits from the resulting income streams, principal payments, and funding. Accordingly, FinWise is exposed to material risks with respect to each individual FinWise loan and the Loan Program as a whole." (O'Bryan Decl., ¶ 17.)

OppFi further submits the declaration of Simon Darchis, the Vice President, Director of Specialty Lending at FinWise. Darchis testifies, among other things, that FinWise is in constant communication with OppFi, that FinWise controls the underwriting process and independently underwrites the loans, that FinWise controls the application process and marketing for the loans, that FinWise maintains compliance oversight, and that FinWise maintains oversight of the proprietary credit models that are developed by OppFi. (Darchis Decl., ¶¶ 1, 9, 14-16, 22, 24-26, 27, 29-30.)

The Commissioner has not disputed or objected to the above testimonies. The Commissioner did not seek to depose the declarants or obtain pertinent documents in discovery from OppFi or any third parties to contradict OppFi's submissions. In reply, the Commissioner does not offer much, if anything, factual. Thus, OppFi's declarations stand largely unrebutted and unimpeached.

The Commissioner argues that OppFi is the "true lender" of OppLoans based on the allegations that (1) OppFi has a prearrangement to purchase OppLoans loan receivables, (2) OppFi owns the OppLoans website, (3) OppFi controls the underwriting process, (4) OppFi purchases over 90 percent of the receivables, and (5) FinWise does not carry the financial risk. (Motion, pp. 4:3-7:1.)

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However, on this motion, the court has found that the Commissioner has not provided sufficient evidence showing that OppFi controls the underwriting process. In addition, as discussed below, OppFi's prearrangement to purchase OppLoans loan receivables and its purchase of over 90 percent of the receivables seem on this motion to be consistent with FinWise's right under Section 27 to assign, sell, or otherwise transfer its loans to OppFi and "[California's] Constitution does not require successors in

interest to be independently exempt from usury restrictions." (*Montgomery, v. GCFS, Inc.* (2015) 237 Cal.App.4th 724, 732.) Finally, the Commissioner has not cited any case holding that owning a website sufficiently supports a finding that the website's owner is the true lender of a loan.

Janisse and *Anderson* stand for the principles that (1) courts look at the substance over the form of a transaction to determine usury and (2) usury is determined at inception of a loan, do not contradict each other. In fact, in both cases, the loans were usurious at the inception.

As stated in the introductory sections of this order, "[i]t is a question of fact as to whether a particular transaction is or is not usurious. (Citation.) Where the form of the transaction makes it appear to be nonusurious, it is for the trier of the fact to determine whether the intent of the contracting parties was that disclosed by the form adopted, or whether such form was a mere sham and subterfuge to cover up a usurious transaction. (Citations.) The trial court may look beyond the form of the transaction and ascertain its substance. (Citation.)'" (*Forte v. Nolfi, supra*, 25 Cal.App.3d at p. 678, citing, among other cases, *Janisse*.)

Here, for purposes of this motion and on the present record, the Commissioner has not sufficiently shown that the OppFi-FinWise partnership was a mere sham and subterfuge to cover up a usurious transaction. The Commissioner has not demonstrated on this motion that OppLoans were usurious in the first place. On this motion, *Janisse* and *Anderson* do not change the court's ruling that the Commissioner has failed to show that she has a reasonable probability of prevailing on the merits on her first cause of action for violation of the CFL. The Commissioner does not carry her burden.

(ii) <u>Section 27</u>

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The parties agree that under Section 27 of the Federal Deposit Insurance Act's ("FDIA"), FinWise is allowed to charge interest rates allowed by the state it is located in, Utah. The statute states in relevant part:

> In order to prevent discrimination against State-chartered insured depository institutions, . . . with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank . . .

> may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan . . . interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(12 U.S.C.A. § 1831d, subd. (a).)

"Courts refer to the authority codified at 12 U.S.C. § 1831d in a variety of ways. Some courts refer to [that] authority as section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ('DIDA'). Other courts refer to [that] authority as section 27 of the Federal Deposit Insurance Act of 1950." (*Williams v. Encore Capital Group, Inc.* (E.D. Pa. 2022) 602 F.Supp.3d 742, 746, fn. 2 ("*Williams*").) This court will refer to 12 U.S.C. § 1831d as "Section 27."

The Federal Deposit Insurance Corporation (the "FDIC") promulgated a regulation (the "FDIC's Interest Provision") interpreting Section 27. According to the FDIC's Interest Provision:

> Whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined as of the date the loan was made. Interest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act shall not be affected by a change in State law, a change in the relevant commercial paper rate after the loan was made, or the sale, assignment, or other transfer of the loan, in whole or in part.

(12 C.F.R. § 331.4, subd. (e) [emphasis added].) Regulations promulgated by federal administrative agencies "have the same preemptive effect as a statute . . . ." (*Durnford v. MusclePharm Corp.*, supra, 907 F.3d at p. 602 [citations removed].)

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According to *Williams*, the FDIC's Interest Provision was promulgated to address "whether the *assignee* of a state-chartered, federally insured bank's loan may disregard state usury laws when collecting on the assigned loan." (*Williams, supra*, 602 F.Supp.3d at pp. 745-746. [italics in original].)

In *Williams*, the plaintiff obtained a credit card from a state-chartered, federally insured bank within the purview of the FDIA, and the issue was

whether the defendants could collect on the plaintiff's debt even when they were not state-chartered, federally insured banks. (*Id.* at pp. 744.) The "[p]laintiff [in *Williams*] insist[ed] that [the defendants] lacked authority to collect the debt because [the defendants were] not themselves the types of institutions federal law authorize[d] to disregard state usury laws. Defendants [in turn] argue[d] that they may collect the debt because the debt was 'valid when made' and [could not] become usurious upon assignment." (*Williams*, *supra*, 602 F.Supp.3d at p. 744 [emphasis added].)

"The central issue [before the federal court] in [*Williams* was] whether Pennsylvania's Loan Interest and Protection Law (the 'LIPL') applie[d] to [the defendants'] attempts to collect [the plaintiff's] debt. If the LIPL [did] not apply, then [the plaintiff] agree[d] that all his claims . . . fail[ed]." (*Williams*, *supra*, 602 F.Supp.3d at p. 745.) "The LIPL is Pennsylvania's usury statute. It establishes that, subject to certain exceptions, the 'maximum lawful rate of interest for the loan or use of money of fifty thousand dollars . . . or less . . . shall be six per cent per annum.' 41. P.S. § 201(a). When a debtor is made to pay interest exceeding this maximum rate, the LIPL authorizes the debtor to sue and recover treble damages." (*Ibid.*)

Through the FDIC's Interest Provision, the *Williams* court concluded, "the FDIC interprets the FDIA to permit the assignee of a state-chartered, federally insured bank's loan to collect interest to the same extent the originating bank could have. Specifically, the rule provides that the 'permissib[ility]' of 'interest on a loan' is 'determined as of the date the loan was made.' 12 C.F.R. § 331.4(e)." (*Williams*, *supra*, 602 F.Supp.3d at p. 746.) "If the interest on a loan is permissible at the time the loan was originated by a state-chartered, federally insured bank, then the permissibility of that interest 'shall not be affected by . . . the sale, assignment or other transfer of the loan.' *Id.* The upshot of this rule is that, 'if [a] loan was not usurious at [its] inception, the loan cannot become usurious at a later time, such as upon assignment, and the assignee may lawfully charge interest at the rate contained in the transferred loan.' 85 Fed. Reg. at 44,149." (*Ibid.*)

The *Williams* court ruled that FDIC's Interest Provision preempted application of Pennsylvania's usury statute (i.e., the LIPL) "to an assignee's efforts to collect on a loan that was legally originated by a state chartered, federally insured bank." (*Williams*, *supra*, 602 F.Supp.3d at p. 748.) "In light of section 27 of the FDIA and precedents . . . interpreting that provision, it [was] indisputable that [Comenity Capital Bank ("Comenity")], as a state-chartered, federally insured bank, was permitted to collect interest exceeding

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the LIPL's limitations on the loan Comenity made to [the plaintiff]. Accordingly, the loan was not usurious when it was originated. And under the FDIC's rule, the loan could not have become usurious upon its assignment to [the defendants]. Defendants must be permitted to collect interest on the loan to the same extent Comenity could have despite the LIPL's limitations." (*Id.* at pp. 746-747.)

Therefore, according to the *Williams* court, on this motion, the Commissioner has not demonstrated why the FDIC's Interest Provision does not preempt application of California's usury law to OppFi's efforts to collect on a loan that was legally originated by FinWise, a state chartered, federally insured bank.

In her reply, the Commissioner argues: "OppFi fails to inform this court that Congress rejected the interpretation espoused by OppFi—that merely naming a bank on loan paperwork establishes the lender. In May and June 2021, both the Senate and the House of Representatives passed a resolution under the Congressional Review Act to overturn the Office of the Comptroller of the Currency's (OCC) Named Lender Rule. S.J. Res. 15, 117th Cong. (2021) [RJN Ex. D]. In 2020, the OCC promulgated a regulation—the Named Lender Rule—declaring that for purposes of Section 85, the 'true lender' is the lender named in the loan agreement. National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (hereinafter Named Lender Rule) [RJN, Ex. C]. The OCC final rule provided that a bank is deemed the 'true lender' and is deemed to make the loan 'when it, as of the date of origination, (1) is named as the lender in the loan agreement or (2) funds the loan.' *Id.* This is OppFi's position here. Congress, however, repudiated that regulation as conflicting with its intent for Section 85 and invalidated the Named Lender Rule 'as though such rule had never taken effect' (5 U.S.C. § 801(f)) and barred adoption of any similar rule without congressional approval (5 U.S.C. § 801(b)(2))." (Reply, p. 4:13-26 [emphasis added; original emphasis removed].)

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It is true that Section 27 was modeled after Section 85 of the National Bank Act, which the OCC's Named Lender rule was based. (*California v. Federal Deposit Insurance Corporation* (N.D. Cal. 2022) 584 F.Supp.3d 834, 841 ("*California v. FDIC*") ["The parties agree that Section 1831d was modeled on Section 85 and, as a result, the two statutes have been construed *in pari materia*"] (italics in original).)

It is also true that the OCC issued a "final rule to determine when a national bank or Federal savings association (bank) makes a loan and is the 'true lender,' including in the context of a partnership between a bank and a third party, such as a marketplace lender. Under [that] rule [i.e., coined the Named Lender Rule], a bank makes a loan if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan. ¶ . . .: The final rule [was] effective on December 29, 2020." (*National Banks and Federal Savings Associations as Lenders*, 85 FR 68742-01.) According to secondary sources, in 2021, United States President Joe Biden signed into law a resolution repealing the Named Lender Rule. (See Consumer Financial Service Law Report, 25 No. 5 Consumer Fin. Services L. Rep. 1 ["On June 30, 2021, President Biden signed into law a Congressional Review Act (CRA) resolution repealing the Office of the Comptroller of the Currency (OCC) 2020 rule . . ."].)

However, the Commissioner overlooks the fact that the OCC promulgated a rule (still in place) providing "that '[i]nterest on a loan that is permissible under [Section 85] shall not be affected by the sale, assignment, or other transfer of the loan.' [Citations.]" (*California v. Office of Comptroller of Currency* (N.D. Cal. 2022) 584 F.Supp.3d 844, 850 ("*California v. OCC*").) In *California v. OCC*, the United District Court for the Northern District of California took judicial notice of (among other things) the Senate Resolution invalidating the OCC's Named Lender Rule, but found that the OCC's interpretation of Section 85, that the sale, assignment, or other transfer of a loan is permissible, was (1) not contrary to the National Bank Act, (2) a permissible construction of the Act, (3) neither arbitrary, capricious, nor manifestly contrary to the law, and (4) did not violate the APA. (*Id.* at pp. 849-860.)

The same federal court also held in *California v. FDIC* (N.D. Cal. 2022) 584 F.Supp3d 834 that the FDIC did not exceed its authority in enacting the FDIC Interest Provision despite acknowledging the similarities between FDIA's Section 27 and the National Bank Act's Section 85. (*California v. FDIC*, *supra*, 584 F.Supp.3d at pp. 840-844.) In that case, the States of California, Illinois, Minnesota, New Jersey, New York, and North Carolina, the Commonwealth of Massachusetts, and the District of Columbia filed the lawsuit challenging the FDIC's Interest Provision. (*Id.* at p. 839.) Similar to the Commissioner's allegations in this case, the plaintiffs argued that "'some non-bank lenders have formed sham "rent-a-bank" partnerships designed to evade state rate caps.' [Citation.] In this situation, a third party will partner with a [federally insured state-chartered banks] to originate the loan in

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question. [That bank] then transfers the loan to the third party, which continues to charge the [bank's] interest rate, even if it exceeds the interest rate cap in the state where that third party is located." (*Id.* at p. 838.) The federal court acknowledged the similarities between FDIA's Section 27 and the National Bank Act's Section 85, but noted that "[u]nlike Section 85, [Section 27] expressly states that contrary state laws are preempted." (*Id.* at p. 840 [emphasis added].) The federal court thereafter employed the analysis in *Chevron U.S.A. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837 ("*Chevron*") and found that the FDIC did not exceed its statutory authority when it promulgated the FDIC's Interest Provision.[5] (*Id.* at p. 840.)

The Commissioner has not cited any authority supporting her implied argument that the FDIC's Interest Provision is unenforceable because Congress repealed the OCC's Named Lender Rule.

On this motion, the Commissioner's argument that Section 27 only applies to state-chartered banks, which OppFi is not, is unpersuasive.[6]

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[5] Under the first step of the *Chevron* analysis, the federal court found that nothing in the text of Section 27 indicated that Congress had directly spoken regarding the questions at issue in that case (i.e., (1) the time at which the validity of the interest rate under Section 27 should be assessed and (2) the components of the right to make loans at rates permitted by a FDIC bank's home state, including the impact of transfer on the validity of interest rates; therefore, the court moved to step 2 of the *Chevron* analysis. (*Id.* at pp. 840-841.) Under the second step, the court found that the FDIC's interpretation of Section 27 was neither arbitrary nor capricious. (*Id.* at p. 842.) Therefore, the court could defer to the FDIC's interpretation of Section 27. (*Id.* at pp. 841 [explaining that "[u]nder the second step of the *Chevron* analysis, the Court defers to the FDIC's interpretation of Section 1831d 'so long as it "is based on a permissible construction of the statute." . . . A permissible construction is one that is not 'arbitrary, capricious, or manifestly contrary to the statute.'" [Citations]"].)

[6] The Commissioner cites federal cases to support her argument that Section 27 only applies to state-chartered banks, which OppFi is not. (Reply, p. 3:7-15.) However, those cases do not change the court's findings on this motion. The Commissioner cites *In Re Community Bank of Northern Virginia* (3d Cir.2005) 418 F.3d 277, 296, for the proposition that "Sections 85 and 86 of the NBA and Section 521 of the DIDA apply only to national and state chartered banks, not to non-bank purchasers of second mortgage loans." However, the Third Circuit Court of Appeals made that statement with

To summarize, on the present record and for purposes of this motion, according to the FDIC and federal cases cited above, to the extent "FinWise-originated" OppLoans had permissible interest rates at the time the loans were made, the fact that the bank sold, assigned, or otherwise transferred the

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regard to removal. Since it was well settled that only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant, the Third Circuit had to examine the underlying complaint to determine if it alleged state law claims of unlawful interest by a nationally or state chartered bank. (*Id.* at pp. 295-296.) The Third Circuit found no basis existed for removal since the complaint did not assert any claims against a national or state chartered federal insured bank and asserted no usury claims against any party under Pennsylvania state law. (*Id.* at p. 296.) The federal court distinguished that case with another where the Eighth Circuit Court of Appeals held removal was proper because "although the credit agreement existed between customers and the department store, it was the national bank that 'process[ed] and servic[ed] customer accounts, and set [ ] terms [such] as interest and late fees.' [Citation.]" (*Id.* at pp. 296–297.) Similarly, the Commissioner also cites *Meade v. Avant of Colorado, LLC* (D. Colo. 2018) 307 F. Supp. 3d 1134, 1145, arguing that in that case, the federal court held there was no preemption as to state regulation of non-bank lenders. However, that case also discussed preemption in the context removal. The court explained: "Whether or not Section 27 gives rise to a *defense* of preemption on the merits of Plaintiff's claims, it does not establish complete preemption or permit removal of the Administrator's exclusively state–law claims to federal court." (*Id.* at p. 1145.) That case, like the Third Circuit Court of Appeal's decision *In Re Community Bank of Northern Virginia* distinguished preemption for the purposes of removal and preemption as a defense. Both cases agreed that although Section 27 does not establish complete preemption or permit removal of purely state-law claims, it is possible that the statute can provide a preemption defense. "[P]reemption is an affirmative defense as to which defendants have the burden of proof." (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 251.) The Commissioner also cites *West Virginia v. CashCall, Inc.* (S.D.W. Va. 2009) 605 F. Supp. 2d 781, 788, but that case also concerned removal. The United States District Court for the Southern District of West Virginia found that it lacked subject matter jurisdiction over the case because the complaint was strictly about a non-bank's violation of state law and alleged no claims against a state-chartered bank under the FDIA. (*Id.* at p. 788.)

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loans to OppFi should not make the loans usurious. On this motion, this principle is consistent with California's usury law and Constitution.[7]

Indeed, as stated above, "'obstacle preemption arises when "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Citations.]" (*Qualified*, *supra*, 187 Cal.App.4th at p. 758; see also *Guerra*, *supra*, 479 U.S.at p. 281 ["federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict . . . [can also occur] . . . because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (citations removed)].)

Here, on this motion and the present record, if the court were to interpret the CFL to mean that FinWise was not a "true lender" for

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[7] The Commissioner frames the "core issue" as being whether FinWise is the "true lender" for purposes of CFL exemption or whether the bank is merely a straw lender for OppFi. (Motion, p. 8:13-16.) The Commissioner suggests that if FinWise is merely a straw lender for OppFi and not the true lender, then OppFi cannot hide its OppLoans under the umbrella of FinWise's exemption. It follows that the Commissioner is also implying that the opposite is true; if FinWise is the "true lender" for exemption purposes, then OppLoans are not unlawful under the CFL. However, as stated, the CFL and the California Constitution exempt banks from California's usury restrictions. The California Constitution also exempts "any successor in interest to any loan . . . exempted under [the Constitution]." (Cal. Const. art. XV, § 1; see also *Strike v. Trans-West Discount Corp.* (1979) 92 Cal.App.3d 735, 745 ["Finally, Strikes contend error in that the judgment allows Trans-West to receive 11 percent interest on the Barclays Bank note, inasmuch as Trans-West does not enjoy the exemption from the usury law as did its assignor Barclays Bank. No authority is cited for the proposition that the assignee of an exempt lender becomes thereby a usurer unable to collect any interest. ¶ The California Constitution, article XV, section 1, exempts certain institutions, such as banks, from the usury laws. Strikes' contention would in effect prohibit make uneconomic the assignment or sale by banks of their commercial property to a secondary market. This would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance. ¶ Further, a contract, not usurious in its inception, does not become usurious by subsequent events."].) Therefore, an assignee or successor in interest to any loan a bank originated should also be exempted.

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exemption purposes because the bank decided to assign, sell, or otherwise transfer OppLoans to OppFi (whether within days of originating the loan or months, or whether in whole or in part), that ruling may stand as an obstacle to the full purposes and objectives of Congress given how courts have interpreted Section 27 and the FDIC's Interest Provision to allow banks such as FinWise to do so.

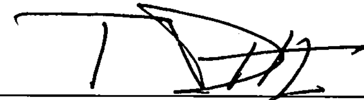
Accordingly, on the present record, the court finds that the Commissioner has not established a reasonable probability of prevailing on the merits.

VII. DISPOSITION

On the present record, Cross-Complainant Commissioner Clothilde Hewlett, in her official capacity as Commissioner of Financial Protection and Innovation's motion for preliminary injunction is denied. The Commissioner is ordered to give notice.

IT IS SO ORDERED.

Dated: October 30, 2023



Timothy Patrick Dillon
Judge of the Superior Court