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CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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9	QUICKEN LOANS, INC., a Michigan corporation,	) NO. CV S-03-0256 GEB JFM
10		)
11	Plaintiff,	)
12		)
13	v.	) <u>ORDER</u>
14		)
15	DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,	)
16		)
17	Defendant.	)
18	_____	)

Plaintiff Quicken Loans, Inc. ("Quicken Loans") moves for partial summary judgment and a permanent injunction which would enjoin Defendant Demetrios Boutris, in his official capacity as the Commissioner of the California Department of Corporations ("Commissioner"), and any other agent of the state of California, from enforcing the "per diem" interest restrictions found in the current and previous version of California Civil Code § 2948.5 and California Financial Code § 50205(o),<sup>1</sup> as to residential mortgage loans made by Quicken Loans that either qualify under the Depository Institutions

<sup>1</sup> California's per diem statutes prohibit mortgage lenders from charging any interest on residential first mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. See Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50205(o).

1 Deregulation and Monetary Control Act of 1980 ("DIDMCA"), or are made  
2 pursuant to the Alternative Mortgage Transaction Parity Act of 1982  
3 ("Parity Act"), or are covered by both statutes. The Commissioner  
4 opposes the motion. The motion was argued May 5, 2003.

5 Background<sup>2</sup>

6 Quicken Loans is a Michigan corporation that engages in  
7 residential mortgage lending in the fifty states of the United States  
8 and the District of Columbia. (Pl.'s Statement of Undisputed Facts  
9 ("Pl.'s SUF") ¶ 1; Def.'s Response to Pl.'s SUF ("Def.'s Response") ¶  
10 1.) Quicken Loans makes a variety of loans secured by residential  
11 mortgages, including home purchase money, refinancing and home equity  
12 residential loans. (Id.) Quicken Loans is licensed and authorized to  
13 make residential mortgage loans in California under the California  
14 Residential Mortgage Lending Act ("CRMLA"). (Id. ¶ 2.) During 2001  
15 and 2002, Quicken Loans contends it made approximately \$500 million  
16 and \$745 million respectively in loans secured by mortgages on  
17 California property. (Id. ¶ 1.)

18 On March 11, 2002, the Commissioner delivered a letter to  
19 Quicken Loans in which he stated Quicken Loans had violated and was  
20 continuing to violate the "per diem" restrictions imposed by  
21 California Civil Code § 2948.5 that was in effect until January 1,  
22 2001 and California Financial Code § 50204(o). (Id. ¶ 11.) In a  
23 letter dated January 28, 2003, the Commissioner ordered Quicken Loans  
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25 <sup>2</sup> The Commissioner denies many of the assertions of fact made  
26 by Plaintiffs on the basis that no discovery has been conducted;  
27 however, the Commissioner states he has "admitted sufficient facts  
28 upon which he believes this court may make a substantive ruling on the  
motion and therefore does not request delay to conduct discovery prior  
to responding to the motion." (Def.'s Memo. of P. & A. in Opp'n  
("Def.'s Opp'n") at 1.)

1 to "(1) review all loans it made in California from a period beginning  
2 October 14, 1999; (2) refund interest payments collected in violation  
3 of the 'per diem' restrictions (and pay borrowers 10% interest on the  
4 refunded interest); and (3) submit a detailed report of all such loans  
5 . . . ." (Id. ¶ 12.) The Commissioner also ordered Quicken Loans to  
6 comply with California Financial Code § 50204(o). (Id.) Quicken  
7 Loans estimates that conducting the review and completing the report  
8 would require it to review approximately 5,500 files at a cost of  
9 approximately \$400,000. (Pl.'s SUF ¶ 14.)

#### 10 Permanent Injunction Standards

11 "The requirements for the issuance of a permanent injunction  
12 are the likelihood of substantial and immediate irreparable injury and  
13 the inadequacy of remedies at law." Easyriders Freedom F.I.G.H.T. v.  
14 Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996). "[To] meet this  
15 standard, [Quicken Loans] must establish actual success on the merits,  
16 and that the balance of equities favors injunctive relief." Walters  
17 v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998). Where an injunction is  
18 sought against an agency of state government, the injunction must be  
19 scrutinized closely "to make sure that the remedy protects the  
20 plaintiff['s] federal constitutional and statutory rights but does not  
21 require more of state officials than is necessary to assure their  
22 compliance with federal law." Clark v. Coye, 60 F.3d 600, 604 (9th  
23 Cir.1995). "This requires both that there be a determination that the  
24 conduct of the [Commissioner] violates federal constitutional law. . .  
25 and that the scope of the injunction is no broader than necessary to  
26 provide complete relief to the named plaintiff[. . . ." Easyriders  
27 Freedom F.I.G.H.T., 92 F.3d at 1496.

1 Discussion<sup>3</sup>

2 Quicken Loans argues that California's "per diem" statutes  
3 are preempted by DIDMCA and therefore cannot be enforced against it.  
4 "Preemption may be either express or implied, and 'is compelled  
5 whether Congress' command is explicitly stated in the statute's  
6 language or implicitly contained in its structure and purpose.'" Fidelity Federal Savings and Loan Ass'n v. Cuesta, 458 U.S. 141, 152-  
7 53 (1982) (citation omitted).

9 [When] explicit pre-emption language does not  
10 appear, or does not directly answer the question  
11 . . . . courts must consider whether the federal  
12 statute's structure and purpose or nonspecific  
13 statutory language, nonetheless reveal a clear,  
14 but implicit, pre-emptive intent. . . . A federal  
15 statute, for example, may create a scheme of  
16 federal regulation so pervasive as to make  
17 reasonable the inference that Congress left no  
18 room for the States to supplement it. . . .  
19 Alternatively, federal law may be in  
20 irreconcilable conflict with state law. . . .  
21 Compliance with both statutes, for example, may be  
22 a physical impossibility, . . .; or, the state law  
23 may stan[d] as an obstacle to the accomplishment  
24 and execution of the full purposes and objectives  
25 of Congress.

18 Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31 (1996)  
19 (quotations and citations omitted).

20 Under DIDMCA,

21 The provisions of the constitution or the laws of  
22 any State expressly limiting the rate or amount of  
23 interest, discount points, finance charges, or  
24 other charges which may be charged, taken,  
25 received, or reserved shall not apply to any loan,  
26 mortgage, credit sale, or advance which is - -  
27 (A) secured by a first lien on residential real  
28 property. . .  
(B) made after March 31, 1980; and  
(C) [a "federally related mortgage loan"]

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28 <sup>3</sup> Summary judgment standards are well known and will not be repeated unless relevant to a point decided.

1 12 U.S.C. § 1735f-7a(a). A "federally related mortgage" "(1) is  
2 secured by residential real property designed principally for the  
3 occupancy of from one to four families; and (2). . . (D) is made in  
4 whole or in part by any 'creditor,' as defined in section 1602(f) of  
5 Title 15, who makes or invests in residential real estate loans  
6 aggregating more than \$1,000,000 per year." 12 U.S.C. § 1725f-5(b).

7 A "creditor" is:

8 a person who both (1) regularly extends,  
9 whether in connection with loans, sales of  
10 property or services, or otherwise, consumer  
11 credit which is payable by agreement in more  
12 than four installments or for which the  
13 payment of a finance charge is or may be  
14 required, and (2) is the person to whom the  
debt arising from the consumer credit  
transaction is initially payable on the face  
of the evidence of indebtedness or, if there  
is no such evidence of indebtedness, by  
agreement.

15 15 U.S.C. § 1602(f). The undisputed facts establish that the Quicken  
16 Loans residential loan transactions at issue in this action are  
17 subject to DIDMCA. States were able to override the DIDMCA's express  
18 preemption by explicitly opting out of its terms prior to April 1,  
19 1983. Id. § 1735f-7a(b)(2). No evidence has been submitted  
20 demonstrating that California opted out of the DIDMCA's express  
21 preemption.

22 California's per diem statutes prohibit interest from being  
23 charged on loaned mortgage funds for a period in excess of one day  
24 prior to recording of the mortgage. Cal. Civ. Code § 2948.5; Cal.  
25 Fin. Code § 50204(o). The per diem statute that was applicable to  
26 Quicken Loans until January 1, 2001, which was an earlier version of  
27 California Civil Code § 2948.5, provided in relevant part:

28 interest on the principal obligation of a  
promissory note secured by a mortgage or deed of

1 trust on real property improved with one-to-four  
2 residential dwelling units shall not commence to  
3 accrue prior to close of escrow, the date upon  
4 which the loan proceeds have been made available  
for withdrawal as a matter of right, as specified  
in subdivision (d) of Section 12413.1 of the  
Insurance Code.

5 The current version of California Civil Code § 2948.5 provides, “[a]  
6 borrower shall not be required to pay interest on a principal  
7 obligation under a promissory note secured by a mortgage or deed of  
8 trust on real property improved with between one to four residential  
9 dwelling units for a period in excess of one day prior to recording of  
10 the mortgage or deed of trust if the loan proceeds are paid into  
11 escrow. . . .” In addition, under the CRMLA, a licensee may not  
12 “[r]equire a borrower to pay interest on the mortgage loan for a  
13 period in excess of one day prior to recording of the mortgage or deed  
14 of trust,” except under certain circumstances which are not relevant  
15 to the present motion. Cal. Fin. Code § 50204(o).

16 Quicken Loans argues that California’s per diem statutes  
17 expressly limit the amount of interest that a lender may collect on  
18 federally related mortgage loans and are therefore preempted by  
19 DIDMCA. (Pl.’s Memo. of P. & A. at 10.) Quicken Loans supports its  
20 position by relying primarily on Shelton v. Mutual Savings and Loan  
21 Ass’n, 738 F. Supp. 1050 (E.D. Mich. 1990). In Shelton, the  
22 plaintiffs argued defendant Bank “violated the Michigan usury statute,  
23 M.C.L. sections 438.31c(2) and (9), by charging interest before the  
24 loan proceeds were disbursed.” Id. at 1053. The court explained,  
25 “the broadest possible interpretation of the exemption from state  
26 usury laws is consistent with the legislative purpose [of DIDMCA],”  
27 and therefore held Michigan’s usury law was preempted by DIDMCA. Id.  
28 at 1057-58.

1           The Commissioner argues that the per diem statutes are not  
2 usury statutes<sup>4</sup> and "do[] absolutely nothing to frustrate the broad  
3 goals of DIDMCA[,]. . . [do] not limit the rate of interest plaintiff  
4 can charge[,] . . . [and do] not limit the total amount of interest  
5 plaintiff can collect, as the rate of interest charged remains within  
6 the control of the plaintiff and may be bargained with the consumer."  
7 (Def.'s Opp'n at 4.) Quicken Loans counters that DIDMCA is not  
8 limited to preempting only state usury statutes. (Pl.'s Reply at 4.)  
9 Quicken Loans contends, "if Congress had wished to limit the effect of  
10 DIDMCA solely to usury statutes, Congress would have done so  
11 explicitly." (Id. at 5.)

12           DIDMCA preempts "[t]he provisions of the constitution or the  
13 laws of any State expressly limiting the rate or amount of interest,  
14 discount points, finance charges, or other charges which may be  
15 charged, taken, received, or reserved. . . ." on particular types of  
16 loans. 12 U.S.C. § 1735f-7a(a). The language of the statute does not  
17 expressly limit the preemptive scope of DIDMCA to state usury laws.  
18 However, the relevant legislative history makes clear that Congress  
19 just intended to create a limited preemption of state usury laws. See  
20 Brown v. Investors Mortgage Co., 121 F.3d 472, 476 (9th Cir.  
21 1997) ("Congress made specific findings that modification of state  
22 usury laws was necessary for a stable national financial system.").  
23 The Senate Report that accompanied the bill containing what became 12  
24 U.S.C. § 1735f-7a provides:

25           In order to ease the severity of the mortgage  
26           credit crunches of recent years and to provide  
27           financial institutions, particularly those with

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28           <sup>4</sup> California's usury laws are found in California  
Constitution, Article XV, § 1.

1 large mortgage portfolios, with the ability to  
2 offer higher interest rates on savings deposits,  
3 H.R. 4986 as reported by the Committee would  
4 preempt any state constitutional or statutory  
5 provision setting a limit on mortgage interest  
6 rates. . . .

7 H.R. 4986 as amended provides for a limited  
8 preemption of state usury laws. It provides that  
9 the state constitutional or statutory restrictions  
10 on the amount of interest, discount points or  
11 other charges on any loan, mortgage or advance  
12 secured by real estate which is described in  
13 section 527(B) of the National Housing Act are  
14 exempt from usury ceilings. . . .

15 The Committee believes that this limited  
16 modification in state usury laws will enhance the  
17 stability and viability of our nation's financial  
18 system and is needed to facilitate a national  
19 housing policy and the functioning of a national  
20 secondary market in mortgage lending. . . .

21 In exempting mortgage loans from state usury  
22 limitations, the Committee intends to exempt only  
23 those limitations that are included in the annual  
24 percentage rate. The Committee does not intend to  
25 exempt limitations on prepayment charges, attorney  
26 fees, late charges or similar limitations designed  
27 to protect borrowers.

28 S. Rep. No. 96-368, at 18-19 (1979), reprinted in 1980 U.S.C.C.A.N.  
236, 254-55.

"Usury is the receiving, securing, or taking of a greater  
sum or value for the loan or forbearance of money, goods, or things in  
action than is allowed by law, the exaction of a greater sum for the  
use of money than the highest rate of interest allowed by law." 45

Laura Dietz & Anne M. Payne, American Jurisprudence, Interest and

Usury § 2 (2d ed. 2002). In California, "usury" has been defined as

"taking more than the law allows upon a loan or for forbearance of a  
debt." Hall v. Beneficial Fin. Co., 118 Cal. App. 3d 652, 654

(1981)(citation omitted). By prohibiting lenders from commencing to  
charge interest on loaned mortgage funds until one day prior to  
recordation, California's per diem statutes constitute usury laws.



1 The Commissioner also argues that California's per diem  
2 statutes do not fall within the type of activities preempted by DIDMCA  
3 because they do not expressly limit interest rates or amounts. The  
4 Commissioner compares California's per diem statutes with the simple  
5 interest statute ("SIS") held not preempted by the DIDMCA in Grunbeck  
6 v. Dime Savings Bank of New York, 74 F.3d 331 (1st Cir. 1996). The  
7 SIS requires that any interest rate or amount agreed to by the parties  
8 be computed on a "simple interest" basis. Grunbeck, 74 F.3d at 337.  
9 The court explained,

10 [t]he SIS . . . does not "serve to . . .  
11 restrain" either the rate or the amount of  
12 simple interest which may be obtained, since  
13 the lender remains free to compensate by  
14 increasing the simple interest rate. Thus,  
15 the SIS does not "expressly" limit "the rate  
16 or amount of interest." Nor, in the  
17 alternative, does the SIS--as distinguished  
18 from market forces-- "limit" the rate or  
19 amount of interest if "limit" means a "final,  
20 utmost or furthest boundary" on the rate or  
21 amount of interest, since the SIS imposes no  
22 ceiling whatsoever on either the rate or  
23 amount of simple interest that may be  
24 exacted.

18 Id. at 338 n.6. The Commissioner argues that like the SIS, the per  
19 diem statutes "do not expressly limit interest rates or amount. . .  
20 [instead they] establish[] the date upon which the per diem interest  
21 may be assessed upon a borrower." (Def.'s Opp'n at 3.)

22 Quicken Loans counters that Grunbeck is factually  
23 distinguishable. Unlike the SIS, California's per diem restriction  
24 does not leave "entirely to the parties the rate and amount of . . .  
25 interest to be exacted" because once the lender and borrower's loan  
26 transaction is finalized, the lender has no way of collecting interest  
27 on loaned mortgage funds that would have been collected absent delays  
28 in recording the deed of trust. Grunbeck, 74 F.3d at 337. Quicken

1 Loans is unable to bargain for a higher interest rate to compensate it  
2 for the possible delay in recordation of the mortgage or deed of trust  
3 because such delay is typically caused by the actions of others: the  
4 settlement agents, the escrow company, and the county clerk who  
5 records the mortgage. Thus, the statute in Grunbeck simply limited  
6 the manner in which the lender expressed its interest rate without  
7 limiting the total amount of interest charged over the course of the  
8 loan. In contrast, California's per diem statutes prevent the lender  
9 from charging a specific pre-determined amount of interest over the  
10 course of the loan by tying the total amount of interest charged to  
11 events outside the lender's control which will not occur until after  
12 the loan is made.

13 DIDMCA preempts only those state laws "expressly limiting  
14 the rate or amount of interest . . ." charged on particular  
15 residential mortgage loans. 12 U.S.C. § 1735f-7a(a). "When engaged in  
16 the task of statutory interpretation, 'courts . . . should . . .  
17 attempt to give meaning to each word and phrase.'" Grunbeck, 74 F.3d  
18 at 338 (citation omitted). Thus, the question is whether the per diem  
19 statutes expressly place a ceiling on interest rates or amounts.<sup>5</sup>  
20 California's per diem statutes establish when interest can be charged  
21 by prohibiting a lender from charging interest on a mortgage for a  
22 period in excess of one day prior to recordation of the mortgage.  
23 Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o). By restricting  
24 the time period in which a lender may charge interest on loaned funds,  
25 the language of the per diem statutes "expressly limit[s] the rate or  
26

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27 <sup>5</sup> The Commissioner also argues that the per diem interest  
28 limitation is permitted under the DIDMCA's exception for "other  
charges," but it is pellucid that the per diem statutes cover  
interest, not other charges.

1 amount of interest. . . which may be charged . . . ." Therefore,  
2 DIDMCA preempts California's per diem statutes. Because Quicken Loans  
3 has demonstrated that it is entitled to judgment as a matter of law,  
4 this aspect of the motion for partial summary judgment is granted.<sup>6</sup>

5 Irreparable Harm and Inadequate Remedy at Law

6 Although Quicken Loans has established actual success on the  
7 merits of its DIDMCA preemption claim, it must show "the likelihood of  
8 substantial and immediate irreparable injury and the inadequacy of  
9 remedies at law." Easyriders Freedom F.I.G.H.T., 92 F.3d at 1495.

10 Quicken Loans has presented no evidence that the Commissioner will  
11 seek to enforce the per diem statutes against it in the face of the  
12 preemption ruling. Therefore, the motion for a permanent injunction  
13 is denied.

14 Conclusion

15 Quicken Loans is granted partial summary judgment on its  
16 claim that DIDMCA preempts the current and previous versions of  
17 California Civil Code § 2948.5 and California Financial Code §  
18 50205(o) as applied to those Quicken Loans residential mortgage loans  
19 that qualify under DIDMCA. The motion for a permanent injunction is  
20 denied.

21  
22 IT IS SO ORDERED.

23 DATED: May 8, 2003

24  
25 GARLAND E. BURELL, JR.  
26 UNITED STATES DISTRICT JUDGE

27  
28 <sup>6</sup> It is unnecessary to reach Plaintiff's preemption arguments  
based on the Parity Act in light of this ruling on DIDMCA's preemption  
of California's per diem statutes.

United States District Court  
for the  
Eastern District of California  
May 8, 2003

\* \* CERTIFICATE OF SERVICE \* \*

2:03-cv-00256

Quicken Loans Inc

v.

Boutris

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 8, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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