

1 MARY ANN SMITH
Deputy Commissioner
2 DOUGLAS M. GOODING
Assistant Chief Counsel
3 MIRANDA LEKANDER (SBN 210082)
Senior Corporations Counsel
4 1515 K Street, Suite 200
5 Sacramento, CA 95814
Tel: (916) 322-8730
6 Fax: (916) 445-6985

7 Attorneys for Complainant

8 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT
9 OF THE STATE OF CALIFORNIA

11 In the Matter of the Accusation of) File No. 413-0360
12 THE COMMISSIONER OF BUSINESS) NMLS ID No. 2427
13 OVERSIGHT OF THE STATE OF)
CALIFORNIA,) ACCUSATION IN SUPPORT OF NOTICE OF
14 Complainant,) INTENT TO ISSUE ORDER SUSPENDING
15 vs.) LICENSE AND IMPOSING PENALTIES
16)
17 GOLDEN EMPIRE MORTGAGE, INC.,)
18 Respondent.)

19
20 The Complainant is informed and believes and, based upon such information and belief,
21 alleges and charges the Respondent as follows:

22 I

23 Golden Empire Mortgage, Inc. (“Respondent” or “GEM”) is a residential mortgage lender
24 and loan servicer licensed since March 22, 2001 by the California Commissioner of Business
25 Oversight (“Commissioner” or “Complainant”)¹ pursuant to the California Residential Mortgage
26 Lending Act (“CRMLA”) (California Financial Code sections 50000 et seq.). Respondent has its
27 principal place of business located at 1200 Discovery Drive, Suite 300, Bakersfield, California,
28

1 93309. Respondent also has multiple branch offices in California doing business under other
2 names. Respondent employs mortgage loan originators.

3 **II**

4 On or about October 19, 2009, the Department commenced a regulatory examination of
5 Respondent’s books and records pursuant to Financial Code section 50302 (“2009 exam”). As a
6 result of the 2009 exam, the Department discovered that in seven out of 32 loans funded through
7 October 2009, or approximately 21percent of the loans reviewed, Respondent had charged the
8 borrower per diem interest in excess of one day prior to the date that the loan proceeds were
9 disbursed from escrow in violation of section 50204(o) of the Financial Code and section 2948.5 of
10 the Civil Code. The amount of per diem interest overcharged per borrower was between \$9.65 and
11 \$301.84. The range of days in which interest was overcharged was between one and six.

12 On or about April 12, 2010, the Department issued a regulatory examination report to
13 Respondent summarizing the various violations found during the 2009 exam (“2009 exam report”).
14 Respondent was instructed to submit a written response to the Department within 30 calendar days
15 with evidence that the cited violations had been corrected. Additionally, Respondent was directed to
16 make refunds of amounts overcharged plus interest at the rate of 10 percent per annum to the seven
17 overcharged California borrowers identified in the report pursuant to Financial Code section 50504.
18 The letter advised that all refunds made to borrowers must be accompanied by the following
19 statement:

20 AS A RESULT OF AN EXAMINATION BY THE DEPARTMENT OF
21 CORPORATIONS, A REFUND OR ADJUSTMENT IN THE AMOUNT OF
22 \$XXX IS BEING MADE FOR YOUR BENEFIT. IF YOU HAVE ANY
23 QUESTIONS CONCERNING THIS REFUND, PLEASE CONTACT (lender)
AT (800) XXX-XXXX.

24 Concerning the Department’s findings of excessive per diem interest charged by
25 Respondent, the 2009 exam report advised:

26
27 ///

28 ¹ As of July 1, 2013, the Department of Corporations and the Department of Financial Institutions merged to form the Department of Business Oversight.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

These overcharges represent a repeat violation from our previous examination and therefore create significant regulatory concern.² Please indicate the measures taken to prevent any recurrences of this violation.

On or about May 20, 2010, Respondent replied that because it had a review system in place, it believed that the Department’s finding of excessive per diem overcharges for some of the loans was “not due to a weakness in GEM’s current process to monitor this area.” Nonetheless, Respondent informed it would make refunds to the seven overcharged borrowers identified in the 2009 exam report.

On or about September 28, 2010, the Department informed Respondent that it had not provided evidence to the Department that it had made sufficient refunds and/or interest payments to all identified borrowers, as instructed by the 2009 regulatory exam report. Additionally, Respondent had failed to include the required consumer notice in its refund letters to borrowers. Concerning the excessive per diem interest charges discovered in the 2009 examination, the Department further advised:

Although your company has a review process in place to review and refund any overcharges noted on per diem interest overcharges, there are still overcharges being made. Some loans are being overlooked in the review process and in some of the loans your company has reviewed, the refunds were being calculated improperly, causing the borrower to be overcharged. Therefore, this matter remains a significant regulatory concern.

On or about August 8, 2012, the Department commenced another regulatory examination of Respondent’s books and records pursuant to Financial Code section 50302 (“2012 exam”). As a result of the 2012 exam, the Department discovered that in seven out of 30 loans funded during the period of October 2011 to May 2012, or approximately 23 percent of the loans reviewed, Respondent had charged the borrower per diem interest in excess of one day prior to the date that the loan proceeds were disbursed from escrow in violation of section 50204(o) of the Financial Code and section 2948.5 of the Civil Code. The amount of per diem interest overcharged per borrower

² In a prior examination in April 2008, the Department found that Respondent had overcharged or understated the per diem interest in 10 percent of loans reviewed.

1 was between \$12.05 and \$392.39. The range of days in which interest was overcharged was
2 between one and five.

3 On or about September 24, 2013, the Department issued a regulatory examination report to
4 Respondent summarizing the various violations found during the 2012 exam (“2012 exam report”).
5 Respondent was instructed to submit a written response to the Department within 30 days describing
6 the corrective actions implemented to address the violations cited. In regard to the Department’s
7 findings of excessive per diem interest charges, the 2012 exam report directed Respondent to
8 conduct an internal audit as follows:

9 Due to the high percentage of per diem interest overcharged (seven out of thirty
10 loans reviewed or 23%), you are instructed to review all loans funded since
11 October 2009 to the current date to determine the number and amount of
overcharges collected from borrowers.

12 As part of its internal review, Respondent was instructed to provide a detailed self-audit
13 report of the files reviewed and the dollar amount of the overcharges established through the review
14 of its originated loans, including, but not be limited to, the loan number, borrower’s name, loan
15 amount, interest rate, date disbursed, date started collecting interest, interest overcharged and date
16 refunded.

17 Further, the Department ordered Respondent to make refunds of excess amounts plus interest
18 at the rate of 10 percent per annum to all overcharged California borrowers, including but not limited
19 to the seven loans identified in the 2012 exam report, pursuant to Financial Code section 50504.

20 Additionally, Respondent was instructed to submit a written report to the Department within
21 30 calendar days describing in detail the actions taken to correct the violations of Financial Code
22 section 50204. Specifically, paragraph 3 of the 2012 exam report stated:

23 Failure to submit a sufficient report may result in a special examination by the
24 Department for which you will be required to pay the cost. Please indicate the
corrective action taken to prevent a recurrence of this violation.

25 . . .

26 This is a repeat violation; consequently, this matter is being referred to the Special
Administrator for administrative action.

27 On or about October 23, 2013, Respondent submitted a written response to the 2012 exam
28 report advising that it disagreed with several of the Department’s findings of per diem interest

1 overcharges. Respondent informed the Department that it had utilized the HUD³ guidelines for
2 calculating collection of interest from the date the lender disburses loan proceeds instead of the
3 method mandated by the CRMLA which permits the lender to charge interest for only one day prior
4 to the date that the loan proceeds are disbursed from escrow. As such, Respondent questioned the
5 necessity to comply with the Department’s instruction to issue all of the refunds that had been
6 identified in the 2012 exam report.

7 Additionally, in its written response to the Department dated October 23, 2013, Respondent
8 informed that since it relied upon the HUD guidelines instead of the CRMLA, it had observed fewer
9 per diem calculation errors than those found by the Department. Accordingly, Respondent requested
10 that the Department “rescind the requirement for GEM to review all loans from October 2009
11 onward and reconsider any reference to a Special Administrator.”

12 On April 9, 2014, the Department sent Respondent a letter demanding that the self-audit
13 report requested in the 2012 exam report be submitted within 10 days. This letter further advised:

14 Your response indicated that the company considers that the day funds are wired
15 to the escrow/settlement agent to be the day that the company disburses and
16 relinquishes control of the funds; therefore the funding day is utilized to calculate
the per diem interest charge

17 The Department considers the date funds were disbursed by the settlement agent
18 to and/or on behalf of the borrower as the disbursement date. Please refer to the
19 Commissioner’s Release 58-FS which is located on the Department’s website ...
20 The funding date as stated in your response is not an acceptable date to determine
21 the date of funds disbursement. The company’s request for the Department to
rescind its request for review all loans originated since October 2009 to present is
denied.

22 On April 18, 2014, Respondent sent a letter to the Department restating its plea for a waiver
23 of the requirement to conduct a self-audit of all loans funded from the period of October 2009 to
24 present.

25 On or about April 28, 2014, the Department again advised Respondent that its request
26 remained denied and that the self-audit report remains overdue.

27
28 _____
³ The Department of Housing and Urban Development.

1 To date, Respondent has failed to submit to the Department the self-audit report that was due
2 within 30 calendar days of the 2012 exam report, and no later than 10 days from the Department’s
3 written demand dated April 9, 2014. Respondent’s refusal to make refunds in accordance with the
4 instructions set forth in the 2012 exam report has resulted in known per diem interest overcharges to
5 at least seven California borrowers. Moreover, the refunds that Respondent did issue to some
6 borrowers either lacked required consumer notices and/or were made subsequent to receiving notice
7 of the Department’s regulatory examinations or well after the date that the loans had closed, which
8 ranged between five and 210 days.

9 III

10 By reason of the foregoing, Respondent has engaged in charging California borrowers interest
11 on loans for a period in excess of one day prior to the date that the loan proceeds are disbursed from
12 escrow in at least seven loans funded during the period of October 2011 to present, in violation of
13 Financial Code section 50204(o), and failing to disclose the amount of such additional interest as
14 required by Civil Code section 2948.5.

15 A. Failure to Make Refunds Pursuant to Financial Code Section 50504

16 Financial Code section 50504, subdivision (b) states:

17 (b) If interest on the principal amount of a loan in excess of the amount authorized
18 by this division is willfully charged, contracted for, or received, in addition to any
19 other penalties or remedies, the commissioner may order the licensee to refund
20 the excess interest amount to all borrowers charged the excess amount, with
interest at the rate of 10 percent per annum, calculated from the date the improper
charge was imposed.

21
22 “Willful conduct does not require a purpose or specific intent to bring about a result.
23 However, it does require more than negligence or accidental conduct . . . The word ‘willfully’
24 when applied to the intent with which an act is done or omitted means with a purpose or willingness
25 to commit the act or to make the omission in question.” *Patarak v. Williams* (2001) 91 Cal.App.4th
26 826, 829-830.

27 Respondent continues to willfully overcharge borrowers per diem interest in violation of
28 Financial Code section 50204(o) and Civil Code section 2948.5 and refuses to make appropriate

1 refunds. Hence, Respondent’s continued overcharging of per diem interest is not negligent or
2 accidental but demonstrates a purpose or willingness to act or make the omission in question,
3 namely continually failing to address the violations brought to its attention by the Department.
4 Therefore, Respondent should refund the excess interest amount with interest at the rate of 10
5 percent per annum pursuant to Financial Code section 50504(b).

6 **B. Failure to Submit Report to Commissioner**

7 Financial Code section 50326 provides in pertinent part:

8 If any licensee fails to do any of the following, the licensee shall forfeit to the
9 people of the state a sum of up to one hundred dollars (\$100) for every day up to
10 the 10th day: (a) to make any report required by law or by the commissioner
11 within 10 days from the day designated for the making of the report, or within any
12 extension of time granted by the commissioner, or (b) fails to include therein any
13 matter required by law or by the commissioner. Thereafter, any failure shall
14 constitute grounds for the suspension or revocation of the license held by the
15 residential mortgage lender or residential mortgage loan servicer.

16 Because Respondent has failed to submit the self-audit report by the time required by the
17 Commissioner, Respondent shall forfeit to the People of the State a sum of up to one hundred
18 dollars (\$100) for every day up to the 10th day pursuant to Financial Code section 50326.

19 **IV**

20 The violations of the CRMLA described above, if committed by Respondent on or before
21 having originally sought a license from the Department under the CRMLA, would have constituted
22 grounds for the Commissioner to deny the application of Respondent under Financial Code section
23 50327. Pursuant to Financial Code section 50327, the Commissioner may suspend any CRMLA
24 license if “a fact or condition exists that, if it had existed at the time of the original application for
25 the license, reasonably would have warranted the commissioner in refusing to issue the license
26 originally.” Pursuant to Financial Code section 50327, the Commissioner may refuse to issue a
27 license if the “applicant . . . has violated any provision of this division or the rules thereunder or any
28 similar regulatory scheme of the State of California”

Financial Code section 50327 provides in pertinent part:

(a) The commissioner may, after notice and a reasonable opportunity to be heard,
suspend or revoke any license, if the commissioner finds that: (1) the licensee has

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

violated any provision of this division or rule or order of the commissioner thereunder; or (2) any fact or condition exists that, if it had existed at the time of the original application for license, reasonably would have warranted the commissioner in refusing to issue the license originally.

Thus, by virtue of any of the violations of the CRMLA set forth above, a fact or condition now exists that, if it had existed at the time of the original application of Respondent for a license under the CRMLA, reasonably would have warranted the Commissioner in refusing to issue the license.

V

Financial Code section 50513 provides in pertinent part:

- (a) The commissioner may do one or more of the following:
 - ...
 - (4) Impose fines on a mortgage loan originator or any residential mortgage lender or servicer licensee employing a mortgage loan originator pursuant to subdivisions (b), (c), and (d).
 - ...
 - (b) The commissioner may impose a civil penalty on a mortgage loan originator or any residential mortgage lender or servicer licensee employing a mortgage loan originator, if the commissioner finds, on the record after notice and opportunity for hearing, that the mortgage loan originator or any residential mortgage lender or servicer licensee employing a mortgage loan originator has violated or failed to comply with any requirement of this division or any regulation prescribed by the commissioner under this division or order issued under authority of this division.
- (c) The maximum amount of penalty for each act or omission described in subdivision (b) shall be twenty-five thousand dollars (\$25,000).
- (d) Each violation or failure to comply with any directive or order of the commissioner is a separate and distinct violation or failure.

VI

The Commissioner finds that, by reason of the foregoing, Respondent has violated Financial Code sections 50204 and 50326 and Civil Code section 2948.5. Furthermore, based upon Respondent’s violations of the CRMLA, a fact or condition now exists, that if it had existed at the time of original licensure under the CRMLA, reasonably would have warranted the Commissioner in refusing to issue a CRMLA license to Respondent. For all the foregoing reasons, grounds exist

1 to: (1) Suspend Respondent’s CRMLA residential mortgage lender and servicer license; and, (2)
2 Levy penalties against Respondent pursuant to Financial Code sections 50326 and 50513.

3 WHEREFORE, IT IS PRAYED that:

4 1. Pursuant to Financial Code section 50327, the residential mortgage lender and
5 servicer license of Respondent be suspended, for the *greater* period of:

6 a. 12 months; or,

7 b. Until (i) Respondent has submitted a complete self-audit report providing all
8 the information demanded by the Commissioner on or about September 24, 2013; (ii) the complete
9 self-audit report has been determined by the Commissioner to be trustworthy; and (iii) Respondent
10 has complied fully with the Order to Refund Excessive Per Diem Interest Charges Pursuant to
11 Financial Code Section 50504.

12 2. Pursuant to Financial Code section 50326, a penalty be levied against Respondent
13 for failure to make any report required by law or by the Commissioner within 10 days from the day
14 designated for the making of the report, or within any extension of time granted by the
15 Commissioner, or failure to include therein any matter required by law or by the Commissioner, in
16 an amount of at least \$1,000, or according to proof.

17 3. Pursuant to Financial Code section 50513(b), penalties be levied against Respondent
18 for at least seven (7) known violations of Financial Code section 50204(o), whereby Respondent
19 overcharged borrowers per diem interest on loans funded during the period from October 2009 to
20 the present, in an amount of \$2,500 per violation, for a sum of at least \$17,500.00, or more to be
21 determined by the Commissioner upon receipt of a reliable audit report, or according to proof.

22 For a total amount of penalties of at least \$17,500.00, or according to proof.

23 Dated: May 29, 2014
24 Sacramento, CA

JAN LYNN OWEN
Commissioner of Business Oversight

25 By _____
26 Miranda LeKander
27 Senior Corporations Counsel
28 Enforcement Division