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 8 SMALL BUSINESS FINANCE
 ASSOCIATION
 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12
 13 SMALL BUSINESS FINANCE
 ASSOCIATION,

14 Plaintiff,

15 v.

16 CLOTHILDE HEWLETT, solely in her
 17 official capacity as Commissioner of the
 California Department of Financial
 18 Protection and Innovation,

19 Defendant.

No. 2:22-cv-08775

**COMPLAINT FOR
 DECLARATORY AND
 INJUNCTIVE RELIEF**

1 Plaintiff Small Business Finance Association (“SBFA”) brings this action for
2 declaratory and injunctive relief against defendant Clothilde V. Hewlett (the
3 “Commissioner”), solely in her official capacity as Commissioner of the California
4 Department of Financial Protection and Innovation (“DFPI”), and alleges as
5 follows:

6 1. This action seeks to enjoin regulations that violate the First
7 Amendment rights of companies that provide capital to small and medium-sized
8 businesses. DFPI adopted these regulations – 10 Cal. Code Regs., tit. 10, ch. 3 (the
9 “Regulations”) – as required by a statute enacted by the California Legislature in
10 2018. *See* S.B. 1235, 2017-2018 Sess. (Cal. 2018) (codified at Cal. Fin. Code
11 §§ 22800-22805) (“SB 1235”). The purpose of the Regulations is to provide
12 businesses seeking financing with disclosures that would allow the businesses to
13 compare the costs and terms of different types of financing arrangements.
14 However, commercial financing takes many forms with unique attributes. While
15 the Regulations attempt to facilitate comparison shopping, they do not require the
16 disclosure of purely factual and uncontroversial information.

17 2. The compelled inaccurate disclosures do not provide meaningful
18 information to businesses seeking financing. To the contrary, they will provide
19 businesses with inaccurate information that misstates the costs of financing and
20 prevents business owners from making informed decisions regarding available
21 financing options. In addition to requiring false and/or misleading disclosures, the
22 Regulations also purport to prohibit additional disclosures and statements that
23 correct, clarify, or supplement the misleading and confusing messages the
24 Regulations compel. Under threat of criminal and civil sanctions, *see* Cal. Fin.
25 Code §§ 22713, 22780, 22805, the Regulations compel providers of commercial
26 financing to speak messages that are false, misleading, and controversial. By
27 compelling commercial speech that is neither factual nor uncontroversial, the
28 Regulations violate the First Amendment.

1 Members are subject to the Regulations and the compelled speech described in this
2 complaint.

3 6. Defendant Commissioner is the Commissioner of DFPI and is named
4 solely in her official capacity. Under the California Financial Code, the
5 Commissioner has the power to enforce SB 1235 and its implementing Regulations,
6 including by determining violations and seeking, among other things, civil penalties
7 and other relief – including injunctions, disgorgement, restitution, and damages –
8 for claimed violations of the statute and Regulations. Cal. Fin. Code §§ 22713,
9 22780, 22780.1. DFPI is an agency of the State of California which maintains an
10 office in this judicial district located at 300 S. Spring Street, Suite 15513, Los
11 Angeles, California, 90013-1259. By statute, this action may be commenced in any
12 judicial district where the California Attorney General maintains an office. The
13 California Attorney General maintains an office in this judicial district located at
14 300 S. Spring Street, Los Angeles, California, 90013-1230.

15
16 **JURISDICTION AND VENUE**

17 7. This Court has subject-matter jurisdiction over this action pursuant to
18 28 U.S.C. § 1331 because this action arises under the First Amendment of the
19 United States Constitution and under TILA, a federal statute.

20 8. Venue is proper in this judicial district pursuant to 28 U.S.C. §
21 1391(b)(1) and (2). The Commissioner has an office in this judicial district, where
22 she performs her official duties. The California Attorney General also maintains an
23 office in this judicial district. Moreover, a substantial part of the events giving rise
24 to SBFA’s claims have occurred or will occur in this judicial district. SBFA’s
25 Members frequently enter into financing transactions that fall within the scope of
26 the Regulations with businesses in this district, and have previously entered into
27 these financings with such businesses. Absent injunctive relief, SBFA’s Members
28 will be compelled to deliver messages that are factually inaccurate, and will be

1 prevented from speaking in the manner they see fit, to businesses in this district and
2 throughout the state.

3
4 **FACTUAL ALLEGATIONS**

5 *Financing Offered by SBFA's Members*

6 9. SBFA's Members provide alternative financing options that differ in
7 material respects from traditional commercial loans and from consumer credit
8 governed by TILA. These financing options include:

9 (i) Sales-Based Financing ("SBF") – SBF is a form of financing
10 whereby the provider purchases a portion of a business's future receivables at
11 a discount and collects those receivables as they are generated by the
12 business in the ordinary course.¹ The generation of receivables by these
13 businesses fluctuates based on a wide variety of factors, such as seasonality
14 and economic conditions. The receivables in many cases are transferred to
15 the provider by the businesses' card processor each day the business batches
16 out its credit card terminal. In other cases, the provider will agree to set a
17 fixed daily amount it will debit from the business's checking account that is
18 based on an estimate of the daily receivables the business will generate. The
19 business can then notify the provider when its daily receivables change and
20 the provider will then adjust the estimated daily amount debited from the
21 business's bank account or reconcile the amount debited based on the
22 business's actual revenue during the relevant time period. The amount of
23 receivables purchased by the provider is generally referred to as the "Amount
24 Sold." The purchase price for the Amount Sold is generally referred to as the
25 "Purchase Price." The difference between the Amount Sold and Purchase

26 _____
27 ¹ SBF as defined by the Regulations also includes loans with payment requirements
28 only to purchases of future receivables.

1 Price is the “Discount.” The percentage of receivables collected each day is
2 commonly referred to as the “Split Percentage.” For transactions where the
3 business’s card processor is not used to “split” the receivables between the
4 provider and the recipient, the daily amount debited from the business
5 checking account is commonly referred to the “ACH Amount.” In those
6 instances, where the business must notify the provider of changes in revenue,
7 any change that results in a modification of the ACH Amount or a
8 reconciliation is referred to as a “True-Up.” The receivables sold in
9 connection with an SBF transaction can be credit card receivables, other
10 payment card receivables, the gross revenue of the business, or any
11 combination of the three. An example of a transaction would be: an Amount
12 Sold of \$12,000, a Purchase Price of \$10,000, and a Split Percentage of 10%.
13 What this means is a business has agreed to deliver 10% of its receivables
14 generated each day to the provider until the provider receives \$12,000 in
15 exchange for an upfront payment of \$10,000. There is no term, no interest,
16 rate, no fixed periodic payment, no accruing rate, and no absolute obligation
17 to repay – all of which are core features of traditional loan products.

18 (ii) Open-end Credit – Open-end Credit is a credit transaction
19 whereby the business is given a credit limit and may draw against that credit
20 limit from time to time. As the balance is paid down, additional “open to
21 buy” is created, offering the business a renewing stream of credit to use to
22 finance its business needs. Open-end credit may have a fixed cost or an
23 accruing rate. Open-end credit products offered by many SBFA Members
24 differ from traditional open-end credit lines (like credit cards) in that many of
25 them have a fixed fee per draw rather than an accruing rate.

26 (iii) Closed-end Credit – Closed-end credit is a loan of money to a
27 business that must be repaid on specific terms and by a specific date. In this
28 regard, the closed-end loans offered by SBFA Members are similar to

1 traditional closed-end loans. However, the closed-end loans offered by many
2 SBFA Members have two distinct differences from traditional loans. First,
3 the periodic payments are typically required daily or weekly instead of
4 monthly. Second, the cost of the loan is typically structured as a fixed fee
5 rather than an accruing rate.

6 10. All three of the products offered by SBFA Members are innovations in
7 small business financing born out of necessity. Small businesses have faced
8 challenges obtaining financing from banks and other traditional lenders because
9 they have been viewed as too risky and because traditional underwriting costs have
10 been high. When banks and other traditional lenders have been willing to provide
11 financing to small businesses, they often take many days or months to underwrite a
12 loan, require significant business and/or personal collateral, and/or require
13 guarantees from spouses or other family members in addition to the small business
14 owner. SBFA Members offer the above products to the businesses who cannot
15 obtain financing from banks and traditional lenders. SBFA Members have become
16 efficient in underwriting small businesses by looking at their cash flow and can, in
17 many cases, provide the needed financing in hours. Accordingly, many small
18 businesses are turning to SBFA Member companies not because they would not
19 qualify for a bank or other traditional loan, but because many small businesses
20 value the speed and efficiency of the process and the lack of collateral or additional
21 guarantors over the cumbersome and time-consuming traditional loan application
22 and approval process.

23 *SB 1235 And The Regulations*

24 11. In 2018, the California Legislature enacted and the Governor signed
25 SB 1235. The stated purpose of the law was to protect small businesses by
26 providing them with accurate disclosures regarding the costs of various financing
27 options. SB 1235, codified at California Financial Code sections 22800-22805,
28 requires a “provider” – meaning a person who extends a specific offer of

1 “commercial financing” to a recipient – to disclose specified information relating to
2 that transaction at the time of extending a specific offer of commercial financing,
3 and to obtain the recipient’s signature on that disclosure before consummating the
4 commercial financing transaction. SB 1235 does not apply to an offer of
5 commercial financing of more than \$500,000, so it is intended to apply to financing
6 extended to small and medium-sized businesses. Disclosures required by the law
7 include the: (1) total amount of funds provided, (2) total dollar cost of the
8 financing, (3) term or estimated term length, (4) method, frequency, and amount of
9 payments, (5) description of prepayment policies, and (6) the “total cost of the
10 financing expressed as an annualized rate.” Cal. Fin. Code §§ 22802(b)(6),
11 22803(a)(6). SB 1235 did not itself prescribe specific disclosures or define how
12 providers were to express the costs of financing as an annualized rate. Instead,
13 DFPI was tasked with issuing regulations implementing SB 1235’s disclosure
14 requirements.

15 12. The Regulations do not regulate economic conduct or prohibit or
16 restrict the types of financing options that SBFA’s Members offer to small
17 businesses. Instead, the Regulations prescribe and restrict the content of SBFA
18 Members’ communications with their customers and potential customers,
19 compelling Members to describe their products in ways that are false and
20 misleading.

21 13. The approach of the Regulations was unique in the context of
22 financing disclosure laws in two material respects. First, the Regulations seek to
23 create a single disclosure form and uniform terms used for a wide variety of
24 products. So unlike other financing disclosure laws, products are forced into one
25 set of parameters. For example, a purchase transaction (*e.g.*, SBF) must include
26 essentially the same disclosures as a loan transaction despite the fact that the terms
27 of the products are entirely different. Second, the Regulations adopted certain
28 terms specifically defined in TILA – including, by way of example, the annual

1 percentage rate (“APR”) and finance charge. TILA applies to loans, lines of credit
2 and retail installment sales. However, unlike SB 1235, TILA does not apply a “one
3 size fits all” approach to all consumer financing transactions. Instead, it expressly
4 excludes leases, factoring transactions, and asset sales. In fact, leases are so unique
5 that Congress passed a separate law to require lease-specific disclosures and the law
6 adopts a lease-specific cost disclosure – it does not adopt APR for leases. 15
7 U.S.C. § 1667a. By treating non-loan transactions (such as leases and sales
8 transactions) and open-end credit like closed-end loans, the speech compelled by
9 the Regulations is inaccurate and does not translate into meaningful disclosures
10 regarding the costs and characteristics of the transactions governed by SB 1235.
11 That means the disclosures required under the Regulations, far from providing
12 accurate information that would allow businesses to compare the terms and costs of
13 different financing options, actually require providers to give inaccurate disclosures
14 that will confuse the recipients that rely on financing provided by SBFA’s
15 Members.

16 14. The Regulations are unduly burdensome. The Commissioner may
17 have an interest in adopting regulations that promote truthful disclosures regarding
18 the cost of commercial financing. But the Regulations go beyond that interest and
19 impose disclosure obligations that are neither factual nor uncontroversial.

20 15. On June 9, 2022, the California Office of Administrative Law
21 approved DFPI’s final version of the Regulations. The Regulations will take effect
22 on December 9, 2022. SBFA’s Members have been forced to develop internal
23 procedures and disclosures to attempt to comply with the Regulations despite the
24 fact that they do not believe the disclosures accurately describe the Members’
25 products. Beginning on December 9, 2022, SBFA’s Members will be required to
26 modify their speech and conduct in order to comply with the Regulations.

27 16. Failure to comply with the Regulations will subject SBFA’s Members
28 to DFPI’s extensive enforcement powers, which may include administrative orders

1 to stop alleged violations and civil injunctive actions in the name of the People of
2 the State of California to enjoin violations, appoint receivers, and obtain equitable
3 relief, including rescission, restitution and civil penalties. SBFA's Members also
4 may face criminal liability for failing to comply with the Regulations.

5 *Compelled Inaccurate Disclosures Regarding SBF Transactions*

6 17. The Regulations require providers to make disclosures regarding sales-
7 based financing transactions. SBFA's Members provide sales-based financing
8 transactions. Sales-based financing differs from traditional commercial loans in
9 many important respects. In a sales-based financing, the capital provider purchases
10 a certain amount of receivables or payment intangibles from the business at a
11 discount, and the purchased receivables are delivered to the provider through a
12 fixed percentage of a business's future receivables until the Amount Sold is
13 delivered to the provider. For example, the provider might pay a business \$10,000
14 (Purchase Price) in exchange for \$12,000 in future receipts (Amount Sold), to be
15 delivered on a periodic basis in an amount equal to 10% of the business's card
16 receivables (Split Percentage) until the full \$12,000 in receivables has been
17 collected by the provider. If the business grows and creates more receivables, the
18 \$12,000 is received faster by the provider. If the business slows down, the \$12,000
19 in receivables is received more slowly by the provider. If the business fails and no
20 receivables are produced, the transaction is complete with the business not having
21 any further obligations or liability as it is a true purchase-and-sale transaction.

22 18. SBF transactions are purchase-and-sale transactions, not loans, as
23 implicitly recognized by the Regulations. Not only are the legal formalities
24 between the products substantially different, but the basic financial terms are very
25 different. In a typical commercial loan, the borrower must pay regular installments
26 of principal and interest of a fixed amount over a fixed term. If a borrower pays
27 less than the full amount due, the shortfall will typically be added to the loan's
28 balance, and the borrower's interest payments will increase accordingly. And if the

1 borrower fails to make a scheduled payment – for example, because its business
2 takes an unexpected downturn – the lender may have a variety of options for
3 recovering its investment, including accelerating the full amount of the loan,
4 liquidating collateral, forcing the business into bankruptcy, or enforcing personal
5 guarantees. A key feature of a loan is that it represents an absolute obligation to
6 repay, with a failure to repay the loan resulting in damages being owed to the
7 lender.

8 19. By contrast, in a sales-based financing transaction a business sells the
9 Amount Sold at a discount for the Purchase Price, and agrees to deliver to the
10 provider the Split Percentage of the applicable receivables generated each day until
11 the full Amount Sold is delivered to the provider. There is no fixed periodic
12 payment, no fixed payment schedule, no term, no accruing rate, and no absolute
13 obligation to repay. The amounts remitted to the provider are entirely dependent on
14 the business generating the applicable receivables. If the business’s revenues are in
15 line with initial expectations, the provider will receive the future receipts it
16 purchased consistent with those expectations. But if revenues lag, the provider will
17 receive the Amount Sold over a longer time period. If the business fails,
18 receivables will no longer be generated and the provider will never receive the full
19 Amount Sold. Additionally, the business will not owe any more or have any other
20 obligations to the provider in this instance absent a breach of the agreement (*e.g.*
21 fraud, breach of warranty, etc.). Indeed, because the business’s financing
22 obligation is entirely contingent on generating the applicable receivables, the
23 provider lacks many of the tools a commercial lender could use to force a business
24 to repay its loan. If a customer’s business falters or fails, the provider bears the risk
25 of loss on its investment with no recourse unless there was a breach of a warranty
26 or representation.

27 20. Notwithstanding these material differences between sales-based
28 financing transactions and traditional loans, the Regulations mandate a series of

1 disclosures that erroneously assume that sales-based financing transactions operate
2 just like traditional loans. These mandated disclosures require SBFA’s Members to
3 describe their sales-based financing arrangements in ways that misstate the costs
4 and features of the financing.

5 21. For example, the Regulations require providers to disclose an
6 Estimated Payment and Estimated Term. However, there is no required payment
7 amount given the transaction is a purchase and sale. A recipient may be in full
8 compliance with their agreement but has made no “payments” for weeks.
9 Estimating the payment amount gives the impression that a specific payment
10 amount or some amount around the disclosed estimated amount is required.
11 Likewise, estimating a term where there is no term gives the false impression that
12 there is some term. Two of the key features of SBF transactions are that there is no
13 fixed payment amount and no term. Yet the Regulations compel providers to
14 disclose these figures when doing so materially undercuts the value proposition of
15 the transactions (no fixed payment amount or term is a key differentiator of these
16 products from traditional financing options businesses use).

17 22. In addition to the fact that the terms Estimated Payment and Estimated
18 Term are by themselves misleading when it comes to SBF transactions, the manner
19 in which the Regulations require the figures to be calculated will result in false and
20 misleading figures being disclosed. Specifically, the Regulations require providers
21 to calculate both of these figures based on estimates of the recipient’s historical
22 average monthly “sales, income or receipts” using methodologies that may conflict
23 with the provider’s internal underwriting methodology, resulting in conflicting and
24 misleading disclosures. Section 914(a)(3)(C) of the Regulations gives two methods
25 for providers of sales-based financing to calculate the projected monthly “sales,
26 income or receipts” of its business customers for purposes of disclosing Estimated
27 Payment and Estimated Term: the “historical method” (Section 930) or the
28 “underwriting method” (Section 931). Both Section 930 and Section 931 force

1 providers to make numerous assumptions regarding monthly “sales, income or
2 receipts” that are not accurate. For example, Section 930(b)(1) prescribes how
3 providers must use historical monthly averages to estimate future monthly “sales,
4 income or receipts,” even though historical averages often are not representative of
5 future monthly “sales, income or receipts” (*e.g.*, seasonal businesses, businesses
6 with recurring sales cycles, businesses that have recently engaged in significant
7 marketing efforts, etc.). Accordingly, even where a provider’s internal
8 underwriting methodologies calculate future “sales, income or receipts” based on
9 factors outside of simply historical numbers, the Regulations nonetheless demand
10 that every provider use the government-dictated method of calculating future “sales,
11 income or receipts,” even when the provider believes it will result in grossly
12 understated or overstated averages for the coming months. Making matters worse,
13 the Regulations mandate that this misstated “sales, income or receipts” average then
14 be used to calculate the Estimated Payment and Estimated Term, which necessarily
15 will likewise be false. The Regulations thereby compel providers to make written
16 statements that are false and in many cases contradicting other information
17 provided to the customer. For example, a customer agreement using ACH debits
18 rather than splitting might set an initial ACH Amount that was calculated based on
19 the provider’s specific and detailed underwriting calculations, but the Estimated
20 Payment disclosure separately provided to the recipient under the Regulations may
21 provide a different amount given the erroneous assumptions the Regulations require
22 providers to make. In other words, while the Regulations require the figures *on the*
23 *required disclosure form* (which is to be provided when the offer is initially
24 extended) to be calculated in accordance with either Section 930 or Section 931,
25 providers are free to continue to use their own internal methodologies to underwrite
26 and price transactions and use that information in customer communications outside
27 of the required disclosure. This scenario will inevitably result in complete
28

1 confusion for recipients, who are now receiving two separate documents, each with
2 conflicting information.

3 23. The issue with Estimated Payment and Estimated Term being wrong
4 due to faulty assumptions is then compounded as the Estimated APR is a
5 calculation done using these figures, so the Estimated APR will be materially
6 wrong to the extent the Estimated Payment and/or Estimated Term is wrong.
7 Accordingly, the disclosures required under Sections 914(a)(3), 914(a)(6) and
8 914(a)(8) will compel providers to give materially false and misleading information
9 to recipients when the offer is extended.

10 24. Section 914(a)(6)'s requirements for disclosure of "the date and
11 amount of any irregular payments listed in chronological order" and "the date and
12 amount of any reasonably anticipated true-ups" also compel disclosure of
13 inaccurate and misleading information. In a sales-based financing transaction, it is
14 not possible to determine in advance either a schedule of "irregular payments" or
15 the date and amount of "reasonably anticipated true-ups," since true-ups and the
16 resulting "irregular payments" are by definition unanticipated. In the context of a
17 sales-based financing transaction with a pre-set periodic remittance amount, a "true-
18 up" is either an adjustment to that periodic remittance amount based upon the actual
19 receivables that the business is generating or a reconciliation of prior remittances
20 against actual revenue to match the percentage of the receipts purchased. For
21 example, if the recipient's business generates fewer receivables than the parties
22 expected at the outset of the transaction, the contract may provide for a reduction in
23 the periodic remittances via bank debits. However, it is impossible for the provider
24 to anticipate at the outset of the transaction whether any true-ups will be made
25 under the contract. The provider simply cannot anticipate whether and how the
26 recipient's revenue will fluctuate throughout the term of the agreement. If the
27 provider could anticipate such fluctuations, it would simply use that information to
28 accurately set the periodic payment amount, and no true-ups would be required.

1 Accordingly, Section 914(a)(6) requires providers to falsely state that they can
2 reasonably anticipate something that cannot be anticipated.

3 25. In addition, when a recipient's revenue drops unexpectedly, the related
4 but unanticipated true-up will cause the Estimated Term of the SBF to be extended.
5 That is, when a small business's revenues take an unexpected downturn, the daily
6 remittance amount is lowered, causing the amount of time it takes for the provider
7 to collect the full Amount Sold to be extended – often by many months.
8 Immediately, the originally disclosed APR is now misleadingly high (because the
9 provider was forced to use an artificial Estimated Term to calculate it). The small
10 business, however, has benefitted immensely by being able to lower its daily
11 obligation during a troubling time for the business. Yet it might have been
12 dissuaded from originally entering the transaction due to the misleading disclosures
13 the provider was forced to make pursuant to the Regulations. Accordingly, forcing
14 providers to disclose an APR that implies it provides an “apples to apples”
15 comparison to other financing products is by no means purely factual and is
16 certainly controversial.

17 26. The Regulations' required disclosures regarding a recipient's supposed
18 “prepayment rights” misstate the true nature of a sales-based financing transaction.
19 The Regulations require providers to falsely state that the recipient may “prepay”
20 their balance and that there is a “required” timeframe for the recipient to “pay off”
21 the financing. Section 914(a)(10) requires the provider to make one of two
22 disclosures. The first provides that if “prepayment” will require the recipient to pay
23 finance charges other than interest accrued, the provider must make the following
24 disclosure: “If you pay off the financing faster than required, you still must pay all
25 or a portion of the finance charge, up to \$[maximum non-interest finance charge]
26 based upon our estimates.” *See* Section 914(a)(10)(A). This completely misstates
27 the nature of sales-based financing transactions. There is no required repayment
28 term for such a transaction, so the phrase “faster than required” is in and of itself

1 materially misleading. In fact, there is no requirement to make “payments” on any
2 schedule, and for this reason “prepayment” is a concept that is foreign to the
3 product given its fundamental nature. Sales-based financing is the purchase of
4 future receivables at a discount in which the recipient’s obligation is to permit the
5 provider to collect receivables as they are generated by the business, with no
6 “payment” requirements. This required disclosure is therefore false and materially
7 misleading to recipients because it suggests that a “prepayment” right exists or that
8 there is a required term – neither of which is true for sales-based financing.

9 27. The second option for the prepayment disclosure is even worse. If the
10 first option is not applicable, Section 914(a)(10)(B) requires the following
11 disclosure: “If you pay off the financing faster than required, you will not be
12 required to pay any portion of the finance charge **other than unpaid interest**
13 **accrued.**” (emphasis added). This disclosure repeats the same error from the first
14 option – forcing purchasers of small business receipts to make the false disclosures
15 that there is a required payment and a term. Additionally, the second line of the
16 disclosure refers to “unpaid interest accrued.” This is also false and misleading to
17 recipients because there is no interest accrual on SBFs. Again, sales-based
18 financing is the purchase of business receivables at a discount. In essence, this
19 portion of the Regulations compels providers to state there is a required term when
20 there is none, and that there is an accruing rate when there is no rate at all. These
21 are materially false and misleading statements as they undercut the value
22 proposition of sales-based financing – there is no term, no rate, and no absolute
23 obligation to pay a sum certain because the transaction *is not a loan*. Yet the
24 Regulations force providers to contradict these key features.

25 28. As another example of how the Regulations compel untruthful speech
26 which misstates the nature of sales-based financing transactions, the Regulations
27 require providers to falsely state that the recipient “owes” money. Section
28 914(a)(4)(C) of the Regulations requires sales-based financing providers to state

1 “Your finance charge will not increase if you take longer to pay off **what you**
2 **owe.**” (emphasis added). This language misstates the nature of sales-based
3 financing transactions by implying that the recipient of such financing has an
4 absolute payment obligation and thereby “owes” an amount to the provider. In a
5 sales-based financing transaction, the recipient sells to the provider a set amount of
6 future receivables, which the recipient may or may not ultimately generate. If the
7 recipient does not generate the receivables the provider purchased, then the
8 recipient does not “owe” the provider *anything*. Section 914(a)(4)(C) therefore
9 requires providers to mislead recipients by falsely stating that they “owe” the
10 provider money. This also harms providers of sales-based financing transactions
11 (and small businesses who may be confused by the difference between that product
12 and a loan due to the one-size-fits-all disclosure regime) because the absence of an
13 absolute obligation to repay is the most important benefit of sales-based financing
14 compared to loans or lines of credit. When business revenue slows down, or if a
15 business fails, a business would much rather have a sales-based financing
16 transaction than a loan because it does not risk default by failing to make a
17 “payment” that is “owed.” By suggesting that something is owed, the Regulations
18 undermine the ability of sales-based financing providers to market their product as
19 a better option than a loan and confuses small businesses who may be encountering
20 a new product for the first time.

21 29. The Regulations require providers to falsely state that the cost of sales-
22 based financing is based on fees. Section 914(a)(3)(D) of the Regulations requires
23 providers of sales-based financing to make the following disclosure where no
24 interest rate is used in the financing: “APR is not an interest rate. The cost of this
25 financing is based upon **fees charged by [Financer]** rather than interest that
26 accrues over time.” (emphasis added). The cost of sales-based financing is based
27 almost entirely on the difference between the Purchase Price and the Amount Sold
28 (the receipts to be delivered) and only secondarily, if at all, on fees. For example, a

1 provider might purchase \$12,000 of future receivables for the purchase price of
2 \$10,000, resulting in a discount of \$2,000. The \$2,000 is not a “fee” under the law,
3 but rather a discount. As such, this provision requires providers to mislead
4 recipients by stating that the cost of the financing is based upon fees, even if this is
5 not the case. Fees in these contracts, if charged at all, typically are charged at
6 origination, and therefore are certain to be paid. A discount, however, will be paid
7 only if the contract is fully performed (*i.e.*, all sold receivables are generated and
8 delivered).

9 30. Section 914(a)(5) of the Regulations requires SBF providers to
10 disclose the “Estimated Total Payment Amount.” However, in an SBF transaction,
11 the total amount of future receivables the recipient is to deliver (Amount Sold) is a
12 fixed amount. It does not fluctuate and is not an estimate. The provider of a sales-
13 based financing transaction purchases a set amount of future receivables.
14 Assuming the recipient’s business actually generates those receivables, the recipient
15 must deliver the Split Percentage until it delivers the Amount Sold. For example, if
16 the provider buys \$12,000 of the recipient’s future receivables and the recipient’s
17 business actually generates that dollar amount of receivables, the recipient will
18 deliver \$12,000. Accordingly, the dollar amount of “payments” (more accurately,
19 remittances) the recipient will make is not an “estimate.” There is, of course, a
20 chance that the recipient’s business will not actually generate the receivables the
21 provider purchased. In such a case, the recipient is not required to remit to the
22 provider the full \$12,000. However, at the outset of a transaction, the provider will
23 never “estimate” that the recipient will remit less than the full \$12,000, because if
24 the provider has reason to believe that the recipient’s business will not actually
25 generate the receivables the provider intends to purchase, the provider will simply
26 refuse to consummate the purchase. The disclosure required under Section
27 914(a)(5) is therefore misleading because it requires providers to state that the total
28 “payment” amount is an “estimate” when in fact it is not an estimate.

1 31. In addition to compelling false and misleading speech, the Regulations
2 also prohibit speech. Specifically, Section 901 provides the general rules for each
3 disclosure and mandates the exact wording to be used in many places, and various
4 other requirements. No modifications are permitted to be made to the disclosure
5 form by a provider, and providers are prohibited from clarifying misleading or
6 inaccurate information required by the Regulations or providing additional
7 information except in limited circumstances that are not sufficient to correct false
8 and misleading statements required by the Regulations. This Section 901
9 significantly restricts important commercial free speech – speech that is vitally
10 needed to prevent false and misleading disclosures otherwise required by the
11 Regulations.

12 32. The mandated disclosures related to SBF transactions are not purely
13 factual or uncontroversial. To the contrary, as detailed above, the Regulations
14 require SBFA’s Members to provide information that does not accurately describe
15 the costs and characteristics of SBF transactions. Additionally, the Regulations
16 prevent SBFA Members from providing prospective customers with additional
17 information that clarifies or corrects the erroneous statements required by the
18 Regulations.

19 *Compelled Inaccurate Speech Regarding Open-End Financing*

20 33. The compelled disclosure of inaccurate information is not limited to
21 SBF transactions. Mandated disclosures related to open-end financing also compel
22 SBFA’s Members to make inaccurate disclosures that substantially overstate the
23 cost of their open-end financing products.

24 34. Open-end financing, also called a line of credit or a revolving line of
25 credit, gives the recipient a specific limit of credit and the ability to borrow as much
26 or as little of that money as the recipient needs at a given time. Open-end financing
27 arrangements can be beneficial for small businesses because the businesses have
28 more control over when and how much they borrow. And because interest

1 ordinarily is not charged on the unused portion of the line of credit, businesses can
2 save money in interest compared to using a closed-end installment loan. SBFA's
3 Members provide open-end financing to small businesses and thus are subject to the
4 Regulations' mandated disclosures for open-end financing.

5 35. The Regulations require providers of open-end credit to disclose
6 misleading terms of the financing that in most cases will substantially exceed the
7 actual cost of the financing. Sections 911(a)(2) and 940(c) of the Regulations
8 require providers of open-end credit to assume that the recipient will make an initial
9 draw of their full approved credit limit, that the recipient will choose to make only
10 minimum monthly payments, and that the recipient will not make any subsequent
11 draws. These assumptions effectively destroy the value of offering an open-end
12 product and do not reflect reality. The main differentiating feature of an open-end
13 credit product is the ability to make multiple draws and repay as the recipient
14 deems appropriate. However, the disclosures required by the Regulations
15 eviscerate these features and convert all open-end products into closed-end products
16 for disclosure purposes. This approach to disclosures was explicitly rejected in
17 connection with TILA's open-end rules and for good reason. Making open-end
18 disclosures as if the product is closed-end is simply misleading and hides the value
19 proposition of open-end products. Few if any recipients will make an initial draw
20 of their full approved credit limit. And, if some recipients were to make such an
21 initial draw, many of them would not choose to make only the minimum required
22 payments, since that would increase the amount of interest they pay. And it is
23 highly unlikely any recipient would ever choose to make one draw and no others.
24 If they were inclined to do so, they would apply for a closed-end product instead.

25 36. The Regulations' required erroneous assumptions regarding open-end
26 financing render various portions of the open-end disclosure requirements –
27 including the Estimated Finance Charge, Estimated Total Payments, Estimated
28 Payment, and APR – materially misleading by requiring providers to disclose

1 amounts that are substantially more than many recipients will actually pay. In
2 essence, the Regulations cram open-end credit into a closed-end credit box, even
3 though they are very different types of financing. This is exactly why TILA
4 provides for different disclosure regimes for open-end credit and closed-end credit
5 and has different APR calculations for each. The Regulations' forced conversion of
6 open-end credit to closed-end credit to compel certain disclosures forces SBFA
7 Members to make highly misleading and inaccurate statements. The upshot is that
8 the Regulations require disclosure of the highest possible cost of open-end
9 financing, not the actual cost the business is likely to incur.

10 37. With respect to open-end credit, the Regulations require an APR and a
11 term to be disclosed but all other related disclosures are estimates. Section
12 911(a)(4) requires the disclosure of an exact APR and not an estimate. Section
13 911(a)(9) requires the disclosure of an exact term and not an estimate. However,
14 the disclosures of the finance charge and payments are estimates. Specifically,
15 Section 911(a)(5) requires the Estimated Finance Charge to be disclosed and
16 Section 911(a)(7) requires the Estimated Payment to be disclosed. Both the
17 Estimated Finance Charge and Estimated Payment are inputs into the APR
18 calculation. If the two of those items are estimates, the APR must be an estimate
19 due to the mathematical formula used to calculate APR. The term is simply a result
20 of these items as well. So either all these items are estimates or all of these items
21 are not estimates. Therefore the Regulations require false and misleading
22 statements to be made with respect to these disclosures.

23 38. The disclosure requirements for open-end credit are not purely factual
24 or uncontroversial. To the contrary, the Regulations compel SBFA's Members to
25 make inaccurate and misleading disclosures regarding their products with which
26 they do not agree. The Regulations compound these problems by prohibiting
27 providers from making additional disclosures that may clarify the inaccuracies and
28 misconceptions created by the Regulations' mandated disclosures.

1 39. The Regulations cause numerous types of irreparable harm. First and
2 foremost, by compelling disclosure of inaccurate information and prohibiting
3 additional disclosures to clarify the inaccuracies, the Regulations violate the First
4 Amendment rights of SBFA’s Members and all other providers covered by the
5 Regulations.

6 40. Absent an injunction, SFBA’s Members will face a Hobson’s choice:
7 either risk significant civil fines, penalties, and injunctions, as well as potential
8 criminal liability, by not complying with the Regulations, or immediately undertake
9 expensive steps to comply with a statute that violates the First Amendment. Parties
10 that refuse to follow the Regulations or that provide disclosures that accurately
11 describe their products but are not consistent with the Regulations would be subject
12 to enforcement actions by DFPI.

13 41. The compelled disclosure of false and inaccurate information
14 regarding their products would also harm Plaintiff’s Members’ competitive position
15 in the marketplace. The purpose of the disclosure requirements is to allow
16 businesses seeking financing to compare “apples to apples” in evaluating the cost of
17 different financing options. The result of the Regulations is that businesses seeking
18 to obtain financing will be comparing apples to oranges painted red to look like
19 apples. The compelled disclosures required by the Regulations would make it
20 appear that the products of Plaintiff’s Members are more expensive than other
21 financing options, and more similar to other financing options than they actually
22 are, so businesses seeking financing would be discouraged from seeking financing
23 from Plaintiff’s Members.

24 42. The Regulations also have adverse consequences for the market for
25 commercial financing. The purpose of SB 1235 is to provide businesses with
26 accurate information so they can assess the cost of various financing options. The
27 Regulations will accomplish the exact opposite by misleading business owners into
28 believing, based on inapposite metrics, that sales-based financing transactions and

1 open-end financing are more expensive and less advantageous than more rigid
2 traditional commercial loans offered by banks, which are not subject to the
3 Regulations and their required inaccurate disclosures. By flooding the market with
4 inaccurate disclosures regarding certain products offered by specific providers, the
5 Regulations will deprive businesses of accurate information regarding the cost of
6 business financing and may lead businesses to unwittingly choose commercial
7 financing products that are more expensive or otherwise less beneficial than the
8 financing options offered by SBFA's Members. Or worse yet, some businesses
9 may forgo obtaining financing altogether due to misguided concern about their
10 ability to pay the financing provider if their sales lag.

11 *TILA Preemption*

12 43. TILA was enacted for the specific purpose of helping consumers
13 compare the cost of credit for certain consumer credit products. Prior to TILA,
14 consumers were given various disclosures with various calculations for a multitude
15 of products. There was no uniformity in the information disclosed, or how it was
16 calculated, between products or states. In order to provide uniformity in disclosures
17 for consumer products, TILA created a disclosure regime that includes certain
18 carefully defined terms of art so disclosures are uniform and meaningful. Some of
19 the carefully defined terms created by TILA were identified as particularly
20 important so that when a consumer saw such a term in a disclosure, the consumer
21 would know exactly what it meant and could compare it to the identical term in
22 another disclosure. The terms "APR" and "finance charge" are two of the most
23 important such terms of art and have specific definitions, calculations, and
24 applications under TILA.

25 44. While the Regulations adopt the APR calculations and finance charge
26 definition from TILA, the Regulations make material modifications from TILA to
27 both.
28

1 45. The Supremacy Clause of the United States Constitution (U.S. Const.
2 art. VI., § 2) establishes that when state law and federal law conflict, federal law
3 preempts state law. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Preemption
4 “may either be expressed or implied, and ‘is compelled whether Congress’
5 command is explicitly stated in the statute’s language or implicitly contained in its
6 structure and purpose.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98
7 (1992). If a state law is not explicitly preempted it can be preempted when the state
8 law “stands as an obstacle to the accomplishment and execution of the full purposes
9 and objectives of Congress.” *Hines*, 312 U.S. at 67. Therefore, in the event a state
10 law is not expressly preempted by a federal law, preemption may be implied. *Geier*
11 *v. American Honda Motor Co.*, 529 U.S. 861, 875 (2000).

12 46. TILA includes an express preemption provision, which provides that
13 TILA does not preempt state law unless the state law is “inconsistent with the
14 provisions of this subchapter and then only to the extent of the inconsistency.” 15
15 U.S.C. § 1610(a)(1). Regulation Z expands on TILA’s statutory preemption
16 provision as follows:

17 . . . State law requirements that are inconsistent with the requirements
18 contained in chapter 1 (General Provisions), chapter 2 (Credit
19 Transactions), or chapter 3 (Credit Advertising) of the Act and the
20 implementing provisions of this part are preempted to the extent of the
21 inconsistency. A State law is inconsistent if it requires a creditor to
22 make disclosures or take actions that contradict the requirements of the
23 Federal law. *A State law is contradictory if it requires the use of the*
24 *same term to represent a different amount or a different meaning than*
25 *the Federal law, or if it requires the use of a term different from that*
26 *required in the Federal law to describe the same item.*

27 12 C.F.R. § 1026.28(a)(1) (emphasis added).

28

1 47. The Official Interpretations to Regulation Z (“Commentary”) also
2 explain that a state law is inconsistent with TILA if it contradicts TILA. State laws
3 that contradict TILA include:

4 i. A state law that requires use of the term finance charge but
5 defines the term to include fees that the Federal law excludes.

6 ii. A state law that requires a label such as nominal annual interest
7 rate to be used for what the Federal law calls the annual percentage
8 rate.

9 12 C.F.R. § 1026.28(a), Supp. I, pt. 3, cmt. 2.

10 48. TILA holds “APR” and “finance charge” in special regard. They must
11 be more conspicuous than all other TILA-required disclosures (in most cases) and
12 are recognized as the two key cost comparison terms defined by TILA. They are, in
13 effect, more important than all other TILA disclosures. This respected status in
14 TILA for APR and finance charge is not only recognized by the fact that these
15 disclosures must be more conspicuous than all other disclosures, but also by the fact
16 that the preemption rules with respect to these two items are much more expansive
17 than the generic preemption rules. As Regulation Z provides, a state-specific
18 finance charge definition or APR computation cannot differ from TILA’s as that
19 would “contradict the amount computed and disclosed under the federal law. [If]
20 the same term is used for different amounts, the state disclosure would be
21 preempted.” 47 Fed. Reg. 16203 (April 15, 1982).

22 49. The Commentary refers to “a state law” broadly, without limitation to
23 certain types of state laws. The language is intentionally broad, to protect the value
24 of the key terms of art that TILA created: APR and finance charge. Accordingly,
25 state laws that impose finance charge or APR disclosures will face more scrutiny in
26 a preemption analysis as these two terms have such significance under TILA. As
27 the Federal Reserve Board stated when concluding a state law requiring APR and
28 finance charge disclosures was preempted:

1 finance charge or annual percentage rate disclosures . . . will be
2 reviewed more strictly; since these disclosures are particularly
3 significant, any contradiction of the corresponding federal disclosure
4 would interfere with the intent of the federal scheme.

5 47 Fed. Reg. 16202 (April 15, 1982).

6 50. The plain wording of TILA and Regulation Z, and the above-
7 referenced determinations, make clear that any state law mandating disclosures for
8 consumer financing covered by TILA is preempted by TILA to the extent:

9 a. The term “Annual Percentage Rate” or “APR” is used but
10 references a different amount than what TILA requires, or the law mandates
11 a calculation different than what TILA requires.

12 b. The term “finance charge” is used but includes fees not included
13 under TILA’s definition of “finance charge,” or excludes fees included under
14 TILA’s definition of “finance charge.”

15 c. The law requires a TILA closed-end credit APR calculation for
16 an open-end credit product, instead of using the TILA open-end credit APR
17 calculation.

18 51. Absent preemption in the foregoing circumstances, consumers would
19 be confused as the finance charge could be defined in states to mean something
20 other than what TILA mandates and the APR calculation could be different from
21 state to state, negatively impacting the value of TILA’s APR calculation. This
22 would clearly impede the goal of TILA to ensure uniformity in consumer finance
23 disclosures. In order for TILA to achieve its goals, the terms “APR” and “finance
24 charge” must be used consistently throughout the country. Additionally, permitting
25 the terms APR and finance charge to be used in products not covered by TILA
26 when the terms are defined differently than they are under TILA, would clearly
27 frustrate the purpose of TILA as APR and finance charge would no longer be
28 reliably consistent and consumers would stop relying on them. The alternative –

1 allowing the terms to be used inconsistently for different products – would degrade
2 the purpose of consistent, uniform terms.

3 52. The Regulations mandate disclosure of “APR” and “finance charge,”
4 but define and calculate those terms differently than is done in TILA.

5 53. The Regulations define “finance charge” as “the amount of any and all
6 costs of the financing, represented as a dollar amount, as more specifically
7 described in section 943.” Cal. Code Regs., tit. 10, ch. 3, § 900(a)(13). Section
8 943 of the Regulations further defines “finance charge” as “all charges that would
9 be included in the finance charge under 12 C.F.R. Part 1026.4 (1-1-21 Edition) . . .
10 if the transaction were a consumer credit transaction and the financier were a
11 creditor under federal law,” plus “the discount taken on the face value of the
12 accounts receivable” for sales-based financing and all broker fees deducted from
13 the “Amount of Financing.” *Id.*, § 943(a)(1)-(2). Purchase discounts are not
14 included in TILA’s definition of finance charge and broker fees are excluded from
15 TILA’s definition of finance charge. Furthermore, for products with variable
16 interest rates where it is “not possible to calculate the interest charges in advance
17 for the entire term of the transaction because” the rate varies, “the provider shall
18 calculate the interest charges for periods of time when the interest charge cannot be
19 calculated in advance based upon the benchmark rate in effect at the time of
20 disclosure and the margin.” *Id.*, § 943(b).

21 54. The Regulations adopt the definition of finance charge from TILA but
22 then amend it. There is little doubt this is not permitted for consumer credit
23 transactions, as TILA and Regulation Z make it clear the definition may not be
24 amended by any state law. The fact that the Regulations apply to commercial
25 transactions and not consumer transactions does not preclude the preemption
26 analysis as the Regulations still amend the definition of finance charge. This will
27 cause confusion and frustrate TILA’s purpose.

28

1 55. The Regulations require the APR to be “determined in accordance
2 with either the United States Rule method or the actuarial method, as both are set
3 forth in Appendix J, 12 C.F.R. Part 1026 (1-1-21 Edition),” with the calculation to
4 “include all finance charges” as defined in Section 943 of the Regulations.” *Id.*, §
5 940(a)-(b). This is the method TILA prescribes for closed-end credit transactions.
6 TILA’s implementing Regulation Z adds numerous details that conflict with the
7 California Regulations. For example, the California Regulations require the APR
8 to be calculated at the time of disclosure, which must be when an offer is made.
9 This is before consummation and in many cases long before consummation.
10 Regulation Z, however, requires the APR calculation to be based on the actual term
11 of the transaction, and the term starts on the date of consummation – not the date an
12 offer is made. 12 C.F.R. § Part 1026, Appendix J(b)(2). So California requires the
13 term to be used for APR calculations to start when the offer is made, while TILA
14 requires the term to be used for APR calculations to start on the date of
15 consummation. This difference may result in different APRs for the exact same
16 product.

17 56. For open-end credit plans, the modifications of TILA’s APR are even
18 more egregious. Rather than use the method TILA prescribes for open-end
19 transactions under 12 C.F.R. § Part 1026.14(b), the Regulations require the provider
20 to use the closed-end APR under TILA. However, because closed-end and open-
21 end products are materially different, the Regulations require providers to convert
22 every open-end product into a closed-end product so that the closed-end APR
23 calculations can be used. The Regulations make this clear by stating: “the provider
24 shall assume that the recipient borrows the approved credit limit at origination and
25 makes no subsequent draws and that minimum on-time payments are made
26 pursuant to the contract.” Section 940(c). Notably, in the Final Statement of
27 Reasons accompanying the Regulations, DFPI acknowledged that the Regulations
28 require a different APR calculation for open-end credit than called for by TILA,

1 and that the required calculation incorporates costs associated with the financing
2 that would not be included in the open-end calculation prescribed by TILA. Final
3 Statement of Reasons, PRO 1/18, Commercial Financing Disclosures, available at
4 [https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-](https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-FSOR.pdf?emrc=0f3440)
5 [Financing-Disclosure-Regulation-FSOR.pdf?emrc=0f3440](https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-FSOR.pdf?emrc=0f3440) (last visited Nov. 13,
6 2022), Responses to Comment 1.15 at 27-28, Comment 1.4.11 at 49, Comment
7 1.34.7 at 100.

8 57. While commercial finance products are not governed by TILA cost-of-
9 credit disclosure rules, small business owners often finance their businesses through
10 a combination of commercial finance products and consumer finance products
11 available to them individually (*e.g.*, consumer loans, home equity loans, credit
12 cards). Consequently, when such business owners shop for financing, they
13 routinely compare products that are subject to TILA with products that are not
14 subject to TILA. A state law mandating disclosure of two essential TILA-defined
15 terms for non-TILA products, but defining or calculating those terms differently
16 from TILA, will create significant confusion among consumers considering TILA
17 products. This inconsistency will result in misleading disclosures of credit choices,
18 thwarting Congress’ primary objective in enacting TILA.

19
20 **CLAIMS FOR RELIEF**

21 **FIRST CLAIM FOR RELIEF**

22 **For Declaratory Relief and Injunctive Relief**
23 **Based Upon Violations of the First Amendment—Compelled Speech**

24 **(U.S. Const. amend. I, 42 U.S.C. § 1983)**

25 58. SBFA incorporates and realleges Paragraphs 1 through 57 as if fully
26 set forth herein.

1 59. Under the First Amendment, a law “compel[ling] individuals to speak
2 a particular message . . . alter[s] the content of their speech” and is thus a content-
3 based speech regulation that is subject to strict scrutiny and presumptively invalid.
4 See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quotation marks omitted and
5 alterations adopted). Because the APR disclosure requirement is not narrowly
6 tailored, and because the State lacks a compelling interest in providing businesses
7 with information to facilitate misleading comparisons of dissimilar financing
8 products, this requirement fails strict scrutiny.

9 60. Nor can the disclosure requirement withstand the scrutiny the Supreme
10 Court has held applies to compelled commercial disclosures. Under *Zauderer v.*
11 *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), a government may compel
12 disclosure only of “purely factual and uncontroversial information about the terms
13 under which [goods or] services will be offered.” *Id.* at 651.

14 61. The Regulations mandate that SBFA Members make disclosures that
15 do not involve purely factual and uncontroversial information. The Regulations
16 instead require SBFA’s Members to mischaracterize the financing they provide
17 using language dictated by the government – terms that are inaccurate and
18 misleading.

19 62. The Regulations compel SBFA Members to make controversial
20 statements that are inaccurate and with which they disagree. They also compel
21 disclosures that are not substantially or reasonably related to any substantial
22 government interest. There is no indication that the State of California considered
23 less speech-restrictive means, such as educational programs, online bulletins, or
24 public announcements to educate businesses on financing options. DFPI did
25 request third parties to submit a proposal to conduct a study on what disclosures
26 would be meaningful to small and medium-sized businesses, but did not proceed
27 with the study prior to issuing the Regulations.

28

1 67. DFPI and the Commissioner have indicated their intent to enforce the
2 Regulations, including their APR and finance charge disclosure requirements,
3 thereby subjecting SBFA Members to actions seeking criminal and civil remedies if
4 they do not comply with the Regulations’ requirements. Accordingly, there exists a
5 ripe, actual controversy related to the legal rights and duties of the parties which
6 this Court can adjudicate.

7 68. For the foregoing reasons, a judicial determination of whether and to
8 what extent the Regulations are preempted by TILA is appropriate at this time.

9 69. In addition, an injunction, including temporary and preliminary relief,
10 should issue prohibiting the Commissioner from enforcing the Regulations’
11 disclosure requirements with respect to an APR and finance charge.

12
13 **PRAYER FOR RELIEF**

14 WHEREFORE, SBFA respectfully prays for relief as follows:

- 15 1. Issue an order granting injunctive relief in favor of SBFA and against
- 16 the Commissioner that prohibits the Commissioner from enforcing the Regulations;
- 17 2. Declare that the Regulations violate the First Amendment as applied to
- 18 SBFA’s Members and may not be enforced;
- 19 3. Declare that the Regulations’ disclosure requirements concerning an
- 20 APR and finance charge are preempted by TILA and may not be enforced;
- 21 4. Award SBFA its costs and expenses; and
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5. Award such further relief as the Court deems just and proper.

Dated: December 2, 2022 MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Scott M. Pearson
Scott M. Pearson
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