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

12 In the Matter of) CRMLA No. 413-0996
13)
14 PRIMELENDING, A PLAINSCAPITAL) **CONSENT ORDER**
COMPANY)
15)
16 Respondent.)
17 _____)

18 This Consent Order (Consent Order) is entered into between the Commissioner of Business
19 Oversight (Commissioner) and PrimeLending, A PlainsCapital Company. (PrimeLending)
20 (collectively, the parties), and is made with respect to the following facts:

21 RECITALS

22 A. The Commissioner has jurisdiction over the licensing and regulation of persons and entities
23 engaged in the business of lending and/or servicing residential mortgage loans pursuant to the
24 California Residential Mortgage Lending Act (CRMLA) (Fin. Code § 50000 et seq.).

25 B. PrimeLending is a residential mortgage lender and loan servicer licensed by the
26 Commissioner since July 7, 2010 (CRMLA License No. 413-0996). PrimeLending has its principal
27 place of business located at 18111 Preston Road, #900, Dallas, TX 75252. PrimeLending operates
28 multiple branch offices in California.

1 C. Todd Salmans is the Chief Executive Officer and a control person of PrimeLending and, as
2 such, is authorized to enter into this Consent Order on behalf of PrimeLending.

3 D. During a regulatory examination of PrimeLending conducted in 2012, and a second
4 examination conducted in 2013, the Commissioner discovered that PrimeLending overcharged per
5 diem interest to California borrowers in violation of Financial Code section 50204, subdivision (o),
6 and Civil Code section 2948.5. The Commissioner did not consider PrimeLending's responses to
7 be timely or satisfactory.

8 E. In or about 2015 the Enforcement Division of the Department of Business Oversight (DBO)
9 informed PrimeLending that it would commence an administrative action to enforce
10 PrimeLending's compliance with the Financial Code, and seek remedies for these past violations.
11 These remedies included seeking orders imposing penalties for past violations, requiring refunds of
12 excessive per diem interest charges pursuant to California Financial Code Section 50504, the
13 discontinuance of violations pursuant to California Financial Code Section 50321 and the
14 suspension of PrimeLending's CRMLA license (collectively, Enforcement Action).

15 F. Upon being informed of the DBO's intent to commence the Enforcement Action,
16 PrimeLending responded by indicating that it would cooperate fully with the Commissioner's
17 request for audits and refunds of per diem overcharges, and agreed to the issuance of this Consent
18 Order by the Commissioner as well, without the need to commence filing the administrative action
19 first. PrimeLending indicated its intent and desire to cooperate fully with the DBO to correct and
20 remedy any past violations.

21 G. During 2015 and 2016, at the request of the DBO, PrimeLending conducted a self-audit of
22 the 20,474 loans it funded in California during the period from February 1, 2012 to May 13, 2015,
23 to identify loans in which excess per diem interest had been charged (Self-Audit). The Self-Audit
24 performed by PrimeLending found per diem interest overcharges had occurred in a number of those
25 files, with interest overcharges totaling \$319,523.80. As the Self-Audit identified overcharges,
26 PrimeLending issued refund checks to the affected borrowers for the amount of the overcharge to
27 each borrower plus 10% annual interest. The Self-Audit also reported that some of the loan files
28 audited did not contain documentation verifying the actual disbursement date of the loans in order

1 to determine if any per diem interest overcharges had occurred. PrimeLending indicated it was not
2 able to subsequently obtain the information or documentation to verify the actual disbursement date
3 on those files at the time of the audit.

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

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

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

10 TERMS AND CONDITIONS

11 1. Purpose.

12 The purpose of this Consent Order is to resolve the DBO's Enforcement Action and investigation
13 into the violations discovered during its examinations of PrimeLending in a manner that avoids the
14 expense of court proceedings and a hearing, is in the public interest, protects consumers, and is
15 consistent with the purposes, policies, and provisions of the CRMLA.

16 2. Finality of Order.

17 PrimeLending hereby agrees to comply with this Consent Order and, further, stipulates that this
18 Consent Order is hereby deemed a final and enforceable order issued pursuant to the
19 Commissioner's authority under California Financial Code Sections 50321, 50504 and 50513.

20 3. Waiver of Hearing Rights.

21 PrimeLending acknowledges that the Commissioner is ready, willing, and able to proceed with the
22 filing of an administrative enforcement action on the charges contained in this Consent Order, and
23 PrimeLending hereby waives the right to a hearing, and to any reconsideration, appeal, or other
24 right to review which may be afforded pursuant to the CRMLA. PrimeLending, further expressly
25 waives any requirement for the filing of an Accusation that may be afforded by Government Code
26 section 11415.60 (b), the California Administrative Procedure Act, the California Code of Civil
27 Procedure, or any other provision of law; and by waiving such rights, PrimeLending effectively
28 consents to this Consent Order becoming final.

1 4. Independent Audit Reports.

2 PrimeLending agrees to engage a certified public accountant(s), certified accounting firm, or
3 compliance auditing firm (Third Party Auditor), subject to the approval of the Department, which
4 approval shall not be unreasonably withheld. The Third Party Auditor shall conduct examinations
5 of PrimeLending's loan information in order to conduct an Independent Audit and provide
6 compliance reports (Independent Audit Reports) to the Department containing the information
7 required in Paragraph 5 and on the following schedule:

8 a. The first Independent Audit Report (First Independent Audit Report) shall cover all
9 California loans originated and/or funded by PrimeLending from the ending date of the Self Audit
10 of May 14, 2015 through October 31, 2016, and shall be submitted to the Department by no later
11 than February 30, 2017.

12 b. For a period of one year from the date of the execution of this Consent Order,
13 PrimeLending shall provide quarterly Independent Audit Reports (Quarterly Compliance Reports)
14 to the DBO as to all new loans originated and/or funded by PrimeLending in California during that
15 period on the following schedule:

16 i. The first Quarterly Compliance Report shall cover all California loans
17 originated by Primelending from and including November 1, 2016 through and including
18 January 31, 2017, and shall be submitted to the Commissioner no later than April 30, 2017.

19 ii. The second Quarterly Compliance Report shall cover all California loans
20 originated by Primelending from February 1, 2017 through April 30, 2017, and shall be
21 submitted to the Commissioner no later than July 31, 2017.

22 iii. The third Quarterly Compliance Report shall cover all California loans
23 originated by Primelending from May 1, 2017 through July 31, 2017, and shall be submitted
24 to the Commissioner no later than October 31, 2017.

25 iv. The fourth Quarterly Compliance Report shall cover all California loans
26 originated by Primelending from August 1, 2017 through October 31, 2017, and shall be
27 submitted to the Commissioner no later than January 31, 2017.
28

1 5. Each report of the Independent Auditor shall include, at a minimum, the following
2 information: (i) the total number of loans originated and funded by PrimeLending during the
3 periods specified in Paragraph 4, subparagraphs (a) and (b) above; (ii) the number of loans with per
4 diem interest charges in excess of the amount permitted by California Financial Code section
5 50204(o) and California Civil Code section 2948.5; (iii) for each and every loan, the borrower's
6 loan number, name, address, loan amount, loan date, per diem interest charged, maximum per diem
7 interest allowed under California Financial Code section 50204(o) and California Civil Code
8 section 2948.5, overcharge amount (if any), date of refund (if applicable), and proof of refund (if
9 applicable) and; (iv) the total number of loans for which PrimeLending failed to include in the loan
10 file the required documentation of the actual disbursement date of the loan proceeds needed to
11 determine if excess per diem interest was charged. For each of the files identified pursuant to
12 section (iv) above, the Independent Audit Report will use the title recordation date in place of the
13 missing disbursement date to calculate and report the amount of per diem interest overcharged if
14 any. PrimeLending will then be required to refund that amount to each of those borrowers under
15 the same requirements provided in Paragraph 6 below for overcharges. However, PrimeLending
16 will not be required to pay an additional \$125.00 penalty pursuant to paragraph 8 subsection (2) for
17 any overcharges found on such loans, since such loans will be assessed a penalty pursuant to
18 paragraph 8 subsection (3) for lacking required documentation.

19 6. Payment of Refunds.

20 In compliance with the Commissioner's Consent Order, PrimeLending agrees to refund any
21 amounts of per diem interest charged in excess of that permitted under Financial Code section
22 50204, subdivision (o), and Civil Code section 2948.5 as follows:

23 a. PrimeLending represents that it has already sent refunds to all borrowers that were
24 overcharged per diem interest that were disclosed in the Self-Audit, plus interest at the rate of 10
25 percent per annum.

26 b. For any additional overcharges identified pursuant to the Independent Audit Reports
27 described in Paragraphs 4 and 5 above, specifically including both the First Independent Audit
28 Report and all Quarterly Compliance Reports, refunds of more than one dollar shall be mailed to the

1 last known address of each borrower no later than 30 calendar days after the date of loan
2 disbursement. Refunds issued within 30 calendar days of disbursement are not considered
3 violations. For any overcharges identified pursuant to this paragraph that is not mailed within 30
4 calendar days after the date of loan disbursement, PrimeLending shall pay the borrower interest on
5 the amount of the refund at the rate of 10 percent per annum.

6 7. Outstanding Refunds.

7 No later than 90 calendar days after the submission of each of the Independent Audit Reports
8 referred to in Paragraph 4 above, PrimeLending shall notify the Commissioner of any refund
9 payment that has been returned or remains outstanding for loans originated during the period
10 covered by the Independent Audit Reports. PrimeLending shall be responsible for ensuring that any
11 outstanding refund payment owed to any borrower identified in the Independent Audit Reports
12 required by Paragraph 4 above is escheated to the State of California pursuant to the provisions of
13 the California Unclaimed Property Law (Code of Civ. Proc., § 1500 et seq.).

14 8. Payment of Penalties.

15 PrimeLending shall pay the following penalties: (1) a penalty of \$1,300,000.00 for the violations of
16 Financial Code sections 50204, subdivisions (e) and (o), and 50326, and Civil Code section 2948.5
17 discovered by the Self-Audit for loans originated through May 13, 2015; plus, (2) a penalty of
18 \$125.00 for each additional loan reported by the Independent Audit Reports as described in
19 Paragraphs 4 and 5 above, where per diem interest was charged in excess of the amount permitted
20 by Financial Code section 50204, subdivision (o), and Civil Code section 2948.5 of more than one
21 dollar and the excess per diem interest charges were not refunded to the borrower within 30 days of
22 the disbursement date; plus (3) a penalty of \$125.00 for each additional loan that is reported by the
23 Independent Audit for which PrimeLending lacked required documentation in the loan file to verify
24 the actual disbursement date of the loan in order determine if excess per diem interest had been
25 charged. Penalties for lack of required documentation in loan files reviewed in the First
26 Independent Audit Report that contain an ALTA form as the only documentation of disbursement
27 date are included in the 1.3 million paid under paragraph 8 subsection (1). However, those files are
28 to be treated as lacking adequate documentation for the purposes of computing interest and paying

1 refunds pursuant to the method specified in paragraph 5 subsection (iv). Penalties for any other
2 violations found in loan files in the First Independent Audit Report shall be assessed an additional
3 penalty of \$125 per violations as described in subsections (2) and (3) above. The payment of the
4 \$1,300,000.00 in penalties set forth in this paragraph shall be due within 30 calendar days of the
5 effective date of this Consent Order, as such date is defined in Paragraph 24, made payable in the
6 form of a cashier's check to the "Department of Business Oversight," and mailed to the attention of
7 Kirk Wallace, Senior Counsel, Enforcement Division, at the Department of Business Oversight
8 located at One Sansome Street, Suite 600, San Francisco, California, 94104. The penalties for any
9 additional violations discovered by the Independent Audit Reports as set forth in Paragraphs 4 and 5
10 above will be paid within 30 days of the submission of each Independent Audit Report described in
11 Paragraph 4 above for the additional violations listed in that report and shall be paid in the same
12 manner and location as indicated above.

13 9. Declaration of Policies and Procedures.

14 PrimeLending has submitted to the Commissioner a declaration under the penalty of perjury
15 (Declaration) from an officer with personal knowledge of PrimeLending's policies and procedures
16 that sets forth all policies and procedures that have been implemented as of the date of this order by
17 PrimeLending to ensure compliance with Financial Code sections 50204, subdivisions (e) and (o),
18 and 50326, and Civil Code section 2948.5. The Commissioner has reviewed the Declaration and
19 deemed the policies and procedures contained therein as satisfactory. PrimeLending agrees to
20 continue implementing those policies and procedures in the future.

21 10. Effect of Consent Order on License.

22 In consideration of PrimeLending's agreement to provide the audit reports described in the
23 paragraphs above, to the entry of this Consent Order, and to pay penalties required by Paragraph 8
24 hereof, the Commissioner hereby agrees that except as set forth in this Consent Order, she shall not
25 suspend the residential mortgage lender or servicer license of PrimeLending or take any further
26 action based on violation of the code provisions cited in this order for the period of February 2012
27 through the date of execution of this Consent Order, as such date is defined in Paragraph 24.
28 Accordingly, this Consent Order does not affect the licensing status of PrimeLending.

1 11. Suspension of License for Failure to Comply with Order.

2 If PrimeLending fails to meet any deadline or any requirement in Paragraphs 6 – 8 (regarding
3 refunds and payment of administrative fees), other than inadvertent and isolated errors that are
4 promptly corrected by PrimeLending, PrimeLending will have 15 days to remediate the issue upon
5 written notice of the failure from the DBO. In the case of any failure involving an untimely or
6 insufficient refund of per diem interest overcharges, PrimeLending shall have no more than thirty
7 (30) calendar days to correct such failure after written notice to them of the failure by the DBO or
8 their discovery of the failure, whichever comes first. Further, if PrimeLending fails to meet any
9 deadline or any requirement in Paragraphs 4 or 5 (regarding the independent certified public
10 accountant’s internal audit reports), PrimeLending will have 15 days to remediate the issue after
11 written notice of the failure from the DBO. In the event PrimeLending discovers the failure
12 PrimeLending shall immediately notify the Department of such failure and cooperate with the
13 Department to cause such failure to be rectified as soon as reasonably practicable. In the event
14 PrimeLending fails to meet any requirement or remedy any failure referred to in this paragraph
15 within the time provided to do so herein to the satisfaction of the Commissioner or one of her
16 delegates, the DBO will provide PrimeLending an additional 10 days advance notice in writing of
17 its intent to immediately suspend the CRMLA license of PrimeLending, unless and until the
18 requirement is met. PrimeLending hereby waives any further notice and hearing rights to contest
19 any immediate suspension from lending issued pursuant to the terms of this paragraph afforded
20 under the California Financial Code, the California Administrative Procedure Act, the California
21 Code of Civil Procedure, or any other legal provisions.

22 12. Full and Final Settlement.

23 The parties hereby acknowledge and agree that this Consent Order is intended to constitute a full,
24 final, and complete resolution of the Enforcement Action and the DBO’s investigation of
25 PrimeLending and for violations discovered during its examinations and that no further proceedings
26 or actions will be brought by the Commissioner in connection with these matters either under the
27 CRMLA, or any other provision of law, excepting therefrom any proceeding to enforce compliance
28 with the terms of this Consent Order, or action if such proceeding or action is based upon discovery

1 of new and further violations of the CRMLA which do not form the basis for this Consent Order or
2 which were knowingly concealed from the Commissioner by PrimeLending.

3 13. Binding.

4 This Consent Order is binding on all heirs, assigns, and/or successors in interest.

5 14. Commissioner's Duties.

6 The parties further acknowledge and agree that nothing contained in this Consent Order shall
7 operate to limit the Commissioner's ability to assist any other agency (city, county, state or federal)
8 with any prosecution, administrative, civil or criminal, brought by any such agency against
9 PrimeLending or any other person based upon any of the activities alleged in these matters or
10 otherwise.

11 15. Third Party Actions.

12 It is the intent and understanding between the parties that this Consent Order does not create any
13 private rights or remedies against PrimeLending, create any liability for PrimeLending or limit
14 defenses of PrimeLending for any person or entity not a party to this Consent Order.

15 16. Future Actions by Commissioner.

16 This Consent Order may be revoked and the Commissioner may pursue any and all remedies
17 available under law against PrimeLending if the Commissioner later discovers that PrimeLending
18 knowingly or willfully withheld information used for and relied upon in this Consent Order.
19 Further, PrimeLending agrees that this Consent Order does not resolve any penalties that may be
20 assessed by the Commissioner upon discovery of new and further violations of the CRMLA.

21 17. Independent Legal Advice.

22 Each of the parties represents, warrants, and agrees that it has received independent advice from its
23 attorney(s) and/or representatives with respect to the advisability of executing this Consent Order.

24 18. Counterparts.

25 The parties agree that this Consent Order may be executed in one or more separate counterparts,
26 each of which when so executed, shall be deemed an original. Such counterparts shall together
27 constitute and be one and the same instrument.

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1 19. Waiver, Modification, and Qualified Integration.

2 The waiver of any provision of this Consent Order shall not operate to waive any other provision set
3 forth herein. No waiver, amendment, or modification of this Consent Order shall be valid or
4 binding to any extent unless it is in writing and signed by all of the parties affected by it.

5 20. Headings and Governing Law.

6 The headings to the paragraphs of this Consent Order are inserted for convenience only and will not
7 be deemed a part hereof or affect the construction or interpretation of the provisions hereof. This
8 Consent Order shall be construed and enforced in accordance with and governed by California law.

9 21. Full Integration.

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

19 22. Presumption from Drafting.

20 In that the parties have had the opportunity to draft, review and edit the language of this Consent
21 Order, no presumption for or against any party arising out of drafting all or any part of this Consent
22 Order will be applied in any action relating to, connected to, or involving this Consent Order.
23 Accordingly, the parties waive the benefit of Civil Code section 1654 and any successor or
24 amended statute, providing that in cases of uncertainty, language of a contract should be interpreted
25 most strongly against the party who caused the uncertainty to exist.

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1 23. Voluntary Agreement.

2 PrimeLending enters into this Consent Order voluntarily and without coercion and acknowledges
3 that no promises, threats or assurances have been made by the Commissioner or any officer, or
4 agent thereof, about this Consent Order.

5 24. Effective Date.

6 This Consent Order shall not become effective until signed by all parties and delivered by the
7 Commissioner's counsel by email to PrimeLending's counsel at nhoward@primelending.com.

8 25. Public Record.

9 Respondent acknowledges that this Consent Order is a public record.

10 26. Authority to Execute.

11 Each signator hereto covenants that he/she possesses all necessary capacity and authority to sign
12 and enter into this Consent Order.

14 Dated: 11/3/16

JAN LYNN OWEN
Commissioner of Business Oversight

16 By _____

MARY ANN SMITH
Deputy Commissioner
Enforcement Division

20 Dated: 11/3/16

PRIMELENDING, A PLAINS CAPITAL COMPANY.

22 By _____

Todd Salmans
Chief Executive Officer

26 APPROVED AS TO FORM AND CONTENT:

27 _____

28 Counsel for PrimeLending, A PlainsCapital Company.