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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

QUICKEN LOANS INC., a Michigan corporation, *Plaintiff*, *v.* DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, *Defendant.*	Case No. CIV. S-03-0256 FCD DAD **PROOF OF SERVICE REGARDING PLAINTIFF QUICKEN LOANS INC.'S REPLY RE MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS; and Supporting Documents** Hearing Date: June 30, 2003 Time: 9 a.m. Judge: Hon. Garland E. Burrell Courtroom: 10 Date Filed: February 11, 2003 Trial Date: t/b/d

PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISO

I am employed in the county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is **Kirkpatrick & Lockhart LLP, 4 Embarcadero Center, 10th Floor, San Francisco, California 94111**.

On **June 23, 2003**, I served the foregoing document(s):

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on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed and sent as follows:

Kimberly L. Gauthier, Corporations Counsel
DEPARTMENT OF CORPORATIONS
1515 K Street, Suite 200
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Executed on June 23, 2003, at San Francisco, California.

Gail L. Pitt

PROOF OF SERVICE

QUICKEN LOANS INC., v. DEMETRIOUS A. BOUTRIS
United States District Court, Eastern District of California
Case No. CIV. S-03-0256 FCD DAD

DOCUMENTS LIST

(1) REPLY IN SUPPORT OF QUICKEN LOANS INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS;

(2) REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DATED MAY 8, 2003;

(3) QUICKEN LOANS INC.'S OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS;

(4) QUICKEN LOANS INC.'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS; and

(5) QUICKEN LOANS INC.'S EVIDENTIARY OBJECTIONS TO DECLARATIONS OF DOUGLAS M. GOODING IN SUPPORT OF DEFENDANT'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT-TAKINGS AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS.

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EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

QUICKEN LOANS INC., a Michigan corporation, *Plaintiff,* *v.* DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, *Defendant.*	Case No. S-03-256 GEB JFM (Related to case S-03-157 GEB JFM) **REPLY IN SUPPORT OF QUICKEN LOANS INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS** Date Filed: February 11, 2003 Trial Date: t/b/d Hearing Date: June 30, 2003 Hearing Time: 9:00 a.m. Hon. Garland E. Burrell (Courtroom 10)

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I. ARGUMENT

A. The Appropriation of Interest is a "Taking."

The Commissioner does not dispute that the interest affected by the per diem statutes is the property of Quicken Loans. Instead, the Commissioner argues that the per diem statutes do not effect a "regulatory taking" of that property because the per diem statutes do not "substantially" or "significantly" interfere with Quicken Loans' legitimate, investment-backed expectations.

It is, therefore, notable that the Commissioner fails to distinguish (or even mention) Brown v. Legal Foundation of Washington, __ U.S. __, 123 S.Ct. 1406 (2003), a case involving the taking of interest on money. Brown concerned a statute commonly referred to as "IOLTA," the acronym for "interest on lawyers' trust accounts." The IOLTA statute required lawyers and "Limited Practice Officers" in the state of Washington to deposit client funds in trust accounts, and pay the interest earned on those accounts to a foundation that provided indigent legal services. While it is difficult to discern from the decision whether the majority based its holding on a "per se" analysis or a Penn Central analysis (id. at 1417-19), it is clear that in the end, the majority "assumed" that the appropriation of that interest for a public use constituted a "taking." Id. at 1419.[1]

The same reasoning applies here. The appropriation of interest earned by Quicken Loans constitutes a "taking" of Quicken Loans' property. As discussed below, the Commissioner's discussion of each of the Penn Central factors fails to explain why this Court should hold otherwise.

1. The First Penn Central Factor.

The Commissioner argues that the per diem statutes do not satisfy the first Penn Central factor because they do not cause a "significant" or "severe" economic impact. That argument is wrong. There is no requirement that the impact be "significant" or "severe" in cases involving the "taking" of money. Furthermore, even assuming for the sake or argument there is such a requirement, the Commissioner has failed to submit any evidence creating an issue of fact as to the severity of the

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[1] The Court did not find the statute unconstitutional, however. It held that the owners were not entitled to any compensation because, absent the IOLTA program, the money would not have generated *any* interest in the first place. Id. at 1421-22. Thus, the clients had not suffered any loss as a result of the "taking."

impact on Quicken Loans.

a. The Economic Impact Need Not Be "Significant" or "Severe."

The Commissioner argues that Quicken Loans "has not satisfied the first prong of the Penn Central test, i.e., that the regulation effects an economic impact sufficient to rise to the level of a taking." Opposition at 4:27-5:6. While it is true that some regulatory Takings cases have described the economic impact in those cases as being "severe" or "significant," the Commissioner cites no case for the proposition that where a regulation appropriates interest, there is some minimum economic threshold below which the regulation withstands all scrutiny, no matter what investment-backed expectations are impacted and no matter the regulation's character. To the contrary, the Commissioner concedes that "there is no set formula for identifying a 'taking' which is forbidden by the Fifth Amendment." Opposition at 2:14-15; see Yancey v. United States, 915 F.2d 1534, 1541 (Fed. Cl. 1991) (there is no "automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value").

"Severity" or "significance" of the impact has played no role in Takings analyses where the governmental conduct involved the appropriation of money. For example, in Brown the Supreme Court regarded the appropriation of small amounts of interest as being a "taking."[2] If there had been a "severity" or "significance" requirement, the Supreme Court never would have "assumed" that a taking had occurred, and never would have reached the compensation issue. Similarly, in Webb's Fabulous Pharmacies v. Beckwith, 499 U.S. 155, 101 S.Ct. 446 (1980), the Supreme Court seemed to eschew any minimum requirement where a state has appropriated interest on money:

> This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. [¶] Here, however, Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." Rather, the exaction [of interest on principal] is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.

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[2] One of the plaintiffs complained about the appropriation of $4.96 in interest. Brown, 123 S.Ct. at 1416 n.5.

449 U.S. at 163, 101 S.Ct. at 452 (citations omitted). Thus, when a regulation appropriates interest on principal, that is sufficient economic impact to constitute a taking.

Further, courts have found regulatory takings even in cases of very insignificant economic impact, where one of the other two factors weighed against the constitutionality of the regulation. See, e.g., Hodel v. Irving, 481 U.S. 704, 714-16 (1987) (ban on devising very small parcels of Indian land effects a regulatory taking, even though economic impact is only $100, because the right to devise property has been "part of the Anglo-American legal system since feudal times"). Here, as in Hodel, Brown and Webb's, the per diem statutes deprive the property owner of a right that the common law has recognized for centuries. Phillips v. Washington Legal Foundation, 524 U.S. 156, 165, 118 S.Ct. 1925, 1930 (1999) ("The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's").

b. The Commissioner Has Failed To Submit Evidence Creating An Issue Of Fact Concerning the Significance Or Severity Of The Impact On Quicken Loans

Quicken Loans submitted evidence that complying with the per diem statutes would require refunds totaling "hundreds of thousands of dollars at a minimum, and potentially millions of dollars." Declaration Of Patrick McInnis In Support Of Quicken Loans Inc.'s Motion For Partial Summary Judgment And Permanent Injunction, executed March 10, 2003 ("1st McInnis Dec"), ¶ 13. The Commissioner failed to submit any evidence to dispute Mr. McInnis' Declaration. Instead, the Commissioner tries unsuccessfully to rely on its skewed interpretation of Quicken Loans' argument and evidence.

The Commissioner first asserts that Quicken Loans' Takings argument applies only to those loans that are not subject to DIDMCA or the Parity Act. Opposition at 2:23-3:9. Although Quicken Loans' Takings argument certainly focuses on loans that are not covered by either of these two federal statutes – for the simple reason that preemption arguments do not apply - Quicken Loans has asserted a Takings claim as to ***all*** of Quicken Loans' California loans. First Amended Complaint, ¶¶ 32-35; Prayer for Relief, ¶¶ 3, 5, 7 (seeking declaration that per diem statutes are "null and void and unenforceable against Quicken Loans, as well as any other mortgage lender, because the per diem

restriction constitutes an unconstitutional taking, in violation of the Takings Clause," and seeking preliminary and permanent injunctions against enforcement of per diem statutes on this ground). Quicken Loans brings this motion for partial summary judgment on that entire claim.

Even with regard to loans not covered by DIDMCA or the Parity Act, however, the Commissioner has not submitted any evidence to dispute the averment in Mr. McInnis' Declaration that loans not covered by DIDMCA or the Parity Act "are relatively large in absolute dollar amount." Declaration of Patrick McInnis In Support Of Quicken Loans Inc.'s Motion For Partial Summary Judgment – Takings ("2d McInnis Dec") at 1:16-17. When viewed in light of the $1.245 billion loan portfolio, see 2d McInnis Dec at 2:15-18, Mr. McInnis' Declaration is sufficient to shift to the Commissioner the burden of submitting conflicting evidence demonstrating a triable issue of fact. The Commissioner cannot defeat summary judgment simply by arguing that Quicken Loans' evidence should have recited precise dollar amounts. Nissan Fire & Marine Ins. Co., LTD v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).

The Commissioner argues that Quicken Loans "has substantial control over the extent of" the economic impact the per diem statutes cause. Opposition at 3:10-18. That argument is not relevant to the first factor of the Penn Central test, however. In any case, the Commissioner's evidence and argument fail to support its point.

The Commissioner mistakenly relies upon a letter from a lobbying firm, submitted on behalf of the California Mortgage Bankers Association, supporting legislation that resulted in enactment of the current version of the per diem statutes. Gooding Dec, Exhibit A. The letter and the statements in it constitute inadmissible hearsay, and on that basis Quicken Loans objects to its use as evidence.[3] Even if the Court considers the letter, the Commissioner has failed to show how that letter bears in any way on Quicken Loans or its claims. The Commissioner has not submitted any evidence that Quicken Loans was a member of that organization when the letter was written, or that Quicken Loans adopted or in any way acquiesced in the positions taken in that letter. The Commissioner fails to cite

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[3] Documents submitted to a legislative committee do not constitute "public records" within the meaning of Federal Rules of Evidence, Rule 803. The letter in question was not prepared by a public agency, and did not set forth the activities of the agency, matters observed by the agency, or factual findings of the agency.

any authority holding that the positions of a lobbyist for a trade organization can be imputed to members of a trade association or, in the case of Quicken Loans, imputed to non-members.[4] Thus, even if the letter were admissible, it would fail to support the argument that Quicken Loans had "control" over the economic impact caused by the statute.

The Commissioner next argues, "if there is some delay in recordation, the per diem statutes in California simply assign the burden of that to the lender, rather than to the borrower." Opposition at 3:19-4:1. Again, the Commissioner does not explain why this is relevant to the first factor of the Penn Central test. Further, the Commissioner's assertion lacks logical connection to the Commissioner's point that Quicken Loans controlled the economic impact.

In any case, requiring Quicken Loans to refund any interest that it earned on lawful loans that it made to its borrowers does not relieve any borrower of any burden whatsoever. As this Court has noted, "[t]he Commissioner's claim that the per diem statutes are designed to protect consumers from unseen costs is unpersuasive. Once the lender distributes funds to the consumer, the consumer has received the benefit of the bargain." May 7, 2003 Order in the related case National City Bank of Indiana v. Boutris, E.D. Cal. Civ. No. S-03-0655 GEB JFM ("NCM May 7 Order") at 22:11-14. The right to possession is transferred when the grant deed is executed, delivered and accepted. Miller, Starr and Regalia, California Real Estate 3d, § 8:36 at 66-68. The status of the deed of trust is quite simply -- and entirely -- irrelevant to the right to possession.

The Commissioner then argues that no taking occurs because the impact of days of lost interest is *de minimis* in comparison to total interest earned over the life of a given loan. The Commissioner also argues that the total impact is small when compared to the large size of Quicken Loans' loan portfolio. Again, the Commissioner cites no case for the proposition that an economic impact costing hundreds of thousands to millions of dollars must be compared to the plaintiff's assets or revenues, or that the impact may be ignored if the plaintiff's assets or revenues are sufficiently large in comparison.

The Commissioner attempts to distinguish Eastern Enterprises v. Apfel, 524 U.S. 498, 531-32,

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[4] Quicken Loans recently joined the CMBA, years after the letter was written.

118 S.Ct. 2131, 2149-51 (1998) on the sole ground that the economic burden at issue there was the result of retroactive legislation. Opposition at 4:20-26. This goes to the second and third factors of the Penn Central analysis (addressed below), not the first factor. Regarding the first factor—economic impact—the impact of hundreds of thousands to millions of dollars over two years here is close to the $5 million impact over the first year in Apfel. 524 U.S. at 517, 531.

In any event, the retroactive character of the regulation at issue in Apfel was no worse than the character of the per diem statutes. "The pre-closing disclosures required by the Truth in Lending Act [and other federal regulations] make it impossible to change the interest rate set on a loan after closing." NCM May 7 Order at 22:4-10. Thus, "once the lender and borrower's loan transaction is finalized, the lender has no way of collecting interest on loaned mortgage funds that would have been collected absent delays in recording the deed of trust." May 8, 2003 Order in this action ("May 8 Order") at 9:25-28. That delay retroactively deprives Quicken Loans of interest for which it and the borrower bargained.

The Commissioner attempts to distinguish Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979) on the ground that the regulation challenged in that case deprived the landowner of the ability to charge 100% of the $72 annual fee for access to the plaintiff's pond. Opposition at 4:8-19. But the use fees were only a fraction of the income the plaintiff earned from the pond, and the regulation did not affect that income whatsoever. See 444 U.S. at 167-68, 100 S.Ct. at 386 (describing revenue from 1,500 marina waterfront lot lessees, 86 non-marina lot lessees and 56 nonresident boat owners). The Court nevertheless found that the limited economic impact that the challenged regulation caused was sufficient to support the finding of a regulatory taking. Further, the point of Kaiser Aetna was that a taking occurs when the government removes one of the fundamental attributes of the property in question. In the case of the marina in Kaiser Aetna, the government's removal of the right to exclude others constituted a taking because the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . ." 444 U.S. at 176, 100 S.Ct. at 391. In the case of money, interest is one of the sticks in the bundle. Phillips, 524 U.S. at 165, 118 S.Ct. at 1930.

2. The Second Penn Central Factor.

The Commissioner argues that Quicken Loans' interest expectation was not "legitimate" because Quicken Loans knew of the existence of the per diem statutes when it made the loans. Opposition at 5:8-17; 6:7-9. The Commissioner's argument fails for two separate and independent reasons.

First, even if the per diem statutes were otherwise enforceable, Quicken Loans would be entitled to expect that it could start collecting interest on the day preceding delivery of the deed to the recorder. Why is this? Because California law requires county recorders immediately to stamp the underlying deed of trust once it is delivered to the recorder's office. Cal. Gov't Code section 27320 (county recorder required to reproduce and index all documents filed "without delay"); Miller, Starr and Regalia, California Real Estate 3d, § 11:19 at 55 (West Gp. 2000). Quicken Loans is entitled to expect that it will not be penalized for delays by the recorder.

Second, even if it was unreasonable for Quicken Loans to expect that county clerks would stamp the underlying deeds "without delay," Quicken Loans until recently was unaware that the Commissioner would interpret and apply the per diem statutes in a manner that would result in an unconstitutional taking. Under California law, "[a]n instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." Cal. Civ. Code section 1170. Thus, by legal definition, Quicken Loans "recorded" the deeds of trust when it "deposited [them] in the recorders office." See Cal. Gov't Code section 27211, 27203(c). The Commissioner, however, maintains that an instrument is not deemed to be recorded until the recorder affixes an official seal to the document and makes the proper entries in the indices, regardless of when the document was delivered. Commissioner's Response to Quicken Loans' Statement of Undisputed Facts, ¶ 8.

The Commissioner relies on Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006, 104 S.Ct. 2862, 2874-75 (1984) in asserting that Quicken Loans' interest expectation was not "legitimate," but the Commissioner's reliance is misplaced. In Ruckelshaus, the plaintiff alleged that a federal regulation that permitted the government to disclose to competitors trade secrets protected under state law was a regulatory taking. The trial court enjoined enforcement of the regulation in its entirety; the

Supreme Court affirmed in part and reversed in part. The Court noted that the statute was amended in 1978 to authorize the government to disclose to competitors any trade secrets submitted after that date. The Court held that, as of that date, the plaintiff had no reasonable investment-backed expectation that data it submitted thereafter would be protected from disclosure, so there would be no taking by the government's disclosure of that information.

The Court also held, however, that there would be a taking if the government disclosed any of the plaintiff's trade secrets that the plaintiff submitted before the government received authorization to disclose the data, and so upheld the injunction regarding data submitted before 1978. Id. at 1010-12. Here, as in Ruckelshaus regarding the data submitted prior to 1978, Quicken Loans has a reasonable investment-backed expectation that the government will protect Quicken Loans' property by complying with the law; *i.e.*, that the county clerks will stamp the deeds that underlie Quicken Loans' loans "without delay." As in Ruckelshaus, impairment of Quicken Loans' property rights, through non-compliance with the law, would be an unlawful taking.

Further, unlike in Ruckelshaus, where the plaintiff was aware of the law in 1978, Quicken Loans was not aware until March 11, 2002 (the date of the letter from the Commissioner's staff) that the Commissioner would interpret the per diem statutes in this way that raises this serious constitutional issue. Thus, even if it was unreasonable for Quicken Loans to expect that county clerks would comply with the law, Ruckelshaus is inapt for every loan originated before March 11, 2002.

The Commissioner relies on Allen v. Cuomo, 100 F.3d 253, 262 (1996), for the same proposition as Ruckelshaus, *i.e.*, that there is no violation of a reasonable investment-backed expectation where the plaintiff is notified in advance that the government would impose the challenged regulation. As explained above, however, Quicken Loans had a reasonable investment-backed expectation that county clerks will comply with the law, and Quicken Loans was not put on notice that the Commissioner would interpret the per diem statutes in a manner that raises serious constitutional issues until March 11, 2002.

Illegal delay by recorders and facially illegal statutory interpretation by the Commissioner cannot defeat Quicken Loans' otherwise legitimate investment-backed expectations.

3. The Third Penn Central Factor.

The Commissioner argues that the per diem statutes do not effect an appropriation of Quicken Loans' property because the statute is part of a regulatory scheme. Opposition at 6:11-23. That argument begs the question. Regulatory schemes can constitute takings. That is, of course, the entire point of the Penn Central analysis.

The Commissioner correctly concedes that the per diem statutes do not appropriate Quicken Loans' property for a "public use,"[5] but that does not negate the taking. Rather, that concession means that if the Court concludes that a taking has occurred, the absence of a "public use" for the taking automatically renders the statute unconstitutional. Brown, 123 S.Ct. at 1417.

If the per diem statutes did effect such an appropriation of property, they would be a "per se" taking. If there is no such appropriation, the "ad hoc" or Penn Central test is used to determine whether they violate the Takings Clause. Brown, 128 S. Ct. at 1418.

The Commissioner argues that the per diem statutes are a "consumer protection statute." Opposition at 6:19-22. As this Court has noted, however, the per diem statutes do not protect consumers from anything. NCM May 7 Order at 22:11-14.

The Commissioner argues that Quicken Loans "misconstrues" Apfel, in that the economic burden the regulation imposed on the plaintiff in Apfel "was simply based on the number of employees the company had once employed, not on 'any commitment the employers made or to any injury they caused.'" Opposition at 6:24-28. The Commissioner does not explain how Quicken Loans misconstrued that case, however. As in Apfel, the per diem statutes impose liability based on actions taken by individuals over whom Quicken Loans has no control. In Apfel, liability was based on the plaintiff's former employees. Here, liability is based on delay caused by county recorders. The character of the regulation found to be a taking in Apfel is no different from the character of the per diem statutes challenged here.

Finally, the Commissioner does not even claim, much less demonstrate, that Quicken Loans misconstrued Kaiser Aetna, 444 U.S. at 179-80, 100 S.Ct. at 392-93, regarding the character of the per diem statutes.

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[5] Opposition at 6:11-12; 7:2-3 (the per diem statutes "are not a taking for any public use whatsoever").

For these reasons, there is no genuine dispute of material fact regarding the Penn Central test and Quicken Loans is entitled to judgment as a matter of law.

B. There Is No Genuine Dispute Of Material Fact Regarding Whether The Per Diem Statutes Substantially Advance A Legitimate State Interest And Quicken Loans Is Entitled To Judgment As A Matter Of Law.

Quicken Loans cited four cases for the proposition that the Takings Clause requires that a regulation substantially advance a legitimate state interest. See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 334, 122 S.Ct. 1465, 1485 (2002); Agins v. City of Tiburon, 447 U.S. 255, 261-62, 100 S.Ct. 2138, 2141-42 (1980); Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 721 (1999). The Commissioner points out that the language in Tahoe-Sierra was dicta, but the Commissioner does not and cannot dispute that the other three cases were holdings and not merely dicta. Furthermore, Brown is unambiguous in articulating the requirement that the taking must be for a public purpose: "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." Brown, 123 S.Ct. at 1417.

The Commissioner argues that states have a legitimate interest in regulating banking and lending. Opposition at 7:12-21. This does not address the question presented, which is whether the per diem statutes substantially advance a legitimate state interest. On this question, this Court has already spoken, stating that the per diem statutes simply do not protect customers. NCM May 7 Order at 22:11-14. To the contrary, the Commissioner's action would force lenders to grant windfalls to individual consumers based solely on the fortuity of how long it takes the county recorder's office to stamp consumers' deeds of trust or the escrow agent to deliver the deed to the recorder's office.

The Commissioner seeks to water down the legal standard from (1) whether the regulation substantially advances a state interest, to (2) whether the state legislature rationally could have believed that the regulation would promote its objective. Opposition at 7:22-8:3. The Commissioner cites to Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 242, 104 S.Ct. 2321, 2330 (1984), and Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72, 101 S.Ct. 2070,

2085 (1981). Neither case supports the Commissioner, as neither case involved this issue. In Midkiff, the issue was whether a "per se" taking was for a public use, in which case the regulation was enforceable but required compensation, or not for a public use, in which case the regulation was unenforceable even with compensation. In Western & Southern, the plaintiff brought challenges under the Commerce and Equal Protection Clauses, not the Takings Clause.

Thus, it is irrelevant that "the California legislature could rationally believe that it was necessary and appropriate to allocate to lenders the burden, when recordation did not promptly follow funding," as asserted by the Commissioner. Opposition at 8:1-3. Because the Commissioner has introduced no evidence regarding whether the per diem statutes substantially advance a legitimate state interest, the Commissioner has not carried his burden of demonstrating a genuine issue of material fact.

Thus, there is no genuine dispute of material fact regarding whether the per diem statutes substantially advance a legitimate state interest and Quicken Loans is entitled to judgment as a matter of law.

II. CONCLUSION

For the foregoing reasons and those in the Points and Authorities, Quicken Loans' motion for partial summary judgment should be granted.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP

Dated: June _, 2003

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

QUICKEN LOANS INC., a Michigan corporation, *Plaintiff*, *v.* DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, *Defendant.*	Case No. S-03-256 GEB JFM (Related to case S-03-157 GEB JFM) **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DATED MAY 8, 2003** Date Filed: February 11, 2003 Trial Date: t/b/d Hearing Date: June 30, 2003 Hearing Time: 9 a.m. Hon. Garland E. Burrell (Courtroom 10)

ARGUMENT

The Commissioner argues that Quicken Loans did not demonstrate that it made any alternative mortgage loans that would fall outside the scope of DIDMCA, but within the scope of the Parity Act. Although counsel admittedly could have made the point more clear, such evidence is in the record before this Court. See Declaration of Patrick McInnis ¶ 3 ("Quicken Loans makes a variety of loans secured by residential mortgages, including . . . home equity residential mortgage loans"); ¶ 16 ("All of the loans Quicken Loans makes are secured by liens on residential real property" – as opposed to just first deeds of trust); ¶ 18 ("Quicken Loans regularly makes alternative mortgage transactions. In fact, Quicken Loans made in excess of 1,800 alternative mortgage transactions from 1999 through the present."); see also Statement of Undisputed Facts 5. Furthermore, Quicken Loans made it clear in its Notice of Motion and Motion for Summary Judgment that Quicken Loans made loans that would be covered by the Parity Act, but not DIDMCA:

> . . . Plaintiff Quicken Loans Inc. ("Quicken Loans") will and hereby does move this Court for an order granting Quicken Loans partial summary judgment . . . as to residential mortgage loans made by Quicken Loans that ***either*** qualify under [DIDMCA] ***or*** are made pursuant to the [Parity Act], ***or are covered by both statutes***.

Plaintiff's Notice of Motion and Motion for Partial Summary Judgment at iv:4-14 (emphasis added). In its opening brief, Quicken Loans attempted to explain that each statute applied to a different class of loans: "DIDMCA expressly preempts state statutes . . . on first-lien residential mortgage loans. . . The Parity Act expressly preempts state statutes that restrict the lending activities of nonfederally chartered housing creditors making 'alternative mortgage transactions.'" Id. at 1:12-18. "An 'alternative mortgage transaction' essentially means a mortgage transaction with terms that differ from a traditional fixed-rate, fixed-term

mortgage." Id. at 10:9-10. By failing to consider this evidence and argument, the Court clearly erred.[1]

The Commissioner impliedly agreed in his opposition that the issue of the Parity Act was ripe for summary judgment both in his "Facts" section and through a thorough briefing of the Parity Act itself. See Opp'n to MSJ at 1:14-21 ("the Commissioner has admitted sufficient facts upon which he believes this Court may make a substantive ruling on the motion . . . ."); id. at 9:1-17:11. The Commissioner in fact devoted significantly more space in his brief to refuting Quicken Loans' Parity Act arguments than to refuting Quicken Loans' DIDMCA claim. Compare Opp'n to MSJ at 1:22-8:28 (briefing on DIDMCA) with 9:1-17:11 (briefing on the Parity Act).

The Court should also reconsider its Order because a failure to rule on the Parity Act claim will leave a significant issue between the Commissioner and Quicken Loans unresolved: whether the Parity Act prevents the Commissioner from enforcing California's "per diem" statutes against Quicken Loans as to those loans that do not qualify for DIDMCA preemption. Quicken Loans brought this declaratory action in the first instance in order to "clarify[] and settle[] the legal relations" between itself and the Commissioner, and to get relief from the "uncertainty, insecurity, and controversy" that the Commissioner's enforcement of the "per diem" statutes has caused. See Eureka Federal Savings & Loan v. American Cas. Co., 873 F.2d 229, 231 (9th Cir. 1989) (declaratory relief is appropriate where these goals will be accomplished). Without a ruling, Quicken Loans is uncertain whether the "per diem" statutes apply to a subset of its loans not covered by DIDMCA.

The final reason why this Court should reconsider its May 8 Order is a practical one: the Commissioner's position would result in a waste of the parties' and this Court's resources. If this Court declines to rule on the Parity Act now, Quicken Loans will have no choice but to proceed to trial on the only Parity Act issue that remains – whether Quicken

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[1] Moreover, if Quicken Loans did ***not*** make such loans, there would be no point to seeking reconsideration of this Court's Order. Quicken Loans' victory would already be complete.

Loans makes loans that qualify for Parity Act preemption, but not DIDMCA preemption. Once Quicken Loans establishes beyond doubt that it does make such loans, Quicken Loans will seek a ruling via a motion for judgment as a matter of law. However, the parties and this Court will have wasted a significant amount of time and money in the interim – in Quicken Loans' view, unnecessarily.

DEVELOPMENTS SUBSEQUENT TO HEARING

Quicken Loans does not premise this motion on a change in law following the hearing. It is, however, appropriate to advise the Court regarding the status of Glukowsky v. Equity One, 821 A.2d 485 (N.J. App. Ct. 2003), which is noncontrolling, adverse Parity Act authority. At the May 5 hearing on Quicken Loans' motion for partial summary judgment, counsel brought Glukowsky to the Court's attention. Counsel subsequently notified the Court that New Jersey's Appellate Division had stayed Glukowsky. Counsel has learned that the Appellate Division denied reconsideration of the decision on June 17, 2003.

CONCLUSION

In accordance with the foregoing, Quicken Loans respectfully requests this Court to reconsider its May 8 Order and rule on Quicken Loans' claim regarding Parity Act preemption.

Dated: June 23, 2003

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

QUICKEN LOANS INC., a Michigan corporation, *Plaintiff,* *v.* DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, *Defendant.*	Case No. S-03-256 GEB JFM (Related to case S-03-157 GEB JFM) **QUICKEN LOANS INC.'S OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS** Date Filed: February 11, 2003 Trial Date: t/b/d Hearing Date: June 30, 2003 Hearing Time: 9:00 a.m. Hon. Garland E. Burrell (Courtroom 10)

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Plaintiff Quicken Loans Inc. hereby opposes Defendant's Cross-Motion For Partial Summary Judgment – Takings for the reasons set forth in Quicken Loans' Points And Authorities In Support Of Quicken Loans' Motion For Partial Summary Judgment – Takings, and Reply In Support Of Quicken Loans' Motion For Partial Summary Judgment – Takings, which are incorporated herein. The Reply is reproduced below for the Court's convenience.

I. ARGUMENT

A. The Appropriation of Interest is a "Taking."

The Commissioner does not dispute that the interest affected by the per diem statutes is the property of Quicken Loans. Instead, the Commissioner argues that the per diem statutes do not effect a "regulatory taking" of that property because the per diem statutes do not "substantially" or "significantly" interfere with Quicken Loans' legitimate, investment-backed expectations.

It is, therefore, notable that the Commissioner fails to distinguish (or even mention) Brown v. Legal Foundation of Washington, __ U.S. __, 123 S.Ct. 1406 (2003), a case involving the taking of interest on money. Brown concerned a statute commonly referred to as "IOLTA," the acronym for "interest on lawyers' trust accounts." The IOLTA statute required lawyers and "Limited Practice Officers" in the state of Washington to deposit client funds in trust accounts, and pay the interest earned on those accounts to a foundation that provided indigent legal services. While it is difficult to discern from the decision whether the majority based its holding on a "per se" analysis or a Penn Central analysis (id. at 1417-19), it is clear that in the end, the majority "assumed" that the appropriation of that interest for a public use constituted a "taking." Id. at 1419.[1]

The same reasoning applies here. The appropriation of interest earned by Quicken Loans constitutes a "taking" of Quicken Loans' property. As discussed below, the Commissioner's

[1] The Court did not find the statute unconstitutional, however. It held that the owners were not entitled to any compensation because, absent the IOLTA program, the money would not have generated *any* interest in the first place. Id. at 1421-22. Thus, the clients had not suffered any loss as a result of the "taking."

discussion of each of the Penn Central factors fails to explain why this Court should hold otherwise.

1. The First Penn Central Factor.

The Commissioner argues that the per diem statutes do not satisfy the first Penn Central factor because they do not cause a "significant" or "severe" economic impact. That argument is wrong. There is no requirement that the impact be "significant" or "severe" in cases involving the "taking" of money. Furthermore, even assuming for the sake or argument there is such a requirement, the Commissioner has failed to submit any evidence creating an issue of fact as to the severity of the impact on Quicken Loans.

a. The Economic Impact Need Not Be "Significant" or "Severe."

The Commissioner argues that Quicken Loans "has not satisfied the first prong of the Penn Central test, i.e., that the regulation effects an economic impact sufficient to rise to the level of a taking." Opposition at 4:27-5:6. While it is true that some regulatory takings cases have described the economic impact in those cases as being "severe" or "significant," the Commissioner cites no case for the proposition that where a regulation appropriates interest, there is some minimum economic threshold below which the regulation withstands all scrutiny, no matter what investment-backed expectations are impacted and no matter the regulation's character. To the contrary, the Commissioner concedes that "there is no set formula for identifying a 'taking' which is forbidden by the Fifth Amendment." Opposition at 2:14-15; see Yancey v. United States, 915 F.2d 1534, 1541 (Fed. Cl. 1991) (there is no "automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value").

"Severity" or "significance" of the impact has played no role in takings analyses where the governmental conduct involved the appropriation of money. For example, in Brown the

Supreme Court regarded the appropriation of small amounts of interest as being a "taking."[2] If there had been a "severity" or "significance" requirement, the Supreme Court never would have "assumed" that a taking had occurred, and never would have reached the compensation issue. Similarly, in Webb's Fabulous Pharmacies v. Beckwith, 499 U.S. 155, 101 S.Ct. 446 (1980), the Supreme Court seemed to eschew any minimum requirement where a state has appropriated interest on money:

> Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." Rather, the exaction [of interest on principal] is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.

449 U.S. at 163, 101 S.Ct. at 452 (citations omitted). Thus, when a regulation appropriates interest on principal, that is sufficient economic impact to constitute a taking.

Further, courts have found regulatory takings even in cases of very insignificant economic impact, where one of the other two factors weighed against the constitutionality of the regulation. See, e.g., Hodel v. Irving, 481 U.S. 704, 714-16 (1987) (ban on devising very small parcels of Indian land effects a regulatory taking, even though economic impact is only $100, because the right to devise property has been "part of the Anglo-American legal system since feudal times"). Here, as in Hodel, Brown and Webb's, the per diem statutes deprive the property owner of a right that the common law has recognized for centuries. Phillips v. Washington Legal Foundation, 524 U.S. 156, 165, 118 S.Ct. 1925, 1930 (1999) ("The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's").

b. The Commissioner Has Failed To Submit Evidence Creating An Issue Of Fact Concerning the Significance Or Severity Of The Impact On Quicken Loans

Quicken Loans submitted evidence that complying with the per diem statutes would require refunds totaling "hundreds of thousands of dollars at a minimum, and potentially millions

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[2] One of the plaintiffs complained about the appropriation of $4.96 in interest. Brown, 123 S.Ct. at 1416 n.5.

of dollars." Declaration Of Patrick McInnis In Support Of Quicken Loans Inc.'s Motion For Partial Summary Judgment And Permanent Injunction, executed March 10, 2003 ("1st McInnis Dec"), ¶ 13. The Commissioner failed to submit any evidence to dispute Mr. McInnis' Declaration. Instead, the Commissioner tries unsuccessfully to rely on its skewed interpretation of Quicken Loans' argument and evidence.

The Commissioner first asserts that Quicken Loans' Takings argument applies only to those loans that are not subject to DIDMCA or the Parity Act. Opposition at 2:23-3:9. Although Quicken Loans' Takings argument certainly focuses on loans that are not covered by either of these two federal statutes – for the simple reason that preemption arguments do not apply - Quicken Loans has asserted a Takings claim as to ***all*** of Quicken Loans' California loans. First Amended Complaint, ¶¶ 32-35; Prayer for Relief, ¶¶ 3, 5, 7 (seeking declaration that per diem statutes are "null and void and unenforceable against Quicken Loans, as well as any other mortgage lender, because the per diem restriction constitutes an unconstitutional taking, in violation of the Takings Clause," and seeking preliminary and permanent injunctions against enforcement of per diem statutes on this ground). Quicken Loans brings this motion for partial summary judgment on that entire claim.

Even with regard to loans not covered by DIDMCA or the Parity Act, however, the Commissioner has not submitted any evidence to dispute the averment in Mr. McInnis' Declaration that loans not covered by DIDMCA or the Parity Act "are relatively large in absolute dollar amount." Declaration of Patrick McInnis In Support Of Quicken Loans Inc.'s Motion For Partial Summary Judgment – Takings ("2d McInnis Dec") at 1:16-17. When viewed in light of the $1.245 billion loan portfolio, see 2d McInnis Dec at 2:15-18, Mr. McInnis' Declaration is sufficient to shift to the Commissioner the burden of submitting conflicting evidence demonstrating a triable issue of fact. The Commissioner cannot defeat summary judgment simply by arguing that Quicken Loans' evidence should have recited precise dollar amounts. Nissan Fire & Marine Ins. Co., LTD v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).

The Commissioner argues that Quicken Loans "has substantial control over the extent of"

the economic impact the per diem statutes cause. Opposition at 3:10-18. That argument is not relevant to the first factor of the Penn Central test, however. In any case, the Commissioner's evidence and argument fail to support its point.

The Commissioner mistakenly relies upon a letter from a lobbying firm, submitted on behalf of the California Mortgage Bankers Association, supporting legislation that resulted in enactment of the current version of the per diem statutes. Gooding Dec, Exhibit A. The letter and the statements in it constitute inadmissible hearsay, and on that basis Quicken Loans objects to its use as evidence.[3] Even if the Court considers the letter, the Commissioner has failed to show how that letter bears in any way on Quicken Loans or its claims. The Commissioner has not submitted any evidence that Quicken Loans was a member of that organization when the letter was written, or that Quicken Loans adopted or in any way acquiesced in the positions taken in that letter. The Commissioner fails to cite any authority holding that the positions of a lobbyist for a trade organization can be imputed to members of a trade association or, in the case of Quicken Loans, imputed to non-members.[4] Thus, even if the letter were admissible, it would fail to support the argument that Quicken Loans had "control" over the economic impact caused by the statute.

The Commissioner next argues, "if there is some delay in recordation, the per diem statutes in California simply assign the burden of that to the lender, rather than to the borrower." Opposition at 3:19-4:1. Again, the Commissioner does not explain why this is relevant to the first factor of the Penn Central test. Further, the Commissioner's assertion lacks logical connection to the Commissioner's point that Quicken Loans controlled the economic impact.

In any case, requiring Quicken Loans to refund any interest that it earned on lawful loans that it made to its borrowers does not relieve any borrower of any burden whatsoever. As this

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[3] Documents submitted to a legislative committee do not constitute "public records" within the meaning of Federal Rules of Evidence, Rule 803. The letter in question was not prepared by a public agency, and did not set forth the activities of the agency, matters observed by the agency, or factual findings of the agency.

[4] Quicken Loans recently joined the CMBA, years after the letter was written.

Court has noted, "[t]he Commissioner's claim that the per diem statutes are designed to protect consumers from unseen costs is unpersuasive. Once the lender distributes funds to the consumer, the consumer has received the benefit of the bargain." May 7, 2003 Order in the related case National City Bank of Indiana v. Boutris, E.D. Cal. Civ. No. S-03-0655 GEB JFM ("NCM May 7 Order") at 22:11-14. The right to possession is transferred when the grant deed is executed, delivered and accepted. Miller, Starr and Regalia, California Real Estate 3d, § 8:36 at 66-68. The status of the deed of trust is quite simply -- and entirely -- irrelevant to the right to possession.

The Commissioner then argues that no taking occurs because the impact of days of lost interest is *de minimis* in comparison to total interest earned over the life of a given loan. The Commissioner also argues that the total impact is small when compared to the large size of Quicken Loans' loan portfolio. Again, the Commissioner cites no case for the proposition that an economic impact costing hundreds of thousands to millions of dollars must be compared to the plaintiff's assets or revenues, or that the impact may be ignored if the plaintiff's assets or revenues are sufficiently large in comparison.

The Commissioner attempts to distinguish Eastern Enterprises v. Apfel, 524 U.S. 498, 531-32, 118 S.Ct. 2131, 2149-51 (1998) on the sole ground that the economic burden at issue there was the result of retroactive legislation. Opposition at 4:20-26. This goes to the second and third factors of the Penn Central analysis (addressed below), not the first factor. Regarding the first factor—economic impact—the impact of hundreds of thousands to millions of dollars over two years here is close to the $5 million impact over the first year in Apfel. 524 U.S. at 517, 531.

In any event, the retroactive character of the regulation at issue in Apfel was no worse than the character of the per diem statutes. "The pre-closing disclosures required by the Truth in Lending Act [and other federal regulations] make it impossible to change the interest rate set on a loan after closing." NCM May 7 Order at 22:4-10. Thus, "once the lender and borrower's loan transaction is finalized, the lender has no way of collecting interest on loaned mortgage funds

that would have been collected absent delays in recording the deed of trust." May 8, 2003 Order in this action ("May 8 Order") at 9:25-28. That delay retroactively deprives Quicken Loans of interest for which it and the borrower bargained.

The Commissioner attempts to distinguish Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979) on the ground that the regulation challenged in that case deprived the landowner of the ability to charge 100% of the $72 annual fee for access to the plaintiff's pond. Opposition at 4:8-19. But the use fees were only a fraction of the income the plaintiff earned from the pond, and the regulation did not affect that income whatsoever. See 444 U.S. at 167-68, 100 S.Ct. at 386 (describing revenue from 1,500 marina waterfront lot lessees, 86 non-marina lot lessees and 56 nonresident boat owners). The Court nevertheless found that the limited economic impact that the challenged regulation caused was sufficient to support the finding of a regulatory taking. Further, the point of Kaiser Aetna was that a taking occurs when the government removes one of the fundamental attributes of the property in question. In the case of the marina in Kaiser Aetna, the government's removal of the right to exclude others constituted a taking because the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . ." 444 U.S. at 176, 100 S.Ct. at 391. In the case of money, interest is one of the sticks in the bundle. Phillips, 524 U.S. at 165, 118 S.Ct. at 1930.

2. The Second Penn Central Factor.

The Commissioner argues that Quicken Loans' interest expectation was not "legitimate" because Quicken Loans knew of the existence of the per diem statutes when it made the loans. Opposition at 5:8-17; 6:7-9. The Commissioner's argument fails for two separate and independent reasons.

First, even if the per diem statutes were otherwise enforceable, Quicken Loans would be entitled to expect that it could start collecting interest on the day preceding delivery of the deed to the recorder. Why is this? Because California law requires county recorders immediately to stamp the underlying deed of trust once it is delivered to the recorder's office. Cal. Gov't Code

section 27320 (county recorder required to reproduce and index all documents filed "without delay"); Miller, Starr and Regalia, California Real Estate 3d, § 11:19 at 55 (West Gp. 2000). Quicken Loans is entitled to expect that it will not be penalized for delays by the recorder.

Second, even if it was unreasonable for Quicken Loans to expect that county clerks would stamp the underlying deeds "without delay," Quicken Loans until recently was unaware that the Commissioner would interpret and apply the per diem statutes in a manner that would result in an unconstitutional taking. Under California law, "[a]n instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." Cal. Civ. Code section 1170. Thus, by legal definition, Quicken Loans "recorded" the deeds of trust when it "deposited [them] in the recorders office." See Cal. Gov't Code section 27211, 27203(c). The Commissioner, however, maintains that an instrument is not deemed to be recorded until the recorder affixes an official seal to the document and makes the proper entries in the indices, regardless of when the document was delivered. Commissioner's Response to Quicken Loans' Statement of Undisputed Facts, ¶ 8.

The Commissioner relies on Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006, 104 S.Ct. 2862, 2874-75 (1984) in asserting that Quicken Loans' interest expectation was not "legitimate," but the Commissioner's reliance is misplaced. In Ruckelshaus, the plaintiff alleged that a federal regulation that permitted the government to disclose to competitors trade secrets protected under state law was a regulatory taking. The trial court enjoined enforcement of the regulation in its entirety; the Supreme Court affirmed in part and reversed in part. The Court noted that the statute was amended in 1978 to authorize the government to disclose to competitors any trade secrets submitted after that date. The Court held that, as of that date, the plaintiff had no reasonable investment-backed expectation that data it submitted thereafter would be protected from disclosure, so there would be no taking by the government's disclosure of that information.

The Court also held, however, that there would be a taking if the government disclosed

any of the plaintiff's trade secrets that the plaintiff submitted before the government received authorization to disclose the data, and so upheld the injunction regarding data submitted before 1978. Id. at 1010-12. Here, as in Ruckelshaus regarding the data submitted prior to 1978, Quicken Loans has a reasonable investment-backed expectation that the government will protect Quicken Loans' property by complying with the law; *i.e.*, that the county clerks will stamp the deeds that underlie Quicken Loans' loans "without delay." As in Ruckelshaus, impairment of Quicken Loans' property rights, through non-compliance with the law, would be an unlawful taking.

Further, unlike in Ruckelshaus, where the plaintiff was aware of the law in 1978, Quicken Loans was not aware until March 11, 2002 (the date of the letter from the Commissioner's staff) that the Commissioner would interpret the per diem statutes in this way that raises this serious constitutional issue. Thus, even if it was unreasonable for Quicken Loans to expect that county clerks would comply with the law, Ruckelshaus is inapt for every loan originated before March 11, 2002.

The Commissioner relies on Allen v. Cuomo, 100 F.3d 253, 262 (1996), for the same proposition as Ruckelshaus, *i.e.*, that there is no violation of a reasonable investment-backed expectation where the plaintiff is notified in advance that the government would impose the challenged regulation. As explained above, however, Quicken Loans had a reasonable investment-backed expectation that county clerks will comply with the law, and Quicken Loans was not put on notice that the Commissioner would interpret the per diem statutes in a manner that raises serious constitutional issues until March 11, 2002.

Illegal delay by recorders and facially illegal statutory interpretation by the Commissioner cannot defeat Quicken Loans' otherwise legitimate investment-backed expectations.

3. The Third Penn Central Factor.

The Commissioner argues that the per diem statutes do not effect an appropriation of Quicken Loans' property because the statute is part of a regulatory scheme. Opposition at 6:11-

23. That argument begs the question. Regulatory schemes can constitute takings. That is, of course, the entire point of the Penn Central analysis.

The Commissioner correctly concedes that the per diem statutes do not appropriate Quicken Loans' property for a "public use,"[5] but that does not negate the taking. Rather, that concession means that if the Court concludes that a taking has occurred, the absence of a "public use" for the taking automatically renders the statute unconstitutional. Brown, 123 S.Ct. at 1417.

If the per diem statutes did effect such an appropriation of property, they would be a "per se" taking. If there is no such appropriation, the "ad hoc" or Penn Central test is used to determine whether they violate the Takings Clause. Brown, 128 S. Ct. at 1418.

The Commissioner argues that the per diem statutes are a "consumer protection statute." Opposition at 6:19-22. As this Court has noted, however, the per diem statutes do not protect consumers from anything. NCM May 7 Order at 22:11-14.

The Commissioner argues that Quicken Loans "misconstrues" Apfel, in that the economic burden the regulation imposed on the plaintiff in Apfel "was simply based on the number of employees the company had once employed, not on 'any commitment the employers made or to any injury they caused.'" Opposition at 6:24-28. The Commissioner does not explain how Quicken Loans misconstrued that case, however. As in Apfel, the per diem statutes impose liability based on actions taken by individuals over whom Quicken Loans has no control. In Apfel, liability was based on the plaintiff's former employees. Here, liability is based on delay caused by county recorders. The character of the regulation found to be a taking in Apfel is no different from the character of the per diem statutes challenged here.

Finally, the Commissioner does not even claim, much less demonstrate, that Quicken Loans misconstrued Kaiser Aetna, 444 U.S. at 179-80, 100 S.Ct. at 392-93, regarding the character of the per diem statutes.

For these reasons, there is no genuine dispute of material fact regarding the Penn Central

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[5] Opposition at 6:11-12; 7:2-3 (the per diem statutes "are not a taking for any public use whatsoever").

test and Quicken Loans is entitled to judgment as a matter of law.

B. There Is No Genuine Dispute Of Material Fact Regarding Whether The Per Diem Statutes Substantially Advance A Legitimate State Interest And Quicken Loans Is Entitled To Judgment As A Matter Of Law.

Quicken Loans cited four cases for the proposition that the Takings Clause requires that a regulation substantially advance a legitimate state interest. See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 334, 122 S.Ct. 1465, 1485 (2002); Agins v. City of Tiburon, 447 U.S. 255, 261-62, 100 S.Ct. 2138, 2141-42 (1980); Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 721 (1999). The Commissioner points out that the language in Tahoe-Sierra was dicta, but the Commissioner does not and cannot dispute that the other three cases were holdings and not merely dicta. Furthermore, Brown is unambiguous in articulating the requirement that the taking must be for a public purpose: "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." Brown, 123 S.Ct. at 1417.

The Commissioner argues that states have a legitimate interest in regulating banking and lending. Opposition at 7:12-21. This does not address the question presented, which is whether the per diem statutes substantially advance a legitimate state interest. On this question, this Court has already spoken, stating that the per diem statutes simply do not protect customers. NCM May 7 Order at 22:11-14. To the contrary, the Commissioner's action would force lenders to grant windfalls to individual consumers based solely on the fortuity of how long it takes the county recorder's office to stamp consumers' deeds of trust or the escrow agent to deliver the deed to the recorder's office.

The Commissioner seeks to water down the legal standard from (1) whether the regulation substantially advances a state interest, to (2) whether the state legislature rationally could have believed that the regulation would promote its objective. Opposition at 7:22-8:3.

The Commissioner cites to Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 242, 104 S.Ct. 2321, 2330 (1984), and Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72, 101 S.Ct. 2070, 2085 (1981). Neither case supports the Commissioner, as neither case involved this issue. In Midkiff, the issue was whether a "per se" taking was for a public use, in which case the regulation was enforceable but required compensation, or not for a public use, in which case the regulation was unenforceable even with compensation. In Western & Southern, the plaintiff brought challenges under the Commerce and Equal Protection Clauses, not the Takings Clause.

Thus, it is irrelevant that "the California legislature could rationally believe that it was necessary and appropriate to allocate to lenders the burden, when recordation did not promptly follow funding," as asserted by the Commissioner. Opposition at 8:1-3. Because the Commissioner has introduced no evidence regarding whether the per diem statutes substantially advance a legitimate state interest, the Commissioner has not carried his burden of demonstrating a genuine issue of material fact.

Thus, there is no genuine dispute of material fact regarding whether the per diem statutes substantially advance a legitimate state interest and Quicken Loans is entitled to judgment as a matter of law.

II. CONCLUSION

For the foregoing reasons and those in the Points and Authorities, the Commissioner's motion for partial summary judgment should be denied.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP

Dated: June 23, 2003

By: _____

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

QUICKEN LOANS INC., a Michigan corporation, *Plaintiff,* *v.* DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, *Defendant.*	Case No. S-03-256 GEB JFM (Related to case S-03-157 GEB JFM) **QUICKEN LOANS INC.'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS** Date Filed: February 11, 2003 Trial Date: t/b/d Hearing Date: June 30, 2003 Hearing Time: 9:00 a.m. Hon. Garland E. Burrell (Courtroom 10)

FACT AND EVIDENCE CITED	RESPONSE
1. Quicken Loans is a Michigan corporation that engages in residential mortgage lending in California, the other 49 states of the United States, and the District of Columbia. Declaration Of Patrick McInnis In Support Of Quicken Loans Inc.'s Motion For	Admitted.

FACT AND EVIDENCE CITED	RESPONSE
Partial Summary Judgment And Permanent Injunction, executed March 10, 2003 ("1st McInnis Decl."), ¶ 3.	
2. Quicken Loans makes a variety of loans secured by residential mortgages, including home purchase money, refinancing and home equity residential mortgage loans. 1st McInnis Decl., ¶ 3.	Admitted.
3. Quicken Loans is licensed and authorized to make residential mortgage loans in California under the California Residential Mortgage Lending Act. 1st McInnis Decl., ¶ 9.	Admitted.
4. Quicken claims that, during 2001 and 2002, it made approximately $500 million and $745 million respectively in loans secured by mortgages on California property. 1st McInnis Decl., ¶ 3.	Admitted.
5. Quicken claims that most of the loans made by Quicken Loans are conventional mortgages secured by first deeds of trust. In addition, Quicken Loans makes variable rate loans, that qualify as "alternative mortgage transactions" under the Parity Act.	Admitted.

FACT AND EVIDENCE CITED	RESPONSE
Finally, Quicken Loans makes a relatively small percentage of loans (but that are still relatively large from an absolute dollar perspective) that are fixed rate, fixed payment, fully amortizing loans not secured by first deeds of trust. An example would be the traditional fixed rate, fully amortizing loan, secured by a second deed of trust. Declaration Of Patrick Mcinnis In Support Of Quicken Loans, Inc.'s Motion For Partial Summary Judgment-Takings ("2d McInnis Decl."), ¶ 3.	
6. On March 11, 2002, the Commissioner delivered a letter to Quicken Loans in which he stated Quicken Loans had violated and was continuing to violate the per diem restrictions imposed by California Civil Code section 2948.5 that was in effect until January 1, 2001 and California Financial Code section 50204(o). 1st McInnis Decl., ¶ 10.	Admitted.
7. In particular, the Commissioner stated that Quicken Loans had charged interest on loans for more than one day "prior to recording of the deed of trust"	Admitted.

FACT AND EVIDENCE CITED	RESPONSE
on the underlying mortgage. 1st McInnis Decl., Exhibit A.	
8. In a letter dated January 28, 2003, the Commissioner ordered Quicken Loans to "(1) review all loans it made in California from a period beginning October 14, 1999; (2) refund interest payments collected in violation of the 'per diem' restrictions (and pay borrowers 10% interest on the refunded interest); and (3) submit a detailed report of all such loans, and to comply with California Financial Code Section 50204(o). 1st McInnis Decl., ¶ 11.	Admitted.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP

Dated: June 20, 2003

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

QUICKEN LOANS INC., a Michigan corporation, *Plaintiff,* *v.* DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, *Defendant.*	Case No. S-03-256 GEB JFM (Related to case S-03-157 GEB JFM) **QUICKEN LOANS INC.'S EVIDENTIARY OBJECTIONS TO DECLARATIONS OF DOUGLAS M. GOODING IN SUPPORT OF DEFENDANT'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT-TAKINGS and IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT - TAKINGS** Date Filed: February 11, 2003 Trial Date: t/b/d Hearing Date: June 30, 2003 Hearing Time: 9:00 a.m. Hon. Garland E. Burrell (Courtroom 10)

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EVIDENCE	OBJECTION
1. Copy of letter dated June 22, 2000, from Kahl Pownall Advocates to the California Senate Finance, Investment and International Trade Committee. Declarations Of Douglas M. Gooding In Support Of Defendant's Opposition To Motion For Partial Summary Judgment-Takings and In Support Of Defendant's Cross-Motion For Partial Summary Judgment - Takings, Exhibit A.	1. **Hearsay; Irrelevant**. Federal Rules of Evidence, Rules 802, 401, 402.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP

Dated: June 20, 2003

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