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

11 In the Matter of: ) OAH No. 2015020277  
12 )  
13 THE COMMISSIONER OF BUSINESS ) NMLS ID No. 24055  
OVERSIGHT, )  
14 ) SETTLEMENT AGREEMENT  
15 Complainant, )  
16 v. )  
17 )  
18 FIRST CALIFORNIA MORTGAGE )  
COMPANY )  
19 )  
20 Respondent. )  
21 )

22 This Settlement Agreement (Settlement Agreement) is entered into between the  
23 Commissioner of Business Oversight (Commissioner) and First California Mortgage Company  
24 (FIRST CAL) (collectively, the parties), and is made with respect to the following facts:

25 ///  
26 ///  
27 ///  
28

**RECITALS**

1  
2 A. The Commissioner has jurisdiction over the licensing and regulation of persons and  
3 entities engaged in the business of lending and/or servicing residential mortgage loans pursuant to  
4 the California Residential Mortgage Lending Act (CRMLA) (Fin. Code, § 50000 et seq.), including  
5 mortgage loan originators.

6 B. FIRST CAL is a residential mortgage lender and loan servicer licensed by the  
7 Commissioner since March 15, 2004 (CRMLA License No. 415-0042). FIRST CAL has its principal  
8 place of business located at 1435 N. McDowell Blvd., Suite 300, Petaluma, California, 94954.  
9 FIRST CAL employs mortgage loan originators and operates multiple branch offices in California.

10 C. David Heier is the Chief Financial Officer of FIRST CAL and a control person of  
11 FIRST CAL and, as such, is authorized to enter into this Settlement Agreement on behalf of  
12 FIRST CAL.

13 D. The Commissioner alleges that during regulatory examinations of FIRST CAL in  
14 2008 and 2012, the Commissioner discovered (1) trust fund shortages in violation of California Code  
15 of Regulations (CCR) section 1950.314.6, and (2) per diem interest overcharges to California  
16 borrowers in violation of Financial Code section 50204, subdivision (o), and Civil Code section  
17 2948.5.

18 E. On October 14, 2014, the Commissioner issued the following to FIRST CAL: Notice  
19 of Intention to Issue Order Suspending Residential Mortgage Lender License and Imposing Penalties  
20 (Notice); Accusation in Support of Notice of Intent to Issue Order Suspending Residential Mortgage  
21 Lending License and Imposing Penalties (Accusation); Order to Refund Excessive Per Diem Interest  
22 Charges Pursuant to California Financial Code Section 50504 and an Discontinue Violations  
23 Pursuant to California Financial Code Section 50321 (Orders); Statement of Facts In Support of  
24 Order to Discontinue Violations Pursuant to California Financial Code Section 50321 (Statement of  
25 Facts); and, Notice of Intent to Make Order Final (Notice of Intent); and, accompanying documents  
26 (collectively, Administrative Action).

1 F. FIRST CAL timely submitted to the Commissioner a Notice of Defense, requesting a  
2 hearing regarding the Administrative Action. The hearing is currently set for January 20, 2016, in  
3 Oakland, California.

4 G. On or about March 14, 2014, FIRST CAL submitted an independent audit report to the  
5 Commissioner identifying refunds of excess per diem interest it had issued for 878 loans funded  
6 during the years 2009-2013. (March 2014 Independent Audit Report).

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

9 I. FIRST CAL enters into this Settlement Agreement without admitting or denying any  
10 of the findings contained within the Administrative Action.

11 J. The Commissioner finds that this action is appropriate, in the public interest, and  
12 consistent with the purposes fairly intended by the policy and provisions of this law.

13 NOW, THEREFORE, in consideration of the foregoing, and the terms and conditions set  
14 forth herein, the parties agree as follows:

15 **TERMS AND CONDITIONS**

16 1. Purpose. The purpose of this Settlement Agreement is to resolve the charges alleged in the  
17 Administrative Action in a manner that avoids the expense of a hearing and possible further court  
18 proceedings, is in the public interest, protects consumers, and is consistent with the purposes,  
19 policies, and provisions of the CRMLA.

20 2. Finality of Order. FIRST CAL hereby agrees to comply with the Commissioner's October  
21 14, 2014, Order to Discontinue Violations and, further, stipulates that said Order is deemed final.

22 3. Pending Hearing: As stated above, an administrative hearing is currently set in this matter  
23 on January 20, 2016. FIRST CAL acknowledges that the Commissioner is ready, willing, and able to  
24 proceed to an administrative hearing on the charges contained in the Administrative Action. If  
25 FIRST CAL successfully completes the requirements of the first six (6) months of this agreement,  
26 then FIRST CAL will waive the right to a hearing, and to any reconsideration, appeal, or other right  
27 to review which may be afforded to FIRST CAL pursuant to the CRMLA, the California  
28 Administrative Procedure Act, the California Code of Civil Procedure, or any other provision of law;

1 and to effect its waiver of such rights, FIRST CAL will withdraw its hearing request, with the consent  
2 of the Department of Business Oversight (Department), at such time as the parties may agree is  
3 appropriate.

4 4. Third Party Auditor: FIRST CAL agrees to engage a certified public accountant(s),  
5 certified accounting firm, or compliance auditing firm (“Third Party Auditor”), subject to the  
6 approval of the Department, which approval shall not be unreasonably withheld. The Third Party  
7 Auditor shall conduct examinations of FIRST CAL’S loan information in order to provide the  
8 compliance reports set forth in Paragraph 5 of this Settlement Agreement, as follows:

9 a. The first compliance report shall cover all California loans originated by FIRST CAL  
10 from and including July 1, 2015 through and including September 30, 2015, and shall be submitted to  
11 the Commissioner no later than December 31, 2015.

12 b. The second compliance report shall cover all California loans originated by FIRST  
13 CAL from October 1, 2015 through December 31, 2015, and shall be submitted to the Commissioner  
14 no later than March 31, 2016.

15 c. The third compliance report shall cover all California loans originated by FIRST CAL  
16 from January 1, 2016, through March 31, 2016, and shall be submitted to the Commissioner no later  
17 than June 30, 2016.

18 d. The fourth compliance report shall cover all California loans originated by FIRST  
19 CAL from April 1, 2016 through June 30, 2016, and shall be submitted to the Commissioner no later  
20 than September 30, 2016.

21 e. The fifth compliance report shall cover all California loans originated by FIRST CAL  
22 from July 1, 2016 through September 30, 2016, and shall be submitted to the Commissioner no later  
23 than December 31, 2016.

24 5. Scope of Reports. Each of the reports indicated in Paragraph 4 shall include, at a  
25 minimum, the following: (i) the total number of loans originated by FIRST CAL during the periods  
26 specified in Paragraph 4 above; (ii) the number of loans with per diem interest charges in excess of  
27 the amount permitted by Financial Code section 50204, subdivision (o), and Civil Code section  
28 2948.5; (iii) for each and every loan, the borrower loan number, name, property address, loan

1 amount, loan date, per diem interest charged, per diem interest that should have been charged under  
2 Financial Code section 50204, subdivision (o), and Civil Code section 2948.5, overcharge amount (if  
3 any), date of refund (if applicable), and evidence of refund (if applicable) in the form of a canceled  
4 check and accompanying correspondence mailed to the borrower pursuant to Paragraph 6 below; and  
5 (iv) an accounting of the trust fund accounts showing compliance with CCR section 1950.314.6.

6       6. Payment of Refunds. In compliance with the Commissioner’s Order, FIRST CAL agrees  
7 to refund any amounts of per diem interest charged in excess of that permitted under Financial Code  
8 section 50204, subdivision (o), and Civil Code section 2948.5 as follows:

9       a. FIRST CAL represents that it has made refunds of all overcharged amounts, plus  
10 interest at the rate of 10 percent per annum, for a total of \$85,678.63 paid to the 878 borrowers  
11 identified in the March 2014 Independent Audit Report;

12       b. For additional overcharges identified pursuant to the reports described in Paragraphs 4  
13 and 5 above, refunds shall be mailed to the last known address of each borrower no later than 30  
14 calendar days after the date of loan disbursement. For any overcharge identified pursuant to this  
15 paragraph that is not mailed within 30 calendar days after the date of loan disbursement, FIRST CAL  
16 shall pay the borrower interest on the amount of the refund at the rate of 10 percent per annum.

17       7. Outstanding Refunds. No later than 90 calendar days after the date of execution of the  
18 Settlement Agreement, as such date is defined in Paragraph 23, FIRST CAL shall notify the  
19 Commissioner of any refund payment that has been returned or remains outstanding for loans  
20 originated during the period covered by FIRST CAL’s June 2014 Self-Audit Report. FIRST CAL  
21 shall be responsible for ensuring that any outstanding refund payment owed to any borrower  
22 identified in the March 2014 Independent Audit Report or any audit report required by Paragraph 4  
23 above is escheated to the State of California pursuant to the provisions of the California Unclaimed  
24 Property Law (Code of Civ. Proc., § 1500 et seq.).

25       8. Payment of Penalties. FIRST CAL shall pay the following penalties: (1) a penalty of  
26 \$138,000.00 as follows: (1) Thirty Eight Thousand (\$38,000.00) shall be due within 5 calendar days  
27 of the effective date of this Settlement Agreement, as such date is defined in Paragraph 23, made  
28 payable in the form of a cashier’s check to the “Department of Business Oversight,” and mailed to

1 the attention of Erik Brunkal, Senior Counsel, Enforcement Division, at the Department of Business  
2 Oversight located at 1515 K St., Suite 200, Sacramento, California, 95814; (2) five (5) equal  
3 payments of Twenty Thousand (\$20,000.00) shall be made on or before the following dates: July 31,  
4 2015, August 31, 2015, September 30, 2015, October 31, 2015, and November 30, 2015. If FIRST  
5 CAL fails to timely pay the penalties as delineated in this paragraph, then the Commissioner reserves  
6 the right to make all remaining penalties due within ten (10) days following notice of said default to  
7 FIRST CAL. If FIRST CAL fails to pay the penalties within ten (10) days following notice of  
8 default, the Commissioner reserves the right to revoke or suspend FIRST CAL's license(s) under  
9 Financial Code sections 50325 and 50327. In such an event, FIRST CAL hereby waives notice and  
10 opportunity to be heard regarding that revocation or suspension.

11 9. Permanent Adoption of Effective Policies and Procedures. In response to the  
12 Commissioner's findings made during the 2008 and 2012 regulatory exams, FIRST CAL adopted  
13 policies and procedures to ensure future regulatory compliance. These policies and procedures were  
14 both outlined and detailed by FIRST CAL's attorney in a February 2, 2015, letter to the Department.  
15 FIRST CAL represents that it now has policies and procedures in place to reasonably prevent the  
16 collection of excess per diem interest and to prevent trust fund deficiencies, including FIRST CAL  
17 staff dedicated to detecting and remedying per diem overcharges and the retention of third party  
18 vendors UHS and DMI to review trust fund and per diem issues. FIRST CAL represents to the  
19 Commissioner that it will continue to adhere to the adopted policies and procedures, including the use  
20 of these third party vendors (or other vendors providing the same or similar services), for as long as it  
21 holds license(s) with the Department. If these policies and procedures prove to be ineffective, FIRST  
22 CAL agrees to adopt further policies and procedures to maintain regulatory compliance.

23 10. Effect of Settlement Agreement on License. In consideration of FIRST CAL's agreement  
24 to provide the audit reports described in the paragraphs above, to comply with the Commissioner's  
25 Order, and to pay penalties required by Paragraph 8 hereof, the Commissioner hereby agrees that  
26 except as set forth in this Settlement Agreement, she shall not suspend the residential mortgage  
27 lender or servicer license of FIRST CAL or take any further action based on violation of the  
28 provisions cited in the Administrative Action for the period of January 1, 2009 through the date of

1 execution of this Settlement Agreement, as such date is defined in Paragraph 23. Accordingly, this  
2 Settlement Agreement, which resolves the Administrative Action, does not affect the licensing status  
3 of FIRST CAL.

4 11. Full and Final Settlement. The parties hereby acknowledge and agree that this Settlement  
5 Agreement is intended to constitute a full, final, and complete resolution of the Administrative Action  
6 and that no further proceedings or actions will be brought by the Commissioner in connection with  
7 these matters either under the CRMLA, or any other provision of law, excepting therefrom any  
8 proceeding or action if such proceeding or action is based upon discovery of new and further  
9 violations of the CRMLA which do not form the basis for this Settlement Agreement or which were  
10 knowingly concealed from the Commissioner by FIRST CAL.

11 12. Binding. This Settlement Agreement is binding on all heirs, assigns, and/or successors in  
12 interest.

13 13. Commissioner's Duties. The parties further acknowledge and agree that nothing  
14 contained in this Settlement Agreement shall operate to limit the Commissioner's ability to assist any  
15 other agency (city, county, state or federal) with any prosecution, administrative, civil or criminal,  
16 brought by any such agency against FIRST CAL or any other person based upon any of the activities  
17 alleged in these matters or otherwise.

18 14. Third Party Actions. It is the intent and understanding between the parties that this  
19 Settlement Agreement does not create any private rights or remedies against FIRST CAL create any  
20 liability for FIRST CAL or limit defenses of FIRST CAL for any person or entity not a party to this  
21 Settlement Agreement.

22 15. Future Actions by Commissioner. This Settlement Agreement may be revoked and the  
23 Commissioner may pursue any and all remedies available under law against FIRST CAL if the  
24 Commissioner later discovers that FIRST CAL knowingly or willfully withheld information used and  
25 relied upon in this Settlement Agreement. Further, FIRST CAL agrees that this Settlement  
26 Agreement does not resolve any penalties that may be assessed by the Commissioner upon discovery  
27 of new and further violations of the CRMLA which do not form the basis for this Settlement  
28 Agreement.

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

4           17. Counterparts. The parties agree that this Settlement Agreement may be executed in one  
5 or more separate counterparts, each of which when so executed, shall be deemed an original. A fax  
6 signature shall be deemed the same as an original signature. Such counterparts shall together  
7 constitute and be one and the same instrument.

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

12           19. Headings and Governing Law. The headings to the paragraphs of this Settlement  
13 Agreement are inserted for convenience only and will not be deemed a part hereof or affect the  
14 construction or interpretation of the provisions hereof. This Settlement Agreement shall be construed  
15 and enforced in accordance with and governed by California law.

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

26           21. Presumption from Drafting. In that the parties have had the opportunity to draft, review  
27 and edit the language of this Settlement Agreement, no presumption for or against any party arising  
28 out of drafting all or any part of this Settlement Agreement will be applied in any action relating to,



1 connected to, or involving this Settlement Agreement. Accordingly, the parties waive the benefit of  
2 Civil Code section 1654 and any successor or amended statute, providing that in cases of uncertainty,  
3 language of a contract should be interpreted most strongly against the party who caused the  
4 uncertainty to exist.

5 22. Voluntary Agreement. FIRST CAL enters into this Settlement Agreement voluntarily  
6 and without coercion and acknowledges that no promises, threats or assurances have been made by  
7 the Commissioner or any officer, or agent thereof, about this Settlement Agreement.

8 23. Effective Date. This Settlement Agreement shall not become effective until signed by all  
9 parties and delivered by the Commissioner’s counsel by email to FIRST CAL’s counsel at  
10 JRosenthal@mhlawcorp.com.

11 24. Public Record. Respondent acknowledges that this Settlement Agreement is a public  
12 record.

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

15  
16 Dated: 07/16/15

JAN LYNN OWEN  
Commissioner of Business Oversight

17  
18  
19 By \_\_\_\_\_  
MARY ANN SMITH  
Deputy Commissioner  
Enforcement Division

20  
21  
22 Dated: 07/09/15

FIRST CALIFORNIA MORTGAGE COMPANY

23  
24 By \_\_\_\_\_  
DAVID HEIER  
Chief Financial Officer

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27 APPROVED AS TO FORM AND CONTENT:

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JOSH ROSENTHAL, Esq.  
Medlin and Hargrave, a Professional Corporation  
Counsel for First California Mortgage