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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, et al.,

Plaintiffs,

Case No. 04-cv-40346

-v-

**QUICKEN LOANS, INCORPORATED,
et al.,**

Defendants.

HEARING

BEFORE THE HONORABLE **STEPHEN J. MURPHY, III**
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Monday, December 20, 2010

APPEARANCES :

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Also Present: Mr. Michael Gerardi, Law Clerk

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1 Detroit, Michigan

2 December 20, 2010

3 At 10:11 a.m.

4 * * *

5 (Call to Order of the Court)

6 MR. GERARDI: The Courts calls case 04-cv-4346,

7 Ryan C. Henry versus Quicken Loans.

8 THE COURT: Good morning, everybody. Have a seat.

9 Do you want to introduce yourselves, please.

10 MR. NICHOLS: My name is Don Nichols. I'm here

11 with Rachhana Srey, for the plaintiffs, Your Honor.

12 MR. NICHOLS: Thank you.

13 THE COURT: Welcome back to both of you.

14 MR. DAVIS: Your Honor, Robert Davis, for Quicken

15 Loans, and Jeffrey Morganroth.

16 THE COURT: Welcome back to both of you.

17 MR. DAVIS: Thank you, Your Honor.

18 MS. GOLDBERG: Your Honor, Rachel Goldberg for the

19 Department of Labor.

20 THE COURT: Ms. Goldberg, how are you today?

21 MS. GOLDBERG: Well, thank you.

22 THE COURT: Come on up. Now, I understand you have

23 a slip to be sworn in.

24 MS. GOLDBERG: Actually, that was taken care of by

25 the Clerk's Office a couple of minutes ago.

1 THE COURT: I don't know that you need to be sworn
2 in given that you're a government lawyer. What do the local
3 Rules say about that?

4 MS. GOLDBERG: When I first made an appearance in
5 the case, I went through the U.S. District Attorney's Office
6 and they took care of getting me what I thought was admitted.
7 And she was able have to confirm that in the Clerk's Office,
8 but she needed to actually swear me in, and that's what she
9 did.

10 THE COURT: I don't know that you need to be sworn
11 in as a government lawyer. But in any event, that's all in
12 the local Rules.

13 MS. GOLDBERG: Just in case.

14 THE COURT: Thank you for the amicus brief and for
15 accepting our invitation.

16 The Fair Labor Standards Act exempts individuals
17 who are employed and bona fide executive, administrative or
18 professional capacities. The secretary has the authority to
19 define and to limit the terms of that statute through
20 legislation. Prior to 2006, it seemed to me there's a very
21 straightforward administrative scheme, which had been
22 addressed by case law, including *Reich versus John Alden Life*
23 *Insurance*; the *Casas versus Conseco Finance Corp.*, which
24 comes out of Minnesota, and a couple of others.

25 And there were, as you would expect with any court

1 interpretation of a statute -- what would you say? -- a
2 certain level of precision, disagreement --

3 MS. GOLDBERG: In those prior cases?

4 THE COURT: Yeah, fine tuning.

5 MS. GOLDBERG: Right.

6 THE COURT: They are not all 100 percent on point
7 but if you combine those cases with opinion letters that were
8 issued prior to 2004, and these are unsigned opinion letters
9 from the Department addressing 29 CFR 541.200, which are the
10 regulations in issue, then it seems to me that Wage & Hour
11 had come up with a pretty well settled application of the
12 administrative exemption. It seemed to me that at that time,
13 in 2004, employees whose use their education, experience
14 training and sound judgment to play important roles
15 representing or managing a financial company were within the
16 administrative exemption. While participation in direct
17 sales work might prompt more scrutiny into precisely what the
18 duties of the employees were, the work wasn't absolutely
19 fatal to be administratively exempt, at least from what we
20 have been able to read, in conjunction with your brief.

21 The law, in my view, was completely undone in 2006,
22 when Labor issued 2006-31, which is the opinion letter issued
23 to the Trade Association that represents, among other
24 clients, Quicken Loans. Right?

25 MS. GOLDBERG: Yes, I believe that's correct.

1 THE COURT: Well, is it correct? I mean, 2006-31
2 came out in 2006 and it undid the prior application of the
3 administrative exemption and it was obtained by the MHA,
4 Mortgage --

5 MS. GOLDBERG: Yes.

6 THE COURT: I'm right about all that, aren't I?

7 MS. GOLDBERG: Yes.

8 THE COURT: Okay. So with that in mind, don't we
9 then have an unchallenged rule making by the agency that
10 essentially threw, at least this case, and the entire
11 industry, into a bit of turmoil at that time?

12 MS. GOLDBERG: With the 2006 letter?

13 THE COURT: Yes.

14 MS. GOLDBERG: Well, we would not characterizing
15 that as a rule making. It was an interpretation of our
16 legislative regulations.

17 THE COURT: Okay. Was it arbitrary and capricious?

18 MS. GOLDBERG: No. It was not, although our
19 position now is that it was inconsistent with the
20 regulations.

21 THE COURT: Tell me the circumstances of how
22 2006-31 came about?

23 MS. GOLDBERG: In all honesty, I'm not sure. I
24 don't work in the client agency, but --

25 THE COURT: You represent the client agency?

1 MS. GOLDBERG: Right.

2 THE COURT: So how did 2006-31 come about?

3 MS. GOLDBERG: We received an incoming request for
4 an opinion --

5 THE COURT: From the --

6 MS. GOLDBERG: -- from the Trade Association, as we
7 received many, and we drafted a response. And in doing so,
8 we reconsidered our position and came to the conclusion that
9 we set out in the 2006 letter.

10 THE COURT: It went completely unchallenged.

11 MS. GOLDBERG: I don't know of any challenge, yes.

12 THE COURT: Who would challenge it? Who would have
13 standing to challenge 2006-31?

14 MS. GOLDBERG: Well, challenge it on -- I mean, in
15 a case, employees would certainly be able to argue that it
16 wouldn't be entitled to deference. But in terms of --

17 THE COURT: 2006-31 comes out. Let's not talk
18 about any litigation at the moment. It's a rework of the
19 prior administrative and case law scheme. It's a novel
20 approach toward settled law. How does that get challenged?

21 MS. GOLDBERG: I believe it would get challenged
22 with -- it's not a rule making, so it doesn't get challenged
23 under the APA kind of notice and comment rule-making
24 procedures but it's an informal interpretation. So certainly
25 a party could lobby the Department of Labor --

1 THE COURT: Employees, for instance?

2 MS. GOLDBERG: Yes. Employee, employee
3 associations --

4 THE COURT: Employees who weren't --

5 MS. GOLDBERG: Uh-huh.

6 THE COURT: -- affected by the letter could
7 challenge the underlying policies issued by the Department in
8 the letter. Right?

9 MS. GOLDBERG: Yes, the underlying interpretation.

10 THE COURT: Now, that's highly unlikely to happen.

11 MS. GOLDBERG: I believe so. I have not seen one.

12 THE COURT: It's never happened. Right?

13 MS. GOLDBERG: (Indicating).

14 THE COURT: The fact of the matter is, an extremely
15 powerful trade association causes a shift in federal law, at
16 least administrative law, with lobbying, briefs -- I made a
17 mistake, I think it's the MBA, Mortgage Bankers Association.
18 I said MHA.

19 And then they continue to change the description of
20 their employees that work in their member associations to
21 come close to what the Department has said, without regard to
22 what the employees are actually doing. Right?

23 MS. GOLDBERG: I believe so. I'm not that familiar
24 with --

25 THE COURT: Well, that --

1 MS. GOLDBERG: -- what they have done. It
2 appears --

3 THE COURT: It had to have because that's what
4 leads to 2010. Right?

5 MS. GOLDBERG: Right. That would be the natural
6 outcome of the 2006 letter. If they got a definition that
7 worked for them, they would modify their job descriptions to
8 fit that. It makes logical sense.

9 THE COURT: Now, it's worrisome to me, and I would
10 like to know from you how the Department would handle a trade
11 association that gets a letter like this, unlikely -- in fact
12 in prior practice never having been challenged, and it
13 delivers a job description to the Department about employees
14 that continues to meld to what the Department has said, while
15 never changing what the employees are doing. The loan
16 officers at all these companies in the MBA are doing the
17 exact same things that they had been doing before the 2006-31
18 letter but they continue to meld the job description that
19 they give to these employees when they start to match up with
20 Wage & Hour's 2006-31 letter. Right?

21 MS. GOLDBERG: Uh-huh.

22 THE COURT: Now, I cannot imagine that's good
23 policy for the employees.

24 MS. GOLDBERG: Correct.

25 THE COURT: So what do you do as a department to

1 address these types of things absent any litigation, which we
2 have here? And I'm going to get to that in a second.

3 MS. GOLDBERG: Right. Well, if -- I mean, we have
4 to be aware of the fact the -- there does appear to be
5 conduct by employers that are -- they are changing job
6 descriptions without actually changing job duties.

7 Well, if the Department knew that, then presumably
8 they would undertake an investigation because in that type of
9 situation, they employers are not, in fact, complying with
10 what the Department has opined at that point.

11 THE COURT: In the meantime, Henry has sued Quicken
12 Loans in Detroit and the case goes forward on the basis of
13 the issuance of 2006-31. And Quicken argues persuasively to
14 the Magistrate Judge in the case that 2006-31 may not
15 necessarily apply to its employees but, regardless, they have
16 a good-faith reliance on its issuance. Right?

17 MS. GOLDBERG: Uh-huh.

18 THE COURT: It seems to me that we have a trade
19 association representing a group of mortgage bankers that has
20 effectively manipulated an agency to issue a letter that
21 governs the outcome of federal litigation without anybody
22 being able to address it -- right? -- on its face. What I
23 say seems very reasonable, doesn't it?

24 MS. GOLDBERG: Yes, although they'd have to prove
25 that they were in fact -- they were in fact doing the job

1 duties that's described in the letter, both for -- to assert
2 that they -- if they at the time were asserting control and
3 deference or a Portal defense, either one.

4 THE COURT: We have the finding here that the
5 Magistrate Judge made. I adopted. We can't go back. Okay.

6 The fact of the matter is, we are now in 2010 and
7 you folks issue what I would call -- I'm not here to
8 criticize anything you've done but you've issued an order,
9 2010-1, which is -- I don't know if even that's an order, but
10 an interpretation that I would call more of a restoration
11 than a switch, that effectively governs how we are going to
12 do these cases in the future. All right.

13 I have two questions. The first question is, why
14 is the 2010-1 interpretation not given retroactive effect
15 when the folks who upset the administrative scheme to begin
16 with knew full well that this was likely to happen and;
17 number two, how do we know there's not going to be another
18 change with another administration in the future?

19 MS. GOLDBERG: Sure. Well, as to your first
20 question as to why the administrator's interpretation, the
21 AI, does not apply retroactively. Wage & Hour has recognized
22 that while we do not agree with the analysis in the 2006
23 letter that that was the position -- the agency's position
24 for that period of time. And that the 2010 AI is a change in
25 direction. I agree that it is properly characterized as a

1 restoration, nonetheless, it is a change from the immediately
2 preceding interpretation. So, in fairness, so as not to
3 prejudice parties, we believe it's proper to only apply it
4 prospectively. Now, that said, that does not -- so, first of
5 all, I would like to clarify what I think is a slight
6 misunderstanding from my brief. We are not take the position
7 that the 2006 letter or the 2001 letter are still entitled to
8 controlling deference. That would be inconsistent with --

9 THE COURT: No, 2010 is entitled --

10 MS. GOLDBERG: That said, while 2010 only applies
11 prospectively, this Court does not have to ignore the legal
12 analysis in the AI, and it's for the Court to interpret the
13 regulations for those time periods prior to 2010. And if the
14 Court agrees with the analysis and the reasoning in the AI,
15 which we believe is very thorough and accurate, then the
16 Court can reach the same conclusion.

17 THE COURT: Right, but --

18 MS. GOLDBERG: But it does not -- the Court is not
19 obligated to because we believe that it would be unfair to
20 parties to apply it retroactively.

21 THE COURT: It would be unfair to the Mortgage
22 Banking Association members who relied on it.

23 MS. GOLDBERG: Right. Whether there was
24 questionable activity on their part in obtaining the 2006
25 letter or not, that was the Department's position for that

1 time.

2 THE COURT: I never said -- I haven't said that
3 today. I haven't said it in the past. I don't know -- I
4 don't mean to suggest it. I don't really know what the
5 circumstances of obtaining 2006-31 were.

6 But let me ask you this question: (1)(a), highly
7 unfair, highly disruptive to employees, plaintiffs and courts
8 who have to deal with this thing. I mean, it's very clear to
9 me, very clear to me, that the folks who were selling
10 mortgages for Quicken Loans and other members of the MBA
11 should have been paid overtime, okay, were not being treated
12 in compliance with the FLSA. Right?

13 MS. GOLDBERG: Uh-huh.

14 THE COURT: Except for the period of 2006 to 2010,
15 when they obtained a letter to get them out of liability from
16 this. That's the way I see the case. And there is very
17 little I can do about it, Ms. Goldberg. It seems
18 preposterous to me that we are going to have a two-month
19 trial to establish that they were not complying with the Act
20 but they had a good-faith reliance on what was issued by the
21 Department when they, through their Mortgage Bankers
22 Association, went to get the opinion. Do you see my problem
23 here?

24 MS. GOLDBERG: I do. I agree.

25 THE COURT: What do you expect me to do? With all

1 deference and respect, I'm not here to yell at you. I want
2 to know what we do here. We are going to have two-month
3 trial with jurors from all over Michigan when we all know
4 what the result is going to be, and should be.

5 MS. GOLDBERG: If I'm understanding what you're
6 articulating the problem to be, is that you believe that the
7 AI is correct and that the mortgage loan officers are
8 entitled to overtime because there are --

9 THE COURT: The 2010 restoration makes eminent
10 sense to me. It is read completely in accord with the
11 administrative scheme prior to '04 and the four cases that
12 you discuss and I have addressed in the brief. It makes
13 eminent sense to me. If that had been in place absent
14 '06-31, we would have had a case that may not have even made
15 it to Federal Court. Okay.

16 MS. GOLDBERG: Uh-huh.

17 THE COURT: But the fact of the matter is, we are
18 in Federal Court facing a two-month trial because of the fact
19 that the defendants in this case, during the pendency of the
20 suit, and their Mortgage Bankers Association went to your
21 department and got a letter which completely upset the merits
22 of the case and how it has to be viewed.

23 I can't go back on the Magistrate Judge's ruling
24 that I've already adopted and enter judgment for the
25 plaintiffs, because they can go to the Sixth Circuit and get

1 me reversed for being unfair to them.

2 MS. GOLDBERG: Uh-huh.

3 THE COURT: But now I have got to force these
4 plaintiffs to go to trial for six weeks to prove what
5 everybody in America, including the Department of Labor,
6 knows is beyond dispute but-for the 2006.

7 MS. GOLDBERG: Right.

8 THE COURT: It's a problem I don't know how to
9 solve.

10 MS. GOLDBERG: I agree it is a difficult situation.
11 I mean, I can say that the Department -- which is exactly why
12 the Department issued the AI. We wanted to rectify what we
13 believed was an incorrect interpretation. As to that time
14 period, that was what was in effect for that period. There
15 is no way we can undo that.

16 THE COURT: Now, in a perfect world, the plaintiffs
17 and employees in this case would have gone to Washington,
18 challenged 2006-31 and got it -- put the scheme back into
19 place and maybe gotten 2010-1, or at least its provisions,
20 put back in place at that time. Right?

21 MS. GOLDBERG: Yes.

22 THE COURT: But those folks don't have any money
23 incentive, there is no profit to a Minneapolis law firm to
24 bring a case like that, so --

25 MS. GOLDBERG: What they could have done, although

1 I agree -- I acknowledge at the outset that it would have
2 been a difficult course, but they could have filed suit, they
3 apparently did, and argued that the 2006 letter was wrong.
4 It was inconsistent with the regulations. And they did.

5 THE COURT: And they did.

6 MS. GOLDBERG: That would have been the alternative
7 course. And I recognize that would have been a difficult one
8 for them because at the time, it would have been entitled to
9 Hour deference, but if it's inconsistent with the
10 regulations, it's inconsistent. It doesn't matter whether
11 Hour applies or not.

12 THE COURT: I was, to be honest with you, a little
13 exercised when 2010-1 came out. Absent that administrative
14 interpretation, we would have been on track to take this case
15 to trial in October and get it addressed, because it appeared
16 to me that the Department -- at the time Magistrate Judge
17 Pepe entered his order and we affirmed it, it appeared to me
18 that the Department of Labor had gone in a completely
19 different direction, and that was the state of the law.
20 Fine.

21 I certainly don't expect the defendants to settle
22 the case or lie down when they have an administrative
23 exemption that makes plain what the Department's
24 interpretation of their own regulations which interpret the
25 statute are going to be. But when 2010 came out, it

1 completely changed the landscape and now having read your
2 brief, which I am grateful for and which was well done, and
3 having dived more deeply into the statutory and regulatory
4 scheme, it would appear to me that the -- I won't say that
5 they were improvidently granted but I would say that 2006-31
6 is/and the only exception to the entire statutory regulatory
7 case law scheme that we've seen interpreting 29 U.S.C. 213
8 (a)(1) through regulation and case law in the entire time
9 that the statute has been in place.

10 MS. GOLDBERG: Uh-huh.

11 THE COURT: All right. So then my question is,
12 what is the Department going to do next? And I guess that
13 leads to question number two, which I think should probably
14 be a pretty easy question for you, what is to say that in
15 2018 we don't have a completely different administrative
16 scheme here?

17 MS. GOLDBERG: Well, the AI is well reasoned and
18 that is the interpretation that is correct, consistent with
19 the regulations.

20 I can't say what the Department is going to do in
21 the future but at this point, we certainly believe that that
22 is the correct interpretation of the regulations.

23 THE COURT: So we will possibly see another
24 challenge, and if we do, similar to 2004 -- excuse me, 2006,
25 disaffected employees have to challenge the administration

1 administratively or in the context of litigation assert some
2 sort of motion in a federal district proceeding, federal
3 district court proceeding, to try to undo what might not be
4 in their favor?

5 MS. GOLDBERG: Yes, that would be the case.

6 THE COURT: All right. I think I'm finished with
7 my questions but let me just check my cheat sheet here.

8 Let me ask one final thing: The fact that you had
9 done your -- excuse me, your agency had done its work by
10 opinion letters in the past, and I think I mentioned those
11 two in the early 2000s that were unsigned, and then '06-31
12 was in fact signed, now you have an actual administrative
13 interpretation, which I characterized as restorative -- as
14 opposed to, quote/unquote, switch -- what is the significance
15 of that? Is the fact that there an administrative
16 interpretation now, as opposed to policy provisions by
17 issuance of letters, so to speak, more -- does that give the
18 Court and the public more confidence that 2010-1 is the
19 current state of the law unlikely to be changed? Is it
20 broader than a letter would be issued to a private party?
21 How should we view that?

22 MS. GOLDBERG: It is broader in that it is not as
23 completely fact -- unique fact driven as the opinion letters
24 were. We try and look at what we consider to be the typical
25 mortgage loan officer so that it has -- it's more -- parties

1 can rely on it more because it has wider -- it speaks to a
2 wider set of factual scenarios. So in that way we do hope
3 that it will be -- we intend for it to be more useful than
4 the opinion letters. I would not say, however, that it's
5 somehow entitled to more deference. It would be the same
6 level of deference because the agency issues general guidance
7 in other forms besides just opinion letters, which aren't
8 completely fact driven, and those are entitled to the same
9 level of Hour deference.

10 THE COURT: I have a concluding comment, and then
11 I'll let the parties speak briefly. I don't know that we
12 have a whole lot to do here. But anything else you would
13 like to say? Anything you want to address to the Court or
14 clarify or --

15 MS. GOLDBERG: No. I mean, it seems like the Court
16 is not confused by this but it seems like there was a
17 misunderstanding from our brief by the parties, so I did want
18 to make clear that we did not intend, if we implied in our
19 brief that the 2001 or 2006 letter is still entitled to Hour
20 deference, that is certainly not our intention. It is not.
21 Neither is.

22 THE COURT: I think the issue in the trial here is
23 going to be far narrower and it's going to be -- given the
24 '06 letter and the defendant's reliance on it, was the
25 reliance good faith such that it should defeat the -- or

1 support the refusal to pay overtime.

2 MS. GOLDBERG: Right.

3 THE COURT: Now, again, I want to say the
4 following: I want to say thank you for coming out here
5 today. I want to say thank you to your department. But as
6 far as I'm concerned, in the overall litigation of the case
7 this is a nonevent. 2010 does not have a retroactive effect.
8 I have spoken as to the effect of 2006-31. Your 2010-1
9 interpretation doesn't provide authority, by your own
10 statement, to go back and upset what has happened. So we
11 have to go to trial on the narrow issue that's been --

12 MS. GOLDBERG: (Indicating).

13 THE COURT: And I think I ought to say, without
14 conceding that 2006-31 was correct at the time, there has
15 been no challenge administratively. We have addressed the
16 regulation in the context of this case and it's not
17 appropriate for me in any fashion to go back and deal with
18 '06-31 given that there is an interpretation of it this year
19 which is given controlling deference going forward. Accurate
20 summary?

21 MS. GOLDBERG: Yes.

22 THE COURT: Thanks for everything.

23 MS. GOLDBERG: Thank you, Your Honor.

24 THE COURT: Mr. Nichols, briefly.

25 MR. NICHOLS: Thank you, Your Honor.

1 THE COURT: Go right ahead.

2 MR. NICHOLS: I would like to address what we did
3 do to challenge the 2006-31. I first became suspicious there
4 was something going on that I didn't understand during the
5 depositions in this case, and I began to ask myself what does
6 Mr. Davis know that I don't know? And out of the blue about
7 a year later 2006-31 comes out, as you already have stated,
8 it was in contradiction of prior stuff. And I must say, Your
9 Honor, when I was defending the depositions, it's not like I
10 hadn't defended a number before. I defended probably 100
11 depositions, and I had 10 to 20 Fair Labor Standards Act loan
12 office cases going at the time so I had heard every possible
13 question, I thought, but Mr. Davis was asking unusual ones.
14 So when 2006-31, I again asked myself, what am I missing and
15 how did I miss this? I'm a member of the American Bar
16 Association. I go to their meetings where this is all
17 discussed. I'm on blogs. I'm on this and that. I like to
18 think I'm generally aware of what is going on.

19 Well, it so happens that the American Bar
20 Association was having a seminar or a meeting of where the
21 DOL was discussed. Guess who is the guest speaker at this
22 meeting? It's Paul DeCamp, the author of 2006-31. At that
23 meeting I challenged Mr. DeCamp and I said, Mr. DeCamp, it
24 seems to me that the defense bar knows what's going on in
25 these cases before the plaintiffs' bar does? How is this

1 possible? I'm asking you today to deny that that is in fact
2 happening. He did not deny it. He did not admit it either,
3 but I came back from that meeting paranoid as ever.

4 And I decided to use the discovery route to find
5 out what, in fact, happened at Quicken and how they were able
6 to know what was going on the whole time, and I wasn't.

7 So needless to say, the discovery went nowhere. I
8 got -- just literally, I got all bound up in attorney-client
9 privilege and this is stayed and that --

10 THE COURT: I read all that, and we issued, or at
11 least supported Judge Pepe's order on the attorney-client
12 privilege.

13 But let me ask this question, and I think I know
14 the answer, why wouldn't you just go to Labor at that time
15 and issue a brief or a letter suggestion on behalf of your
16 clients that 2006-31 was illogical and legally capricious, if
17 you will?

18 MR. NICHOLS: I didn't have the evidence yet, Your
19 Honor. I still didn't have the evidence and I didn't get the
20 evidence until I brought a Freedom of Information Act --

21 THE COURT: As a matter of law -- I just went
22 through with Ms. Goldberg why as a matter of law you would
23 have an adequate opportunity -- excuse me, I should say an
24 ample argument for challenging 6-31 as being capricious and
25 inconsistent with the prior development of labor law by Wage

1 & Hour in this area.

2 MR. NICHOLS: What I had, Your Honor, at that point
3 basically a recitation of the reg where the facts had been
4 adjusted to fit the reg. They kept moving the facts closer
5 and closer to the reg, and what I would have had was no
6 challenge at all.

7 THE COURT: I agree.

8 MR. NICHOLS: I would have probably looked like a
9 fool, and I certainly didn't realize at the time --

10 THE COURT: Maybe if you made a factual
11 argument -- well, you know what, I appreciate and I respect
12 your position in this, and I'm largely sympathetic because
13 you and I are going to be together for a long, long time
14 fighting about something that's probably apparent to many, if
15 not all lawyers who observe these types of cases, but the
16 fact of the matter is, we are where we are. The Department's
17 not going to let me go back. Their 2010-1 letter is
18 prospective. I can't reverse the ruling that I made with
19 regard to the good faith exception and the application of
20 '06-31 without acting in a highly unfair fashion towards the
21 defense in the case, and I just can't do it. So I think we
22 have to play the hand that we are dealt, unfortunately.

23 MR. NICHOLS: Your Honor, I respect what you've
24 said but I strongly disagree. This Court has the power to
25 correct mistakes in the past and here a mistake occurred. I

1 don't think this Court was aware that Mr. Davis negotiated
2 with the Department of Labor for a two-month period where
3 they negotiated the facts, Your Honor. They submitted a
4 draft request for an opinion letter. Two months later, they
5 submit their real request. Why do you need to draft
6 your -- why do you have to -- deliver the question? Because
7 you are really haggling over the answer and they kept
8 drafting it so close and so close until they could finally
9 persuade them to give them what they wanted, and that is
10 wrong. That is -- they knew it was wrong and they got by
11 with it and we should correct it today. We are all in this
12 room together. If what I'm saying is not true, it's time for
13 somebody in this room to stand up and say, Mr. Nichols has
14 made these accusations and they are false. They are not.

15 THE COURT: All right. Thank you, sir. Anything
16 else?

17 MR. NICHOLS: Thank you, Your Honor. Your Honor,
18 could I just say one thing off topic?

19 THE COURT: Please do.

20 MR. NICHOLS: I have noticed in the Court's recent
21 orders the reference to denying us our day in court. I
22 unfortunately wrote that language, and we all write our
23 things together, and I just want to say to the Court, I
24 apologize for that language. I do not lay any delay in this
25 case at this Court's doorstep. This Court has been more than

1 fair with us on timing and schedules, and whatever, and I
2 apologize for that unfortunate language. I'm just frustrated
3 after all these years.

4 THE COURT: Listen, I appreciate you saying that.
5 You know what, I apologize for taking it in a, you
6 know -- letting something like that get to me. I've been
7 working as hard as I can on this case, and I know you have,
8 too. There is no personal affront taken. I just want the
9 record to be clear that I have been working as hard as I
10 possibly can. Don't worry about that. I'm grateful for you
11 saying that.

12 MR. NICHOLS: Thank you, Your Honor.

13 THE COURT: Let's hear from Mayer Brown.

14 MR. DAVIS: Thank you, Your Honor.

15 THE COURT: Mr. Davis, how are you today?

16 MR. DAVIS: Just fine, Your Honor. Thank you very
17 much. I'll be very brief.

18 THE COURT: Good.

19 MR. DAVIS: Your Honor, five very quick points, I
20 would like to speak to some things the Court -- as
21 Ms. Goldberg -- first, clearly administrator's interpretation
22 2010-1 is not retroactive. Plaintiffs have argued that the
23 Labor Department did not respond specifically to this Court's
24 order. In fact, they did. The Court asked us -- asked the
25 Department to speak to 2010, quote, relative to 2006-31.

1 Indeed the Labor Department did that.

2 Third, as the Labor Department's brief shows, as
3 supported by the Portal-to-Portal Act, withdrawal of the 2006
4 opinion letter does not apply retroactively. That's been
5 fully briefed to the Court.

6 Two quick last points. I think the Court has
7 already made up its mind on this, so I don't think I need to
8 address it further, but I think the Court has already
9 recognized that plaintiffs are trying to confuse the issue of
10 liability that will be tried with the separate issue of the
11 good-faith defense under the Portal Act.

12 One quick last point, which is, we think -- and
13 actually Ms. Goldberg at least implicitly endorsed that in
14 her statements today -- that the 2006 opinion letter clearly
15 applies in the trial of this case. It is the only Labor
16 Department guidance that is out there during the period. It
17 is the most recent guidance. I said only it must be paired
18 up with the 2004 regulations and the 2001 opinion letter,
19 unsigned, as you've noted.

20 Further, it has a definition of sales in it, which
21 the Labor Department specifically has recognized in its
22 brief. I expect we'll probably be revisiting that, Your
23 Honor, when we bring our draft instructions -- or proposed
24 instructions to you.

25 And then I would like to conclude with one last

1 point. Your Honor, you've used the phrase as to 2010-01 as
2 being restorative. I actually would like to go back and
3 point out that the 2004 regulations were issued, as you've
4 noted earlier. Those clearly are controlling here and the
5 record shows that Quicken Loans throughout, and well before
6 the 2006 opinion letter, i.e., even before the 2004
7 regulations, was clearly looking at the governing standards
8 and looking at the duties of the mortgage loan officers.
9 Mr. Carroll testified on that. Mr. Carroll gave a
10 declaration on that and that was part of the finding that
11 Judge Pepe made and that you've accepted.

12 THE COURT: Right. I don't have any quibble with
13 that point. I characterized the 10-1 letter as restorative
14 because it seemed to me restore what had been the status quo
15 at that time you're talking about, which is before 2006. As
16 that may be, I think we are where we are and I agree with you
17 on that. There was one specific thing I wanted to say -- the
18 only thing I wanted to say, and I've already said it, is that
19 I wish 10-1 came out late 2006, or to make a little joke,
20 specifically before August 18th, 2008 and then I'd have a
21 better 2011 looking at me. But that's the way it is.

22 Anything else?

23 MR. DAVIS: No, Your Honor. Thank you very much.

24 THE COURT: Thank you all very much. I'm really
25 grateful. I know it's the end of the year and you're busy,

1 and probably each party has had a lawyer come in from out of
2 town to argue today. But the matter, as you know, was
3 extremely important to the Court because I have taken it up
4 with the parties several times before and I think that the
5 Department of Labor has worked to educate the Court about
6 where we are legally going forward and, again, I'm grateful
7 for that. So I will wish you all a Happy New Year and be
8 safe with your travels and we will reconvene after the first
9 of the year to keep on schedule. All right.

10 We'll be recess now.

11 MR. GERARDI: Please rise. Court is in recess.

12 (Proceedings adjourned at 10:51 a.m.)

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CERTIFICATE OF REPORTER

As an official court reporter for the United States District Court, appointed pursuant to provisions of Title 28, United States Code, Section 753, I do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

s/ Karen Klerekoper

KAREN KLEREKOPER, CSR, RPR

Official Court Reporter