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9
10 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT
11 OF THE STATE OF CALIFORNIA

12 In the Matter of) CRMLA License No.: 413-0908
13) CFLL License No.: 603-H971
14 THE COMMISSIONER OF BUSINESS) NMLS No. 109738
OVERSIGHT,)
15)
Complainant,) SETTLEMENT AGREEMENT
16)
v.)
17)
NATIONS DIRECT MORTGAGE, LLC)
18)
Respondent.)
19)

20
21 This Settlement Agreement is entered into between Nations Direct Mortgage, LLC
22 (“Nations”), and the Commissioner of Business Oversight, (“Commissioner” or “Complainant”), and
23 is made with respect to the following facts:

24 **RECITALS**

- 25 A. Nations is a limited liability company formed in California on February 2, 2007, with a
26 principal place of business at 5 Hutton Centre Drive, Suite 200, Santa Ana, CA 92707.
27 B. Nations is a residential mortgage lender licensed by the Commissioner since September 7,
28 2007 (License No. 413-0908), pursuant to the California Residential Mortgage Lending Act

1 (“CRMLA”) (Financial Code section 50000 et seq.). Nations is also a finance lender licensed by the
2 Commissioner on August 3, 2010 (License No. 603-H971), pursuant to the California Finance
3 Lenders Law (“CFLL”) (Financial Code section 20000 et seq.).

4 C. The Commissioner has jurisdiction over the licensing and regulation of persons and entities
5 engaged in the business of lending and/or servicing residential mortgage loans under the CRMLA and
6 the CFLL.

7 D. Dan Upton is the Chief Executive Officer of Nations and, as such, is authorized to enter into
8 this Settlement Agreement on behalf of Nations.

9 E. During a regulatory examination of Nations in 2011 to 2012, the Commissioner found that
10 Nations had a trust fund shortage in violation of Financial Code section 50202 and Cal. Code Regs.,
11 tit. 10, § 1950.314.1. It was also discovered that Nations overcharged per diem interest to borrowers
12 in violation of Financial Code section 50204, subdivision (o), and Civil Code section 2948.5. Finally,
13 the examination disclosed that Nations obtained signed blank documents pertaining to per diem
14 interest disclosures in violation of Financial Code section 50204, subdivision (e).

15 F. During a subsequent examination of Nations in 2014, the Commissioner found similar
16 violations. First, Nations failed to fully reconcile funds in its trust account in violation of Financial
17 Code section 50202 and Cal. Code Regs., tit. 10, section 1950.314.1. Second, Nations overcharged
18 per diem interest to borrowers in violation of Financial Code section 50204, subdivision (o), and Civil
19 Code section 2948.5. Third, the California per diem interest disclosure contained a blank in violation
20 of Financial Code section 50204, subdivision (e).

21 G. On October 29, 2015, Nations submitted a self-audit report to the Commissioner identifying
22 refunds of excess per diem interest it had issued for 1,690 loans funded through the period of
23 September 1, 2011, to May 31, 2015. However, the Commissioner tested 150 of those loans and
24 found a significant number of loans with refunds that were still owed to borrowers. Nations, at its
25 own expense, is conducting a second audit of its loans funded since September 1, 2011.

26 H. It is the intention and desire of the parties to resolve this matter without the necessity of a
27 hearing and/or other litigation.

28 I. The Commissioner finds that this action is appropriate, in the public interest, and consistent

1 with the purpose fairly intended by the policy and provisions of the CRMLA.

2 NOW, THEREFORE, in consideration of the foregoing, and the terms and conditions set forth
3 in this document, the parties agree as follows:

4 **TERMS AND CONDITIONS**

5 1. Purpose. The purpose of this Settlement Agreement (“Agreement”) is to resolve the matter
6 before the Commissioner in a manner that avoids the expense of a hearing and possible further court
7 proceedings, is in the public interest, protects consumers, and is consistent with the purposes,
8 policies, and provisions of the CRMLA and the CFLL.

9 2. Finality of Agreement. Nations hereby agrees to comply with the Agreement, set forth
10 below, and stipulates that the Agreement is hereby deemed final. The Agreement hereby resolves all
11 matters arising from the current and previous examinations of Nations by the Commissioner.

12 3. Order to Discontinue Violations. Nations stipulates that in accordance with Financial Code
13 section 50321, that Nations Direct, LLC immediately discontinue the violations set forth above.

14 4. Waiver of Hearing Rights. Nations acknowledges that the Commissioner is ready, willing
15 and able to proceed with the filing of an administrative enforcement action on the charges contained
16 in this Agreement, and Nations hereby waives the right to a hearing, and to any reconsideration,
17 appeal, or other right to review which may be afforded pursuant to the CRMLA or CFLL; and
18 Nations further expressly waives any requirement for the filing of an Accusation that may be afforded
19 by Government Code section 11415.60(b); the California Administrative Procedure Act, the
20 California Code of Civil Procedure, or any other provision of law; and by waiving such rights,
21 Nations effectively consents to this Agreement becoming final.

22 5. Policies and Procedures. The Commissioner acknowledges that Nations developed and
23 implemented sufficient policies and procedures that are designed to prevent all the violations
24 mentioned in this Agreement including trust fund reconciliation, per diem overcharges, and blank
25 fields contained within per diem disclosure documents. Nations shall provide these policies and
26 procedures to the Independent Auditor specified in Paragraph 7.

27 6. Corrected Self-Audit, Audit Report, and Refunds. Nations agrees to complete its current
28 corrected self-audit of loans made from September 1, 2011 to September 30, 2016. Nations shall

1 submit an audit report to the Department no later than one hundred eighty (180) calendar days from
2 the date of execution of this Agreement by the parties. The audit report, with respect to per diem
3 charges, shall include, at a minimum, the following: (i) the total number of loans originated and
4 funded by Nations from September 1, 2011 to September 30, 2016; (ii) the number of loans with per
5 diem interest charges in excess of the amount permitted by Financial Code section 50204, subdivision
6 (o), and Civil Code section 2948.5; and (iii) for each and every loan, the borrower loan number,
7 borrower name, address, loan amount, loan date, per diem interest charged, per diem interest that
8 should have been charged under Financial Code section 50204, subdivision (o) and Civil Code
9 section 2948.5, overcharge amount (if any), date of refund (if applicable), and proof of refund (if
10 applicable). Nations agrees to refund with ten (10) percent interest (per annum) all of the borrowers
11 identified by the audit report who were charged excessive per diem interest. Nations agrees to mail all
12 refunds no later than ten (10) business days following completion of the self-audit. If the audit shows
13 an overpayment of per diem interest plus 10 percent interest per annum to any borrower based on a
14 previous refund from Nations, then Nations agrees not to collect that amount from the borrower. No
15 later than ninety (90) calendar days after Nations submits its audit report to the Department, Nations
16 shall notify the Commissioner of any refund payment that has been returned or remains outstanding.
17 Nations shall be responsible for ensuring that any outstanding refund payment owed to any borrower
18 is escheated to the State of California pursuant to the provisions of the California Unclaimed Property
19 Law (Code of Civ. Proc., § 1500 et seq.).

20 7. Independent Auditor. Within thirty (30) calendar days following the date of final execution
21 of this Agreement by the parties, Nations agrees to engage an independent certified public accountant
22 or certified public accounting firm that is acceptable to the Department (“Independent Auditor”) to
23 detect and report on violations of law as required by Paragraph 7 of this Agreement.

24 8. Audit and Reports on Trust Shortage, Blank Documents, and Overcharges. Nations agrees
25 to have the Independent Auditor conduct an internal review of Nations’ loan files and trust account
26 records to determine whether its policies and procedures to prevent trust fund shortages, blank per
27 diem interest disclosures, and per diem overcharges are effective. The audit shall commence no later
28 than thirty (30) calendar days from the date of engagement of the Independent Auditor. The audit

1 shall cover all California loans originated and funded by Nations from the date the audit commences
2 and continuing for a twelve-month period. For the twelve month period, the Independent Auditor
3 shall submit audit reports on a quarterly basis as follows:

4 a. The first audit report shall cover all California loans originated by Nations from and
5 including October 1, 2016 through and including December 31, 2016, and shall be submitted to the
6 Commissioner no later than February 28, 2017.

7 b. The second audit report shall cover all California loans originated by Nations from and
8 including January 1, 2017 through and including March 31, 2017, and shall be submitted to the
9 Commissioner no later than May 31, 2017.

10 c. The third audit report shall cover all California loans originated by Nations from and
11 including April 1, 2017 through and including June 30, 2017, and shall be submitted to the
12 Commissioner no later than August 31, 2017.

13 d. The fourth audit report shall cover all California loans originated by Nations from and
14 including July 1, 2017 through and including September 30, 2017, and shall be submitted to the
15 Commissioner no later than November 30, 2017.

16 The audit report shall describe whether any additional trust fund shortages were found, and
17 whether any additional blank per diem disclosures were found. With respect to per diem charges, the
18 audit report shall include, at a minimum, the following: (i) the total number of loans originated and
19 funded by Nations: (ii) the number of loans with per diem interest charges in excess of the amount
20 permitted by Financial Code section 50204, subdivision (o), and Civil Code section 2948.5; and (iii)
21 for each and every loan, the borrower loan number, borrower name, address, loan amount, loan date,
22 per diem interest charged, per diem interest that should have been charged under Financial Code
23 section 50204, subdivision (o) and Civil Code section 2948.5, overcharge amount (if any), date of
24 refund (if applicable), and proof of refund (if applicable).

25 9. Refunds. Nations agrees to refund with ten (10) percent interest (per annum) all of the
26 borrowers identified by the Independent Audit report who were charged excessive per diem interest.
27 Nations agrees to mail the refunds no later than ten (10) business days following receipt of the
28 Independent Auditor's findings. No later than ninety (90) calendar days after the Independent Auditor

1 submits a report to the Department, Nations shall notify the Commissioner of any refund payment
2 that has been returned or remains outstanding. Nations shall be responsible for ensuring that any
3 outstanding refund payment owed to any borrower is escheated to the State of California pursuant to
4 the provisions of the California Unclaimed Property law (Code of Civ. Pro., § 1500 et seq.).

5 10. Administrative Penalty Based on Independent Audit Findings. Nations agrees to pay an
6 administrative penalty of the following amounts for each new violation found by the Independent
7 Auditor: (i) two thousand five hundred dollars (\$2,500.00) for each violation involving a trust fund
8 shortage, and (ii) two hundred fifty dollars (\$250.00) for each violation involving a per diem
9 overcharge or a blank per diem document. With respect to per diem overcharges, all loans that are
10 compliant at closing, or compliant within 30 calendar days of closing, shall not be deemed to be new
11 violations. The payment for these penalties shall be made within ten (10) business days from the
12 receipt of the Independent Auditor's findings and made payable to the Department of Business
13 Oversight, sent to the attention of Timothy L. Le Bas, Senior Counsel, Enforcement Division, 1515 K
14 Street, Suite 200, Sacramento, CA 95814.

15 11. Administrative Penalty Based on Self-Audits and Examination. Nations also agrees to pay
16 an administrative penalty of one million fifty two thousand dollars (\$1,052,000.00) in connection
17 with the violations found as a result of Nations' self-audits and the Department's examination.

18 Within thirty (30) calendar days from the date of final execution of this Agreement by the
19 parties, Nations shall pay the above penalty amount made payable to the Department of Business
20 Oversight, and sent to the attention of Timothy L. Le Bas, Senior Counsel, Enforcement Division,
21 1515 K Street, Suite 200, Sacramento, CA 95814.

22 12. Failure to Make Timely or Sufficient Refunds. Nations agrees that if it fails to meet any
23 deadline or any requirement in Paragraph 6 and 9 above (regarding payment of refunds), other than
24 inadvertent and isolated errors that are promptly corrected by Nations within thirty (30) calendar
25 days, Nations's CRMLA license number 413-0908 and CFLL License number 603-H971 shall be
26 immediately suspended until the requirements are met. Nations hereby waives any notice and hearing
27 rights to contest the immediate suspension resulting from failure to comply with Paragraphs 6 and 9
28 above which may be afforded under the California Financial Code, the California Administrative

1 Procedure Act, the California Code of Civil Procedure, or any other legal provisions.

2 13. Failure to File Timely or Complete Reports Concerning Audits or Refunds. Nations
3 agrees that if it fails to meet any deadline or any requirement in Paragraph 6 (regarding the corrected
4 self-audit), Paragraph 8 (regarding the independent auditor’s internal review) or Paragraph 9
5 (regarding outstanding refunds), Nations shall immediately notify the Department of such failure and
6 cooperate with the Department to cause such failure to be rectified as soon as reasonably practicable
7 but no later than thirty (30) calendar days. Failure to abide by these terms shall result in the
8 immediate suspension of Nations’s CRMLA license number 413-0908 and CFLL license number
9 603-H971 until the requirements are met. Nations hereby waives any notice and hearing rights to
10 contest the suspension resulting from failure to comply with Paragraphs 6, 8 and 9 above that may be
11 afforded under the California Financial Code, the California Administrative Procedure Act, the
12 California Code of Civil Procedure, or any other legal provisions.

13 14. Failure to Make Timely Payment of Penalties: Nations agrees that if it fails to meet the
14 deadline for payment of penalties set forth in Paragraphs 10 and 11, Nations’s CRMLA license
15 number 413-0908 and CFLL license number 603-H971 shall be immediately suspended until
16 payment is received by the Commissioner. Nations hereby waives any notice and hearing rights to
17 contest the suspension resulting from failure to comply with Paragraphs 10 and 11 above that may be
18 afforded under the California Financial Code, the California Administrative Procedure Act, the
19 California Code of Civil Procedure, or any other legal provision.

20 15. Full and Final Settlement. The parties hereby acknowledge and agree that this
21 Agreement is intended to constitute a full, final, and complete resolution of the Administrative Action
22 and that no further proceedings or actions will be brought by the Commissioner in connection with
23 these matters either under the CRMLA, or any other provision of law, excepting therefrom any
24 proceeding or action if such proceeding or action is based upon discovery of new and further
25 violations of the CRMLA which do not form the basis for this Settlement Agreement or which were
26 knowingly concealed from the Commissioner by Nations.

27 16. Binding. This Agreement is binding on all heirs, assigns, and/or successors in interest.

28 17. Commissioner’s Duties. The parties further acknowledge and agree that nothing

1 contained in this Agreement shall operate to limit the Commissioner’s ability to assist any other
2 agency (city, county, state or federal) with any prosecution, administrative, civil or criminal, brought
3 by any such agency against Nations or any other person based upon any of the activities alleged in
4 these matters or otherwise.

5 18. Third Party Actions. It is the intent and understanding between the parties that this
6 Agreement does not create any private rights or remedies against Nations create any liability for
7 Nations or limit defenses of Nations for any person or entity not a party to this Agreement.

8 19. Future Actions by Commissioner. This Agreement may be revoked and the
9 Commissioner may pursue any and all remedies available under law or this Agreement against
10 Nations, if the Commissioner later discovers that Nations knowingly or willfully withheld
11 information used and relied upon in this Agreement. Further, Nations agrees that this Agreement
12 does not resolve any remedies, including penalties that may be assessed by the Commissioner, upon
13 discovery of new and further violations of the CRMLA that occur after execution of this Agreement,
14 which do not form the basis for this Agreement.

15 20. Independent Legal Advice. Each of the parties represents, warrants, and agrees that it has
16 received independent advice from its attorney(s) and/or representatives with respect to the
17 advisability of executing this Agreement.

18 21. Counterparts. The parties agree that this Agreement may be executed in one or more
19 separate counterparts, each of which when so executed, shall be deemed an original. A fax signature
20 shall be deemed the same as an original signature. Such counterparts shall together constitute and be
21 one and the same instrument.

22 22. Waiver, Modification, and Qualified Integration. The waiver of any provision of this
23 Agreement shall not operate to waive any other provision set forth herein. No waiver, amendment, or
24 modification of this Agreement shall be valid or binding to any extent unless it is in writing and
25 signed by all of the parties affected by it.

26 23. Headings and Governing Law. The headings to the paragraphs of this Agreement are
27 inserted for convenience only and will not be deemed a part hereof or affect the construction or
28 interpretation of the provisions hereof. This Agreement shall be construed and enforced in

1 accordance with and governed by California law.

2 24. Full Integration. Each of the parties represents, warrants, and agrees that in executing this
3 Agreement it has relied solely on the statements set forth herein and the advice of its own counsel.
4 Each of the parties further represents, warrants, and agrees that in executing this Agreement it has
5 placed no reliance on any statement, representation, or promise of any other party, or any other
6 person or entity not expressly set forth herein, or upon the failure of any party or any other person or
7 entity to make any statement, representation or disclosure of anything whatsoever. The parties have
8 included this clause: (1) to preclude any claim that any party was in any way fraudulently induced to
9 execute this Agreement; and (2) to preclude the introduction of parol evidence to vary, interpret,
10 supplement, or contradict the terms of this Agreement.

11 25. Presumption from Drafting. In that the parties have had the opportunity to draft, review
12 and edit the language of this Agreement, no presumption for or against any party arising out of
13 drafting all or any part of this Agreement will be applied in any action relating to, connected to, or
14 involving this Agreement. Accordingly, the parties waive the benefit of Civil Code section 1654 and
15 any successor or amended statute, providing that in cases of uncertainty, language of a contract
16 should be interpreted most strongly against the party who caused the uncertainty to exist.

17 26. Voluntary Agreement. Nations enters into this Agreement voluntarily and without
18 coercion and acknowledges that no promises, threats or assurances have been made by the
19 Commissioner or any officer, or agent thereof, about this Agreement.

20 27. Effective Date. This Agreement shall not become effective and final until signed by all
21 parties.

22 28. Public Record. Respondent acknowledges that this Agreement is a public record.

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29. Authority to Execute. Each signator hereto covenants that he/she possesses all necessary capacity and authority to sign and enter into this Agreement.

Dated: October 19, 2016 JAN LYNN OWEN
Commissioner of Business Oversight

By _____
MARY ANN SMITH
Deputy Commissioner
Enforcement Division

Dated: October 14, 2016 NATIONS DIRECT MORTGAGE, LLC

By _____
DAN UPTON
Chief Executive Officer

APPROVED AS TO FORM AND CONTENT:

Dated: October 14, 2016
By _____
HAYDN J. RICHARDS, JR.
Bradley Arant Boult Cummings LLP
Counsel for Nations Direct Mortgage, LLC