UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, et al.,

Plaintiffs,

v.

QUICKEN LOANS INC., et al.,

Defendant.

Civil Action No.: 2:04-CV-40346

Honorable Stephen J. Murphy, III

PLAINTIFFS' MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ON LIABILITY, SECTION 259 GOOD FAITH, AND WILLFULNESS

MOTION

Pursuant to this Court's Order dated November 24, 2010 (Dkt. 608), Plaintiffs respectfully move this Court to reconsider its prior summary judgment Orders. Specifically, Plaintiffs request that the Court (1) **grant** Plaintiffs' motion for summary judgment on Quicken's administrative exemption defense, (Dkt. 432), and (2) **deny** Quicken's motion for summary judgment on § 259 good faith and willfulness, (Dkt. 436). For all the reasons stated in the supporting memorandum filed herewith, Plaintiffs' motion should be granted.

Dated: December 30, 2010 NICHOLS KASTER, PLLP

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ON LIABILITY, SECTION 259 GOOD FAITH, AND WILLFULNESS

ISSUES PRESENTED

1. Should the Court reconsider and **grant** Plaintiffs' motion for partial summary judgment (Dkt. 432) on liability in light of the Department of Labor's withdrawal of Opinion Letter FLSA2006-31 and issuance of AI No. 2010-1?

Plaintiffs' Answer: Yes.

2. Should the Court reconsider and **deny** Defendants' motion for summary judgment (Dkt. 436) on Defendant's Section 259 "good faith" defense in light of the Department of Labor's withdrawal of Opinion Letter FLSA2006-31 and issuance of Administrator's Interpretation No. 2010-1?

Plaintiffs' Answer: Yes.

3. Should the Court reconsider and **deny** Defendants' motion for summary judgment (Dkt. 436) on willfulness in light of the Department of Labor's withdrawal of Opinion Letter FLSA2006-31 and issuance of Administrator's Interpretation No. 2010-1?

Plaintiffs' Answer: Yes.

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INTRODUCTION

From its comments at the December 20, 2010, hearing with the Department of Labor, it appears that the Court seems to agree that there is no genuine issue of material fact that Quicken's loan officers' primary duty was sales, and submitting this question would be a waste of a jury's time. The Court also seems to recognize that Quicken is not in a position to claim "unfairness" when it played a role in upsetting the administrative scheme to begin with. However, a number of comments made by the Court suggest that it believes that it is prohibited from reversing its summary judgment Orders at this juncture. Simply put, the Court's hands are not tied. As discussed in detail in this memorandum, a federal district court has the inherent power to reverse its own interlocutory orders at any time prior to final judgment.

In this case, it is undeniable that things have changed since the Court's original Orders denying Plaintiffs' motion for summary judgment on liability, and granting Quicken's motions on its § 259 "good faith" defense and willfulness. Considering these changes, and the following reasons, it would be clear error and a manifest injustice to require Plaintiffs to try the liability issue, and deny them the right to a trial on good faith and willfulness.[1]

First, the Court was new to the case at the time it affirmed Magistrate Judge Pepe's recommendations and, as the Court has pointed out, it has since spent a considerable amount of time diving more deeply into the case, and concluding that the primary sales nature of the job is **obvious**. **Second**, the only basis for denying Plaintiffs' motion summary judgment—opinion

[1] The importance of the Court's decision cannot be understated. As it stands, the § 259 "good faith" ruling wiped out all claims arising after FLSA2006-31's issuance, but before AI 2010-1 (March 24, 2010) not only in this case but also in Mathis v. Quicken Loans Inc., No. 07-cv-10981 (E.D. Mich.); and Chasteen v. Rock Financial Inc., No. 07-cv-10558 (E.D. Mich.); Biggs v. Quicken Loans Inc., No. 2:10-cv-11928 (E.D. Mich.). Given this, Plaintiffs will have no choice but to appeal the Court's rulings.

letter FLSA2006-31—has been abandoned by the DOL with considerable force. The DOL has withdrawn it, describing it as "misleading," "selective," and "narrow." At the hearing, the DOL continued, stating that FLSA2006-31 was "inconsistent" with the regulations, and agreeing with the Court that it was the only exception to the entire body of statutory, regulatory, and case law developed interpreting the administrative exemption. This Court has already ruled that FLSA2006-31 was entitled to Skidmore deference commensurate only with its persuasiveness, and allowed Quicken to go forward with its defense based on the letter reluctantly, and only after pointing out what it suspected where flaws in its "facts," findings, and conclusions. Now that the letter has been withdrawn by its author for many of the same reasons that made the Court hesitant in the first place, FLSA2006-31 deserves no deference, and the path to summary judgment for Plaintiffs is clear.

Third, retroactive application of AI 2010-1 is not necessary for the Court to reverse its summary judgment Orders. As the DOL pointed out at the hearing, even if AI 2010-1 is not applied retroactively, the Court is not required to ignore the thorough and consistent legal analysis contained within, and can reach the same conclusion. **Fourth**, while "unfair surprise" may be a reason not to retroactively apply AI 2010-1 to some employers, the employer in this case cannot complain about "unfair surprise" when it was responsible for intentionally and improperly creating the confusion in the first place,[2] all while knowing that its loan officers'

[2] Although the Court wanted to know how it came to be that the DOL would issue such a letter when it is so clearly contrary to the settled application of 29 C.F.R. § 541.200 to loan officers that preceded it, the DOL's representative punted, stating that she was "not sure" because she did not work "in the client agency" at that time. However, the DOL admitted that the request was "unchallenged," and it is undisputed that Quicken—using its litigation counsel who was apparently representing only the MBA at the time—actually negotiated the "facts" presented in the request before formally submitting it for its pre-disposed conclusion. While the DOL is "not sure" and unwilling to discuss how FLSA2006-31 came about, Plaintiffs have pieced it together

primary duty was sales. Regardless, because AI 2010-1 need not be retroactively applied, "unfair surprise" presents no barrier. **Finally**, with the denial of Plaintiffs' motion for summary judgment reversed, Quicken's § 259 good faith and willfulness defenses must be submitted to the fact finder to weigh the credibility of Quicken's claims of "good faith" in light of the obvious sales nature of the position[3] and its role in obtaining the letter.

For these reasons more fully discussed below, reversal of the Court's prior Orders is necessary. Plaintiffs respectfully request that this Court reconsider its summary judgment Orders and (1) **grant** Plaintiffs' motion for summary judgment on Quicken's administrative exemption defense, and (2) **deny** Quicken's motion for summary judgment on § 259 good faith and willfulness.

RELEVANT BACKGROUND

This overtime case was filed on May 17, 2004. (See Compl.) But Quicken knew that it was violating the FLSA long before this lawsuit started. On September 5, 2002, Angelo Vitale, Senior Corporate Counsel, sent an email to (among others) Quicken's owner and Chairman Dan Gilbert, Vice President of Administration David Carroll, and Corporate Counsel Richard Chyette. (Dkt. 551 at 2.) Attached to the email was a June 2002 FLSA bulletin discussing the decision in Casas v. Conseco Fin. Corp., 2002 WL 507059 (D. Minn. 2002), in which the court found loan originators non-exempt as a matter of law. (Id.) Mr. Vitale did not mince words in explaining the impact of the Conseco case on Quicken's business:

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through discovery and a Freedom of Information Act request and presented it to the Court. (See Dkt. 551 at 2-7; Dkt. 586 at 10-11.)

[3] Not even FLSA2006-31 provides "good faith" shelter for Quicken when the position was obviously sales because it plainly states, "Of course if, based on all the facts in a particular case, a mortgage loan officer's primary duty is selling mortgage loans, the mortgage loan officer will not qualify for the administrative exemption." (FLSA2006-31 n.3.)

> Suffice it to say, *unless the FLSA overtime exemptions are explicitly broadened* to cover mortgage loan originators (especially as applied to a web/call center environment such as ours), this decision could have a serious financial impact on our business.

(Id. (emphasis added).) Mr. Vitale ended the email by requesting, "Please pass this along to the Government Affairs/Lobbying specialist in the firm ASAP and advise us of any and all avenues available to 'right this wrong.'" (Id.)

Quicken's discovery of the Conseco case—confirmation that the company was violating the FLSA—set off a chain of events that included extensive failed lobbying efforts to try to change the non-exempt status of loan officers, and concluding with Quicken negotiating and obtaining a self-serving Department of Labor opinion letter on September 8, 2006, through the political connections of Robert Davis and his dual representation of Quicken and the Mortgage Bankers Association.[4] (Id. at 2-7; Dkt. 586 at 10-11.) As this Court is aware, the opinion letter, FLSA2006-31, was based on a set of flawed and narrow assumptions, and selective and misleading analysis, supplied by Quicken and its associates in order to obtain an opinion that loan officers were "exempt" under the FLSA's administrative exemption. (Id.) Indeed, Quicken and Mr. Davis specifically negotiated the assumed facts and analysis of what would eventually become FLSA2006-31 for at least two months. (See Dkt. 586 at 10-11.) All the while, Quicken knew that the "facts" that it had concocted were not the actual duties its loan officers performed. (See, e.g., Dkt. 432.)

On October 5, 2007, Plaintiffs filed a motion for summary judgment on Quicken's administrative exemption defense. (Dkt. 432.) Quicken also filed several motions. Relevant here, Quicken filed a motion for summary judgment on its administrative exemption defense,

[4] For the sake of brevity, the full details of these events are not set forth in this brief, but can be found at docket numbers 551 and 586.

and also filed motions for summary judgment on its good faith defense under 29 U.S.C. § 259 and on whether the company willfully violated the Act.[5] (Dkt. 434, 436.)

In their motion for summary judgment on the merits, Plaintiffs provided irrefutable evidence that Quicken's loan officers had sales as their primary job duty, and were without question non-exempt. For example, the evidence provided by Plaintiffs included:

- Job offer letters told loan officers that they were "joining the most highly skilled sales force in the United States of America—the Quicken Loans Sales/Web Center!" and referring to loan officers as "sales professionals";
- Loan officers attended "Initial Sales Training";
- Loan officers were required to follow Quicken's ten-step "Sales Process";
- Quicken required loan officers to use various aggressive sales techniques such as "responding to objections," "pivoting," and "closing";
- Loan officers worked in a high-pressure sales environment where they were continuously pushed to "SELL, SELL, SELL";
- Quicken's compensation system was based on sales volume, and encouraged loan officers to generate additional fees in order to raise the "green bar"; and
- Loan officers were praised, promoted, and terminated based on sales.

(See generally Dkt. 432.)

Not surprisingly, Quicken's motions for summary judgment relied heavily, if not exclusively, on the hypothetical "facts" and accompanying "analysis" contained in Opinion Letter FLSA2006-31. For example, in its opening briefing on the merits, Quicken touted that the

[5] Complete briefing on the parties' summary judgment motions on the administrative exemption defense can be found at docket numbers 432, 434, 466, 467, 475, and 478. Complete briefing on Quicken's good faith defense and willfulness motions can be found at docket numbers 436, 470, 476, 551, and 553.

"**DOL formally concluded in September 2006 that mortgage loan officers who have the same primary duties as mortgage bankers are covered by the administrative exemption.**" (Dkt. 434 at 2 (emphasis added).) Discussing FLSA2006-31 at length, Quicken described the letter as "**DOL's only authoritative and legally binding opinion on mortgage loan officers.**" (Id. at 9-12 & n.18 (emphasis added).) Quicken argued that the loan officers in FLSA2006-31 performed duties "**which are identical, in all material respects, to the duties of QL mortgage bankers[.]**" (Id. at 10.) Each section of Quicken's argument purported to explain how its mortgage bankers were "**Like The Loan Officers In The DOL Opinion Letter.**" (See generally id. at 12-43 & section headings (emphasis added).) In its reply brief, Quicken argued that it prevailed because, "**PLAINTIFFS CANNOT ESCAPE THE APPLICATION OF THE DOL OPINION LETTER[.]**" (Dkt. 478 at 1 (emphasis added).)

Quicken's motion on § 259 good faith and willfulness was equally dependent on FLSA2006-31. Quicken argued that it was not liable for FLSA violations after the issuance of FLSA2006-31 because it purportedly relied in "good faith" on, and acted in conformity with, the 2006 letter. (Dkt. 436 at 10-12.) On willfulness, Quicken argued that Plaintiffs could not show that Quicken knew or showed reckless disregard for the fact that it was violating the FLSA. Specifically, Quicken argued that Plaintiffs had no evidence that the company "knew" it was violating the law, and claimed that it "carefully considered" the appropriate legal authorities—including FLSA2006-31—in classifying its loan officers.[6] (Id. at 13-15.)

The motions were referred to Magistrate Judge Steven D. Pepe. On July 16, 2009, Judge Pepe recommended that the Court deny the parties' cross-motions on the administrative exemption. (Dkt. 556.) Magistrate Judge Pepe recommended that the Court grant Quicken's

[6] Quicken was ordered to produce additional documents after initial summary judgment briefs were filed, which the company improperly withheld on privilege grounds. (See Dkt. 551.)

motion on § 259 and willfulness. (Dkt. 555.) Both parties filed objections. (Dkts. 559-570.) On September 30, 2009, the Court affirmed Magistrate Judge Pepe's recommendations. (Dkt. 571.)

Quicken's 2006 opinion letter played a significant role in the Court's summary judgment Orders. For example, in denying the parties' cross-motions for summary judgment on the merits, the Court gave the letter deference under Sixth Circuit case law. (Dkt. 556 at 38-40.) The Court noted Quicken's claim that "because the web mortgage bankers' duties are substantially similar to those of the typical mortgage loan officer hypothesized to the DOL the Court should defer to the DOL's September 2006 Opinion Letter and recommend summary judgment in their favor." (Dkt. 556 at 29.) The Court also noted that Quicken "relied heavily" on FLSA2006-31's definition of "sales" as "customer-specific persuasive sales activity." (Id. at 30.) And although the Court expressed clear reservations about doing so, such as noting that the letter's facts were "likely drafted with that regulation in hand" (id. at 35), the Court used the letter as a basis for its ruling. The Court stated:

> As a straight forward application of the regulation to a given set of facts, this September 2006 Opinion Letter may carry less weight and deference than is to be accorded an agency's own interpretation of an ambiguous regulation such as involved in Auer. ***The ambiguity in the present case is more related to whether the primary job duties of the Plaintiffs are sales or as the job description given in the September 2006 Opinion Letter. Clearly, if a jury finds the latter, then September 2006 Opinion Letter is persuasive authority for them to find these jobs qualify for the administrative exception.***

(Id. at 36 (emphasis added).) The Court concluded that "it is for a jury to determine if Plaintiffs' primary duties are similar to the financial service industry employees found exempt in the DOL's September 2006 Opinion Letter or whether Plaintiffs' primary duties are sales as asserted by Plaintiffs." (Id. at 40; accord Dkt. 571 at 18 ("Here, there are factual disputes as to the nature of the mortgage bankers duties and whether the job matched the hypothetical duties in the September 2006 opinion letter.").)

The Court's denial of Plaintiffs' motion for summary judgment on the merits directly impacted its Orders on § 259 good faith and willfulness. For example, on the "conformity" element of good faith the Court held:

> Because the 2006 Opinion Letter addressed the same industry and the same classification decision at issue in this litigation, and ***because the undersigned does not recommend that Plaintiffs receive partial summary judgment on the issue of Plaintiffs' primary jobs being sales, no reasonable fact finder could conclude that Quicken Loans's position that it acted in conformity with the DOL 2006 Letter was not plausible.***

(Dkt. 555 at 32 (emphasis added); accord Dkt. 571 at 26 ("Given that finding, the defendants could as a matter of law 'plausibly' rely on the September 2006 Opinion Letter stating that the administrative exemption applied to loan officers that performed similar tasks to the Quicken mortgage bankers whose jobs are at issue here.").) In other words, the Court held that since summary judgment was not granted on whether Plaintiffs fit the administrative exemption (due to the Court finding a fact question based on the FLSA2006-31 letter), then summary judgment must be granted on Quicken's good faith reliance. Likewise, on the issue of willfulness, the Court granted summary judgment for Quicken because "there were plausible reasons . . . to suggest Plaintiff's jobs would be classified as exempt." (Dkt. 555 at 39.) The Court noted that "Quicken Loans' conclusion can hardly been characterized as reckless . . . with the aid of hindsight – the 2006 Opinion Letter." (Id.)

On March 24, 2010, the Department of Labor issued Administrator's Interpretation No. 2010-1 ("AI 2010-1"). The Interpretation addressed the application of the administrative exemption to loan officers, concluding that the exemption does not apply. Significantly, AI 2010-1 forcefully withdrew FLSA2006-31, specifically citing its "misleading assumption and selective and narrow analysis." (AI 2010-1.)

On March 31, 2010, the Court ordered the parties to file briefs on their positions as to what effect AI 2010-01 had on the case. The parties filed briefs as requested by the Court (Dkts. 584, 585, 586, 587, 588), and a hearing was held on June 21, 2010. Following the hearing, on September 27, 2010, the Court invited the DOL to file an amicus curiae brief on the issues raised by AI 2010-1's withdrawal of FLSA2006-31, after FLSA2006-31 already served as a basis for summary judgment. (Dkt. 596 at 5.) The Court said that it would be "open to reversing its earlier rulings should the present legal issues be decided in a manner favorable to the plaintiffs, as they have suggested should be done." (Dkt. 608.) The Court set December 31, 2010 as the deadline for Plaintiffs' formal motions for reconsideration. (Id.)

The DOL filed its brief on December 9, 2010. (Dkt. 609.) The DOL did not directly answer the question posed by the Court, but instead addressed the level of deference that should be given to AI 2010-1 prospectively. (See id.)

A hearing was held on December 20, 2010. At the hearing, the Court expressed concern regarding the manner in which FLSA2006-31 was obtained by Quicken and the Mortgage Bankers Association. (E.g., 12/20/2010 Hearing Tr. 8:14-10:23.) The Court noted that FLSA2006-31 had "completely undone" the regulatory scheme prior to 2006, (id. 4:16-6:7), which was recently restored by AI 2010-1 in March 2010, (id. 16:12-17:9). The Court also expressed frustration about the effect that FLSA2006-31 has had on this case, and on the Court's summary judgment Orders. (Id. 13:14-20:23.)

ARGUMENT

I. THIS COURT HAS AUTHORITY TO RESCIND OR MODIFY ITS ORDERS ON THE PARTIES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Under Fed. R. Civ. P. 54(b), "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does

not end the action . . . and may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." As the Sixth Circuit has made clear, "[d]istrict courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment."[7] Mallory v. Eyrich, 922 F.2d 1273, 1282 (6th Cir. 1991) (citing Marconi Wireless Tele. Co. v. United States, 320 U.S. 1, 47-48 (1943)). "A district court may modify, or even rescind, such interlocutory orders."[8] Id. (citing Simmons Co. v. Grier Bros., 258 U.S. 82, 88 (1922)). In general, district courts are justified in reconsidering prior orders when there is (1) an intervening change of controlling law, (2) new evidence available, or (3) a need to correct a clear error or prevent manifest injustice.[9] Rodriguez v. Tenn. Laborers Health & Welfare Fund, 89 Fed. Appx. 949, 959 (6th Cir. 2004) (unpublished).

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[7] The time limit for reconsideration under Local Rule 7.1(h) does not apply to situations involving the Court's inherent authority to reconsider its interlocutory orders. See Kniffen v. Macomb County, 2006 WL 3205364, at *1 (E.D. Mich. Nov. 3, 2006) ("Because Plaintiff's motion is filed well beyond the ten-day limit, the Court finds that it is more appropriately construed as a request for reconsideration under FRCP 54(b)."); McNulty v. Reddy Ice Holdings, Inc., 2009 WL 2168231, at *2 (E.D. Mich. July 17, 2009) (noting that a district court's power under Rule 54(b) is discretionary and may be exercised at "any time."). Regardless, the Court has already indicated that these time limits are not applicable here. (See Dkt. 608.)

[8] Although Quicken may argue that reconsidering summary judgment would violate the doctrine of the "law of the case," that doctrine merely "directs a court's discretion, it does not limit the tribunal's power." Cale v. Johnson, 861 F.2d 943, 947 (6th Cir. 1988) overruled on other grounds by Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999)). Indeed, if the demands of justice require, a district court "may simply change its mind." Id. at 948. The law of the case is "discretionary," and does not limit the court's authority to reopen what has already been decided. In re Kenneth Allen Knight Trust, 303 F.3d 671, 677-78 (6th Cir. 2002). To depart from the law of the case, the court must find "some cogent reason to show the prior ruling is no longer applicable," such as if the prior decision was "a clearly erroneous decision that would work a manifest injustice." Id. (internal quotation marks omitted). Exceptions to the application of the doctrine of the law of the case largely mirror the justifications generally used when courts reconsider their interlocutory orders. See, e.g., In re M.T.G., Inc., 291 B.R. 694, 699 n.6 (E.D. Mich. 2003).

[9] Under Local Rule 7.1(h)(3), a motion for reconsideration typically must "demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the

This Court unquestionably has the authority to rescind or revise its partial summary judgment Orders in this case.[10] Exercising its discretion, the Court invited Plaintiffs to bring a formal motion for reconsideration. (Dkt. 608.) As set forth below, it was clear error to give any deference to FLSA2006-31 in denying Plaintiffs' motion for summary judgment on the merits and granting summary judgment for Quicken on § 259 good faith and willfulness. Accordingly, the Court should reconsider its motions and (1) **grant** Plaintiffs' motion for summary judgment on Quicken's administrative exemption defense, and (2) **deny** Quicken's motion for summary judgment on § 259 good faith and willfulness. Correcting these previous errors will prevent the manifest injustice that would result from requiring Plaintiffs to engage in a lengthy trial on whether Quicken's loan officers had sales as their primary duty, while denying them their right to a trial on Quicken's flawed claims of § 259 good faith and lack of willfulness.

II. AS AI 2010-1 CONFIRMED, OPINION LETTER FLSA2006-31 IS ENTITLED TO NO DEFERENCE

Although Quicken previously led the Court to believe that the analysis contained in FLSA2006-31 represented the consistent and reasoned guidance of the DOL, the issuance of AI

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motion have been misled but also show that correcting the defect will result in a different disposition of the case." A palpable defect is a defect which is "obvious, clear, unmistakable, manifest, or plain." Mktg. Displays, Inc. v. Traffix Devices, Inc., 971 F. Supp. 262, 278 (E.D. Mich. 1997). The Local Rules, however, do not restrict the Court's considerable discretion on a motion for reconsideration. L.R. 7.1(h)(3) (" . . . without restricting the court's discretion . . ."). Plaintiffs prevail on their motion for reconsideration regardless of which standard, either Rule 54(b) or Local Rule 7.1(h)(3), is applied.

[10] Orders on partial summary judgment are interlocutory. E.g., Bohanan v. United Parcel Serv., 1989 WL 118007, at *1 (6th Cir. 1989) ("An order of partial summary judgment is an interlocutory order[.]"); Byrne v. Wood, Herron & Evans, LLP, 2009 WL 5064451, at *1 (E.D. Ky. Dec. 16, 2009) ("The Court's Order granting partial summary judgment in favor of Defendants was an interlocutory order."); Reuss v. First Fin. Collection Co., 2009 WL 4828600, *3 n.7 (S.D. Ohio Dec. 11, 2009) ("A decision denying a motion for partial summary judgment is interlocutory in nature and may be revisited by the trial court before final judgment is entered."); In re Dow Corning Corp., 255 B.R. 445, 541 (E.D. Mich. 2000) ("An order granting partial summary judgment is interlocutory.").

2010-1 has confirmed what Plaintiffs (and this Court) have suspected all along—that FLSA2006-31 is nothing more than an inconsistent, selective, narrow, and misleading view of the law that was drafted, negotiated, and obtained by Quicken's lawyers and their trade association for use in litigation. Because of this, the erroneous opinion letter was forcefully withdrawn by the DOL on March 24, 2010. (AI 2010-1.) In light of these recent developments, the Court should correct the error that was made in considering FLSA2006-31 at the summary judgment stage, and reconsider its Orders with no deference to FLSA2006-31.

The Supreme Court has held that the rulings, interpretations, and opinions of the DOL "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id. DOL opinion letters are "entitled to respect" under Skidmore, but only to the extent that they have "the power to persuade." Christensen v. Harris County, 529 U.S. 576, 587 (2000).

There are numerous reasons for affording no deference to FLSA2006-31. First, FLSA2006-31 is inconsistent with earlier and later DOL pronouncements. As the Court pointed out at the recent hearing with the DOL, the law was completely undone in 2006 when the DOL issued 2006-31. (12/20/2010 Tr. 5:21-24.) The Court was correct. Prior to 2006, the DOL had routinely found loan officers to be non-exempt. See, e.g., Opinion Letter, 1999 WL 1002401 (May 17, 1999); Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001); 69 Fed. Reg. at 22145-46 (citing Casas v. Conseco Fin. Corp., 2002 WL 507059 (D. Minn. 2002)). Further, unlike the

DOL's earlier pronouncements, FLSA2006-31 improperly assumed that 29 C.F.R. § 541.203(b) provided an alternative test to the requirements set forth in § 541.200. As the DOL previously concluded, loan officers do not perform work that is directly related to the management or general business operations of the employer or the employer's customers, and therefore do not fit the administrative exemption. Opinion Letter, 1999 WL 1002401 (May 17, 1999). The FLSA2006-31 letter is similarly inconsistent with the DOL's later pronouncement in AI 2010-1. (AI 2010-1.) As the Court correctly noted, and the DOL agreed, AI 2010-1 represents a restoration of the law to its prior state. (12/20/2010 Tr. 11:6-12, 11:19-12:8.) FLSA2006-31 is plainly inconsistent with both earlier and later DOL pronouncements, and it therefore unworthy of deference.

Second, FLSA2006-31 is also inconsistent with the administrative exemption regulations. For example, the regulations clearly state that an employee is non-exempt if his primary duty is "sales." See 29 C.F.R. § 541.203(b). Although FLSA2006-31 acknowledges in a footnote that "sales" rather than "customer-specific persuasive sales" is the standard, it nonetheless relied on Quicken's inappropriately narrow definition of sales to find that the hypothetical loan officers' primary duty was something other than sales. Based on this, Quicken has repeatedly and incorrectly claimed that sales is defined as "including only customer-specific persuasive sales activity." (E.g., Dkt. 615 at 2.) This claim not only flatly contradicts the plain language of the regulations, but has also been rejected by this Court. Indeed, this Court has acknowledged, "No DOL regulation nor the FLSA define or equate 'primary duty' as '50% of total work time engaged in customer-specific persuasive sales activity.'" (Dkt. 556 at 30-31.) "The only place it is suggested that the 'primary duty' test for sales requires 50% of total work time engaged in customer-specific persuasive sales activity is in the MBA's request for an opinion letter to the

DOL on September 23, 2005, apparently drafted by Quicken Loan's current attorney in his capacity as counsel for the MBA." (Id.) Further, FLSA2006-31 is also inconsistent with the regulations to the extent that it attempts to portray § 541.203(b) in a way that attempts to "swallow" the requirements of 29 C.F.R. § 541.200. (See AI 2010-1.) Because its analysis is inconsistent with the regulations, FLSA2006-31 should be given no deference.

Third, FLSA2006-31 has been withdrawn. Courts routinely refuse to afford deference to opinion letters after they are withdrawn. E.g., In re RBC Dain Rauscher Overtime Litig., 703 F. Supp. 2d 910, 926-27 & n.5 (D. Minn. 2010) ("The Court therefore finds that the two earlier opinion letters that plaintiffs cite do not determine the outcome of this issue."); Pontius v. Delta Fin. Corp., 2007 WL 1496692, at *6 (W.D. Pa. Mar. 20, 2007) (refusing to follow withdrawn opinion letter). Although Quicken would have this Court believe that FLSA2006-31 is entitled to "controlling" deference for the time periods before and after its issuance, (Dkt. 615 at 2), this is absurd. As the DOL confirmed, this Court is in no way required to defer FLSA2006-31. (See 12/20/2010 Tr. 12:10-16 ("[It is] for the Court to interpret the regulations for those time periods prior to 2010."), 12:6-8 ("We [the DOL] are not [taking] the position that the 2006 letter or the 2001 letter are still entitled to controlling deference."), 19:17-21 ("I did want to make clear that we [the DOL] did not intend, if we implied in our brief that the 2001 or 2006 letter is still entitled to [Auer] deference, that is certainly not our intention. It is not. Neither is.").)

Fourth, the Court should refuse to give FLSA2006-31 deference in this case because it was drafted, negotiated, and obtained by Quicken and its litigation counsel through their political connections and partnership with the Mortgage Bankers Association. These facts should not be taken lightly in the deference analysis. Indeed, at least one other district court has flat out

refused to consider an opinion letter obtained and used under such circumstances.[11] In Chaloupka v. SLT/TAG Inc., the district court noted that the defendant "solicited the DOL opinion letter through the auspices of the National Automobile Dealership Association (NADA), an organization to which defendants belong." 2003 WL 23538004, at *2 (D. Or. July 21, 2003). The court concluded that the "solicitation of the opinion letter by those associated with defendants" was a factor in finding that it "lacks the power to persuade." Id.

Finally, the DOL's and this Court's criticism of FLSA2006-31 is another reason to give the letter no deference. In AI 2010-1, the DOL criticized FLSA2006-31 as having a "misleading assumption and selective and narrow analysis." (AI 2010-1.) This Court has also noted its skepticism of the letter, noting that its facts were "likely drafted with that regulation in hand." (Dkt. 556 at 35.) The Court also criticized the letter's use, and Quicken's reliance on, the concept of "customer-specific persuasive sales activity." (See id. at 30-31.) Without a doubt, these expressions of distrust in FLSA2006-31 are a factor against deference.

In sum, FLSA2006-31 (1) is inconsistent with earlier and later DOL pronouncements, (2) is inconsistent with the regulations themselves, (3) has been withdrawn by the DOL, (4) was obtained under improper circumstances, and (5) has been criticized by both the DOL and this Court. If it was not clear before, it is now abundantly clear that FLSA2006-31 should be granted no deference by the Court in this case.

[11] The Court noted that "[t]he loan officers at all these companies in the MBA are doing the exact same things that they had been doing before the 2006-31 letter but they continue to meld the job description that they give to these employees when they start to match up with Wage & Hour's 2006-31 letter." (12/20/2010 Tr. 9:15-20.)

III. THE COURT SHOULD RECONSIDER AND GRANT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE MERITS

Because FLSA2006-31 can no longer play a part in the Court's analysis of Quicken's FLSA exemption defense, the only barrier to the Court granting summary judgment in Plaintiffs' favor has been removed. As the DOL noted at the recent hearing, "[it is] for the Court to interpret the [administrative exemption] regulations for those time periods prior to 2010."[12] (Id. 12:10-16.) As set forth in full in Plaintiffs' motion for summary judgment, when the evidence is viewed against the relevant regulations, no genuine issues of fact exist and Quicken has failed to meet its heavy burden of proving exemption from the FLSA. Plaintiffs have shown beyond question that their primary job duty was sales, and that they do not meet the duties requirements set forth in the DOL's regulations as interpreted by the relevant authorities.[13] (See Dkt. 432, 475; see also Dkt. 467.) Accordingly, the Court should reconsider and grant Plaintiffs' motion for summary judgment on the merits.

IV. THE COURT SHOULD RECONSIDER AND DENY QUICKEN'S MOTION FOR SUMMARY JUDGMENT ON § 259 GOOD FAITH AND WILLFULNESS

The DOL's issuance of AI 2010-1 and withdrawal of FLSA2006-31, along with the recent hearing on these issues, have also made it clear that the Court erred in granting Quicken's motions for summary judgment on its good faith defense under 29 U.S.C. § 259 and on

[12] Although it is not required to, the Court is free to follow the analytical framework that has been restored by AI 2010. (12/20/2010 Tr. 12:13-16 ("[I]f the Court agrees with the analysis and the reasoning in the AI, which we [the DOL] believe is very thorough and accurate, then the Court can reach the same conclusion.").

[13] For the sake of brevity, Plaintiffs will not repeat all of the facts and arguments contained in their summary judgment briefs on the merits, or on good faith and willfulness. Plaintiffs do not waive those arguments, and invite the Court to re-examine the original briefing on these issues in light of the guidance provided by AI 2010-1, the withdrawal of FLSA2006-31, and the recent hearing with the Department of Labor.

Plaintiffs' claims of willfulness. Denying Plaintiffs a trial on these issues would be a manifest injustice. (See Dkts. 436, 470, 476, 551, 553.)

To be sure, Quicken was initially successful in manipulating the DOL into issuing the self-serving FLSA2006-31 opinion letter, and in similarly convincing this Court to believe that the company truly relied on FLSA2006-31 in good faith and did not know that it was violating the law. (See Dkts. 555, 571.) But in the time since the Court's Orders on summary judgment it has become clear to everyone involved—including the DOL and this Court—that, at the barest minimum, there are serious questions to be answered as to (1) whether Quicken truly relied on the letter with the "good faith" contemplated by § 259 and (2) whether Quicken knew or showed reckless disregard for the fact that it was violating the FLSA.

1. Good Faith

On § 259 good faith, Quicken bears the heavy burden of pleading that it actually relied on and conformed to FLSA2006-31, and that its reliance was truly in "good faith," both subjectively and objectively. (See Dkt. 470 at 11-12.) It has become glaringly apparent that Quicken has not met, and cannot meet, its substantial burden.

As set forth in detail in Plaintiffs' opposition to Quicken's summary judgment motion, Quicken knew full well as far back as 2002 that its loan officers had sales as their primary duty, and that its classification of them as exempt was in violation of the FLSA. (See generally, Dkt. 470, 551.) Indeed, Quicken acknowledged that it would remain in violation of the law unless the regulations were "explicitly broadened." (Dkt. 551 at 2.) And when its efforts to change the law through legislation fell flat, Quicken turned to the political connections of its litigation counsel and the clout of the Mortgage Bankers Association to obtain the FLSA2006-31 opinion letter. (Id. at 3-7.) For two months, Quicken negotiated the question that would be presented to the

DOL, the facts that would be assumed, and the answer that would be received. (See id. at 5-6; Dkt. 586 at 10-11.)

But although Quicken originally convinced this Court that it had actually conformed with FLSA2006-31 and relied on it with "good faith," this is far from true. "The fact of the matter is, an extremely powerful trade association causes a shift in federal law, at least administrative law, with lobbying . . . [a]nd then they continue to change the description of their employees that work in their member associations to come close to what the Department has said, without regard to what the employees are actually doing." (12/20/2010 Tr. 8:14-22.) Quicken knew that the primary job duty of Quicken's loan officers is and has always been sales, (see Dkt. 432), and Quicken never conformed to or relied in good faith on the misleading assumption and selective and narrow analysis that it concocted for FLSA2006-31. (Dkt. 470 at 12-15.)

Moreover, the improper manner in which Quicken, its litigation counsel, and the Mortgage Bankers Association went about obtaining FLSA2006-31 also negates any inference of true good faith. (See Dkt. 551 at 2-7.) As the issuance of AI 2010-1 has now confirmed, Quicken knew that the "opinion" it was creating was nothing more than a misleading set of facts, and a selective and narrow analysis of the law. (AI 2010-1.) Plaintiffs are entitled to a trial on whether Quicken was truly relying on the letter in good faith.[14] The Court should allow this to happen by reconsidering, and denying, Quicken's motion for summary judgment.

[14] In addition, as Plaintiffs explained in their brief on the impact of AI 2010-1, (Dkt. 585 at 13-15), the Court originally granted summary judgment on § 259 because, in light of the fact that summary judgment on the merits had been denied, "no reasonable fact finder could conclude that Quicken Loan's position that it acted in conformity with the DOL 2006 Letter was not plausible." (Dkt. 555 at 32; Dkt. 571 at 26.) If the Court now grants summary judgment on the merits, this would serve as an additional reason to reconsider the issue of good faith.

2. Willfulness

A violation of the FLSA is willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the Act]." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988); Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962, 967 (6th Cir. 1991). Here, as fully set forth in Plaintiffs' summary judgment briefing, and now confirmed by the withdrawal of FLSA2006-31, the law has always been that loan officers are non-exempt if their primary duty is sales. (Dkt. 470 at 3-7; Dkt. 551 at 2-9.) Quicken knew this as early as 2002 when it became aware of the Conseco case, and confirmed it again in late 2003 through its corporate counsel. (Dkt. 551 at 2-3.) But rather than changing their conduct to conform to the law, Quicken tried to change the law (while continuing to knowingly violate it), and eventually obtained a self-serving and misleading opinion letter to defend itself during litigation. (Id. at 3-7.) This letter, FLSA2006-31 has now been withdrawn and criticized as misleading, selective, and narrow. (AI 2010-1.) Just as with Quicken's claims of "good faith," the Court should deny summary judgment on willfulness and allow the fact finder to decide after hearing the whole story.

CONCLUSION

The Plaintiffs in this case are call center employees whose job it is to sell loans in a high pressured sales environment. As the Court now knows, any claim that their primary job duty is not sales, that Quicken was not aware that their primary duty is sales, and that it relied in "good faith" on FLSA2006-31 is absurd. Because this Court is not bound to perpetuate an error, and may correct mistakes any time before final judgment, this Court should (1) **grant** Plaintiffs' motion for summary judgment on Quicken's administrative exemption defense, and (2) **deny** Quicken's motion for summary judgment on § 259 good faith and willfulness.

Dated: December 30, 2010 NICHOLS KASTER, PLLP

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: **Kathy L. Bogas, Charlotte Croson, Robert P. Davis, Michele R. Fisher, Paul J. Lukas, Jeffrey Morganroth, Mayer Morganroth, Donald H. Nichols, and Rachhana T. Srey.**

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