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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,

Plaintiffs below,

Respondents.

Proposed Amici Brief of National Association of Consumer Advocates, Mountain State Justice, West Virginia Attorney General, and West Virginia Association for Justice in Support of Plaintiffs and Respondents Lourie Brown and Monique Brown

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John W. Barrett (WVSB 7289)
Jonathan R. Marshall, (WVSB 10580)
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110 (facsimile)
National Association of Consumer Advocates

Frances A. Hughes (WVSB 1816)
Chief Deputy Attorney General
Jill L. Miles (WVSB 4671)
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Building 1, Room 26-E
Capitol Complex
Charleston, WV 25305
(304) 558-2021
(304) 558-0140 facsimile
State of West Virginia ex rel. Darrell V. McGraw, Jr. Attorney General

Daniel F. Hedges (WVSB 1660)
Bren J. Pomponio (WVSB 7774)
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, WV 25301
(304) 344-3144
(304) 344-3145
Mountain State Justice, Inc.

Anthony J. Majestro (WVSB 5165)
Powell & Majestro PLLC
405 Capitol Street, Suite 1200
Charleston, WV 25301
(304) 346-2889
(304) 346-2895
West Virginia Association for Justice

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I. INTRODUCTION AND STATEMENT OF INTEREST[1]

The issues raised in this appeal, *inter alia*, whether the Court has the authority under West Virginia Code § 46A-2-121 to void unconscionable loans, whether punitive damages are available when a mortgage lender acts reprehensibly, and whether West Virginia consumers can continue to rely on the protections afforded by West Virginia Consumer Credit and Protection Act, have enormous implications for consumers in West Virginia. The mortgage crisis has caused millions of people to lose their homes, the stock market to plummet, millions if not billions of dollars in 401K losses, and the costly bailout of the institutions responsible for the crisis in the first place.

The actions of Quicken Loans, Inc. (Quicken) in this case typify the type of reckless lending that led to the mortgage crisis. With the help of a willing appraiser, Quicken extended Lourie Brown and Monique Brown a predatory loan that vastly exceeded the value of their property and would have ultimately resulted in the loss of their property when a hidden balloon payment came due. As set forth in Section III.A. below, predatory loans like the Browns' have been on the rise for several reasons, including the creation of a secondary market for loans where lenders pass off the risk of default to investors, and ultimately main street. One overarching characteristic of most predatory loans is lender manipulation of the appraisal process. In particular, as the trial court found in this case, lenders send appraisers target numbers in the form of an estimated value prior to the appraiser completing his or her assignment. The appraiser then takes this number and reverse-engineers an appraisal report so that the loan will close, often

[1] Counsel for Plaintiffs did not author or make monetary contributions specifically intended to fund the preparation or submission of this brief.

leaving the borrower with an upside down mortgage. As explained in Section III.B., federal regulators, Congress, and the appraisal industry universally condemn lender manipulation of the appraisal process due to the harm caused to borrowers and the economy in general. Notwithstanding the existence of federal regulations and industry standards prohibiting the practice, appraisal manipulation persists for a number of reasons, including lack of enforcement and the non-existence of available remedies. As a result, the best and most important consumer protection continues to be through the enforcement of state law and remedies, as set forth Sections III.C. and III.D.

The Amici submitting this brief, Mountain State Justice, Inc. (MSJ), West Virginia Association of Justice (WVAJ), the National Association of Consumer Advocates (NACA), and West Virginia Attorney General's Office[2] all have an interest in seeing West Virginia law enforced and predatory lenders like Quicken held accountable for their actions. Accordingly, the Amici ask that the trial court's opinion be upheld.

MSJ is a non-profit legal service firm. The firm represents low income individuals in a variety of contexts. A large portion of the firm's representation involves predatory lending, loan servicer abuse, and foreclosure defense. MSJ has a significant interest in ensuring that persons injured by such acts have a means to remedy such abuses.

WVAJ is a non-profit legal organization consisting of attorneys licensed to practice law in the State of West Virginia who represent citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others. A large area of interest to the organization's

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[2] The West Virginia Attorney General is tasked with enforcing the West Virginia Consumer Credit Protection Act in accordance with W.Va. Code § 46A-7-102.

members involves predatory lending, loan servicer abuse, and foreclosure defense. WVAJ members have a significant interest in ensuring that persons injured by such acts have a means to remedy such abuses.

NACA is a non-profit legal organization consisting of private and public sector attorneys who represent consumers victimized by fraudulent, abusive and predatory business practices. Predatory lending, loan servicer abuse, and foreclosure defense are of particular interest to the organization's members. NACA members have a significant interest in ensuring that persons injured by such acts have a means to remedy such abuses.

II. OPERATIVE FACTS IN THE UNDERLYING CASE

Amici incorporate by reference the statement of facts provided in the Respondents' brief.

III. DISCUSSION AND ARGUMENT

A. The rise of predatory mortgage lending

Predatory mortgage lending is a real, pervasive, and destructive problem in our society. Indeed, the explosion in predatory lending over the past ten years has contributed to the greatest foreclosure crisis since the Great Depression. The statistics are grim. Millions of homes have already been foreclosed upon and estimates are that another eight to ten million mortgages, roughly one in five outstanding home loans, will default in the next six years.[3] While homeowners, academics, and policymakers debate the various causes of the crisis, almost all agree that predatory mortgage lenders played a key role in the crisis by stripping billions of dollars of equity from American homeowners. Predatory lenders profit by selling complex

[3] *See* Testimony of Laurie S. Goodman, Amherst Securities Group to the Subcomm. on Housing, Transportation and Community Development of the S. Comm. on Banking, Housing and Urban Affairs at 2 (Sept. 20, 2011) (http://varbuzz.com/wp-content/uploads/2011/09/20110920_Goodman.pdf).

mortgage products through aggressive sales tactics, coercion and even fraud. The story in this case is an all too common one: A lender preys on an unsuspecting homeowner, making false promises that it never intends to keep. It conceals important information about the terms of the loan, and ultimately makes a lot of money as a result of its unscrupulous behavior.

While predatory lending has eluded a single, uniform definition, a joint report by the U.S. Department of Housing and Urban Development and the U.S. Department of the Treasury defines predatory lending as "engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms...that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practice."[4]

The explosion in predatory lending has been driven by two interrelated factors. The first factor driving the growth in predatory lending is the rise of non-traditional, nondepository market participants – i.e., mortgage brokers, mortgage bankers, and finance companies.[5] Unlike

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[4] HUD-Treasury Task Force on Predatory Lending, Curbing Predatory Home Mortgage Lending at 1 (2000) ("HUD-Treasury Report") (http://www.huduser.org/Publications/pdf/treasrpt.pdf); *see also* Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039, 2043-44 (2007) (cataloguing predatory lending practices and including rent seeking, fraud and deception, discrimination, and concealment); Michelle W. Lewis, *Perspectives on Predatory Lending: The Philadelphia Experience*, 12 J. Affordable Housing & Community Dev. L. 491, 493 (2003) (http://www.philatask.com/ABAart03.pdf) (describing subprime lending as "subprime mortgage loans and high-interest loans for people with bad credit that are accompanied by egregiously unethical practices, such as hidden exorbitant fees and taxes, grossly inflated sales prices for property, flipping, and making loans to customers who have no realistic ability to repay").

[5] *See* U.S. Gen. Accounting Office. Rep. No. GAO-04-0280, *Consumer Protection: Federal and State Agencies Face Challenges in Combatting Predatory Lending*, Report to the U.S. Senate Chairman and Ranking Minority Member, Special Committee on Aging at 22 (2004) ("GAO Report") (http://www.gao.gov/new.items/d04280.pdf) (noting that "[f]ifty-nine percent of subprime lenders are independent mortgage companies (mortgage bankers and finance companies)"); Kathleen C. Engel &

traditional lenders, these market participants are largely unregulated, and typically do not hold their loans within their own portfolios. Instead, they pass off the risk of default when they sell a mortgage note to assignees in the secondary market.[6] Quicken Loans is one such finance company.

Many of these non-traditional, nondepository institutions focus their lending in the subprime market, which caters to people who, because of poor credit history or even discrimination by traditional lenders, have been historically excluded from obtaining credit.[7] Indeed, the emergence of predatory lending is inextricably linked to the growth in subprime lending. Subprime loans charge higher interest rates, points and fees compared to loans in the prime or conventional mortgage market. Certainly, not all subprime loans are predatory loans. However, lenders making predatory loans operate within and exploit advantages in the subprime market, which is generally less regulated and less competitive than the conventional lending market.[8]

The second factor driving the growth of predatory lending is "securitization." Securitization is the process of investing in and providing capital for mortgage lending. The process begins with the origination of a loan. The lender groups loans into pools (or the lender may sell the loan to an entity that then groups loans into pools). Securities backed by this group

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Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1273 (2002).

[6] GAO Report, *supra* note 3, at 20.

[7] HUD-Treasury Report, *supra* note 2, at 17-18.

[8] *Three Markets*, *supra* note 3, at 1270-97 (describing market dynamics and regulatory deficiencies that allow predatory lenders to thrive within the subprime mortgage market).

of mortgages are then sold to investors. The investors receive a portion of the future income stream generated from the borrowers' payments. In some cases, future payments to investors were guaranteed by Fannie Mae, Freddie Mac, or Ginner Mae. In other cases, future payments were guaranteed by bond insurance companies. The lender receives proceeds from the sale of the group of loans that it can then use to make more loans. Importantly, the risk of loss is passed from the lender to the investors (or the insurers). Using the securitization process, predatory lenders are able to churn bad loans, selling them to investors and passing off the risk of the inevitable default while obtaining proceeds from the sale with which to make new predatory loans.[9] Like many other subprime lenders, Quicken Loans sells its loans through the securitization process, thereby holding little, if any, risk of default.

B. Influencing appraisals is unconscionable and universally condemned.

Mortgage-loan officers and mortgage lenders make money when they close loans. They can only close mortgage loans when the loans are supported, at least on paper, by the value of the underlying collateral. Consequently, unscrupulous lenders who make predatory loans described above are tempted to influence the appraisal process and encourage appraisers to inflate the market-value of homes they are hired to appraise. As the trial court recognized, the practice of a lender influencing the appraisal process and passing estimated values to appraisers before an appraisal has been performed serves "no legitimate purpose." It is also universally condemned by federal law and well-established industry standards. Unfortunately, federal regulation and the

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[9] Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2213-14 (2007); *see also* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 13 (2011).

industry standards have largely fallen short in reigning in these abusive practices. This leaves state law as the best, and in many instances, only avenue to regulate lender practices.

1. Federal law and regulators forbid lenders from influencing appraisals.

A host of federal agencies with lending oversight – including Office of the Comptroller of the Currency (OCC), Federal Reserve Board (FRB), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) -- have adopted strict requirements designed to ensure independent and accurate appraisals.[10]

These requirements were promulgated in response to the lending industry's repeated failure to regulate itself. For instance, in response to the savings and loan crisis of the 1980s, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1331 *et seq.*, was enacted on August 9, 1989. In pertinent part, Title XI of the FIRREA provided that all written real estate appraisals for federally related transactions conform with the Uniform Standards of Professional Appraisal Practice (USPAP), as promulgated by the Appraisal Standards Board of the Appraisal Foundation. *See* 12 U.S.C. § 1339 (1989); *see also* 12 U.S.C. § 3350 (1989).[11] As set forth below, USPAP forbids appraisers from accepting assignments based upon the reporting of a predetermined value - i.e. a lender provided estimated value or loan amount.

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[10] *See* OCC: 12 C.F.R. §§ 34.45, .45 (1994); FRB: 12 C.F.R. §§ 225.64, .65 (1994); FDIC: 12 C.F.R. §§ 323.4, .5 (1994); OTS: 12 C.F.R. §§ 564.4, .5 (1994); and NCUA: 12 C.F.R. §§ 722.4, .5 (1994).

[11] "The term 'written appraisal' means a written statement used in connection with a federally related transaction that is *independently and impartially prepared* by a licensed or certified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by presentation and analysis of relevant market information." 12 U.S.C.A. § 3350 (emphasis added).

Throughout the 1990s and through the mid-2000s, federal regulators continued to emphasize the need for independent appraisals. In October 1994, federal regulators jointly issued *Interagency Appraisal and Evaluation Guidelines,*[12] which provided:

> Because the appraisal and evaluation process is an integral component of the credit underwriting process, it should be isolated from influence by the institution's loan production process. An appraiser and an individual providing evaluation services should be independent of the loan and collection functions of the institution and have no interest, financial or otherwise, in the property or the transaction.

See OCC: Comptroller's Handbook for Commercial Real Estate and Construction Lending (1998) (Appendix E) at 79.

These 1994 *Guidelines* were followed up in October 2003 with an *Independent Appraisal and Evaluation Functions, Interagency Statement,*[13] and in March 2005 with *Frequently Asked Question on Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions.*[14] In pertinent part, the October 2003 *Interagency Statement* again emphasized the need for independent appraisals, free from influence from lending institutions. *See* OCC: AL 2003-9 at 1-2.

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[12] *See* OCC: Comptroller's Handbook for Commercial Real Estate and Construction Lending (1998) (Appendix E) (http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/realcon.pdf); FRB: SR letter 94-55, FDIC: FIL-74-94, and OTS: Thrift Bulletin 55a (same) (NCUA was not a part of these Guidelines at the time).

[13] *See* OCC: AL 2003-9 (http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-9a.pdf); FRB: SR letter 03-18, FDIC: FIL-84-2003, OTS: CEO Memorandum 184, and NCUA: LTCU 03-CU-17 (same).

[14] *See* OCC: OCC 2005-6 (http://www.occ.gov/news-issuances/bulletins/2005/bulletin-2005-6a.pdf); FRB: SR letter 05-05, FDIC: FIL-20-2005, OTS: CEO Memorandum 213, and NCUA: LTCU 05-CU-06 (same).

The FAQ was even more specific with respect to information that could legitimately be passed to an appraiser as part of an appraisal assignment. The FAQ provided:

> *What information should the regulated institution provide to the appraiser upon engagement?*
>
> Answer: The regulated institution should provide the property's address, its description, and any other relevant information. The regulated institution may also provide a copy of the sales contract for purchase transactions. **However, the information provided by the regulated institution should not unduly influence the appraiser or in any way suggest the property's value.** The regulated institution and the appraiser should agree on the scope of the appraisal in advance, consistent with the Uniform Standards of Professional Appraisal Practice (USPAP) and the agencies' appraisal regulations and interagency guidelines.

See OCC: OCC 2005-6 at 2 (FAQ, No. 4) (emphasis added). Finally, in December 2010, these agencies issued revised *Interagency Appraisal and Evaluation Guidelines.*[15] These guidelines reaffirmed their position on appraiser independence, and provided, *inter alia*:

> An institution's policies and procedures should ensure that it avoids inappropriate actions that would compromise the independence of the collateral valuation function, including:
>
> - Communicating a predetermined, expected, or qualifying estimate of value, or a loan amount or target loan-to-value ratio to an appraiser or person performing an evaluation.
> - Specifying a minimum value requirement for the property that is needed to approve the loan or as a condition of ordering the valuation.

75 Fed. Reg. at 77457.

Notwithstanding the efforts of these federal agencies, many unscrupulous lending institutions continued, or even increased the number of predatory loans they were originating through the early 2000s. In fact, appraiser influence became one of most prevalent characteristics

[15] *See* 75 Fed. Reg. 77450 (2010).

of these loans. These practices ultimately culminated in the financial meltdown of the housing industry, and ushered in a new wave of federal legislation, including the Dodd-Frank Act.

In pertinent part, the Dodd-Frank Act amended the Truth in Lending Act, 15 U.S.C. § 1631 *et seq.*, by adding Section 129E (Appraisal independence requirements), which provides, *inter alia*, that it is unlawful to "engage in any act or practice that violates appraisal independence," including "seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction[.]" *See* 15 U.S.C.A. § 1639e (2010).

Other more recent promulgations of federal law reaffirm the universal condemnation of influencing appraisals. *See e.g.*, 12 U.S.C.A. § 1715z-23 (2009) (prohibiting lending institutions from influencing appraisers); and 12 U.S.C.A. § 3353 (2010) (providing that "appraisals are conducted independently and free from inappropriate influence and coercion"). It remains to be seen whether this new federal legislation will be effective in preventing lender influence of appraisers.

2. *The Appraisal Foundation and USPAP condemn influencing appraisals.*

The Uniform Standards of Professional Appraisal Practice (USPAP), as promulgated by the Appraisal Standards Board of the Appraisal Foundation, are the generally accepted standards for professional appraisal practice in the United States. Indeed, all real estate appraisals for federally related transactions must conform with these standards. *See* 12 U.S.C. § 1339; *see also* 12 C.F.R. § 34.44; 12 C.F.R. § 225.64; 12 C.F.R. § 323.4; 12 C.F.R. § 564.4; and 12 C.F.R. § 722.4. Under the USPAP, an appraiser's "impartiality, objectivity, and independence" is of paramount importance. *See* USPAP *Conduct* Ethics Rule (2004;[16] 2010[17] (same)). Indeed, "an appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions[.]" *See id.* Moreover, it is unethical for an appraiser to accept an assignment that is contingent on the reporting of a predetermined result (e.g., opinion of value), the amount of a value opinion, or the attainment of a stipulated result. *See* USPAP *Management* Ethics Rule (2004;[18] 2010[19] (same)).

3. Fannie Mae condemns influencing appraisals.

In October 15, 2010, Fannie Mae issued Appraiser Independence Requirements to be incorporated into its Selling Guide, also condemning the influencing of appraisals. In pertinent part, Fannie Mae's Appraiser Independence Requirements provide that lending institutions should not "[p]rovid[e] to an appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or target amount to be loaned to the Borrower[.]" *See* Fannie Mae Appraiser Independence Requirements at 1-2.[20]

4. State law condemns influencing appraisals.

Unfortunately, most of the aforementioned federal regulations and industry standards have fallen short in curbing the practice of predatory lending, many due to lack of enforcement

[16] http://www.ourappraisal.com/xsites/appraisers/centralilappraisal/Content/UploadedFiles/USPAP%202004.pdf

[17] http://uspap.org

[18] http://www.ourappraisal.com/xsites/appraisers/centralilappraisal/Content/UploadedFiles/USPAP%202004.pdf

[19] http://uspap.org

[20] https://www.efanniemae.com/sf/guides/ssg/relatedsellinginfo/appcode/pdf/air.pdf

or a private right of action. It is also unclear whether new federal legislation will have an effect on curbing the practice of predatory lending.

Thus, the best and most effective way of regulating the industry remains at the state level. Indeed, most states, including West Virginia, have passed specific prohibitions on appraiser influence.[21] Although the specifics of West Virginia law in this regard will be addressed in the following section of this brief as well as in other submissions by Amici, suffice it to say, West Virginia state law prohibits lenders from improperly influencing appraisers. Nevertheless, such regulation is meaningless absent the ability to enforce strong remedies as described below.

C. The Court should uphold the power of a Circuit Court to void unconscionable loans under 46A-2-121.

Petitioner Quicken argues that the Circuit Court lacked the authority to void the loan obligation. Quicken's position is contrary to the plain language of the statute and long-standing precedent interpreting the WVCCPA. Section 46A-2-121 of the West Virginia Code clearly states: "[I]f the court as a matter of law finds: (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, *the*

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[21] *See e.g.*, Alaska Stat. § 06.60.340; Ariz. Rev. Stat. Ann. § 32-3633; Ark. Code Ann. § 23-39-513; Cal. Civ. Code § 1090.5; Cal. Fin. Code § 50204; Cal. Fin. Code § 22755; Cal. Bus. & Prof. Code § 11345.4; Colo. Rev. State. § 21-61-910.2; Conn. Gen. Stat. § 36a-760j; 5 Del. Code § 2418; D.C. Code § 26-1114; Fla. Stat. § 494.00255; Idaho Code § 26-31-211; 205 ILCS 635/2-4; 205 ILCS 635/7-13; Ind. Code § 23-2-5-9.1; Ind. Code § 23-2-5-20; Ind. Code § 24-5-23.5-7; Iowa Code § 543D.18A; Iowa Code § 535D.17; Kan. Stat. Ann. § 58-2344; Ky. Rev. Stat. Ann. § 286.2-030; La. Rev. Stat. 6:1092; Me. Rev. Stat. Ann. tit. 9-A, § 8-206-J; Mich. Comp. Laws § 493.77; Mich. Comp. Laws § 445.1679; Minn. Stat. § 58.13; Miss. Code Ann. § 81-18-27; Mo. Rev. Stat. § 443.737; Neb. Rev. Stat. § 45-714; Nev. Rev. Stat. § 645C.557; Nev. Rev. Stat. § 645C.730; N.H. Rev. Stat. Ann. § 397-A:14; N.Y. Banking Law § 590-b; N.C. Gen. Stat. § 53-244.111; N.D. Cent. Code § 13-10-17; Ohio Rev. Code § 1322.07; Ohio Rev. Code § 1321.59; Okla. Stat. tit. 59, § 2095.18; 10 Pa. Cons. Stat. § 46.2; R.I. Gen. Laws § 19-14.10-17; S.C. Code Ann. § 37-22-190; S.D. Codified Laws § 36-21B; S.D. Codified Laws § 36-21A-71; Tenn. Code. Ann. § 45-13-401; Tex. Fin. Code Ann. § 180.153; Utah Code Ann. § 61-2c-301; Wash. Rev. Code § 19.146.0201; and Wis. Stat. § 224.77.

court may refuse to enforce the agreement[.]" W. Va. Code § 46A-2-121(1) (emphasis added). It is a bedrock principle of statutory interpretation that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." *See Thomas v. Morris*, 224 W. Va. 661, 666, 687 S.E.2d 760, 765 (2009) (quoting Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548*, 144 W. Va. 137, 107 S.E.2d 353 (1959)).

Enforcement of the statute's clear and unambiguous terms is also supported by the purpose of the WVCCPA, which is to extend broad protections to West Virginia consumers beyond the common law's allowance for voidance of unconscionable contracts. *See Casillas v. Tuscarora Land Co.*, 186 W. Va. 391, 393-94, 412 S.E.2d 792, 794-95 (1991); *see also Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, ___, 711 S.E.2d 577, 583 (2011); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995) ("The purpose of the CCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action. . . . Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.").

Furthermore, the Act similarly allows the Attorney General to bring an injunctive relief action to enjoin the enforcement of unconscionable contracts, while also leaving all remedies open to consumers to enforce directly. *See* W. Va. Code § 46A-7-109. The provisions of the Act should be read "in *pari materia* to ensure that legislative intent is being effected." *Community Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, ___, 712 S.E.2d

504, 513-14 (2011). Thus, reading the Act as a whole, both consumers and the Attorney General have the right to seek an injunction against the enforcement of an unconscionable contract.

Finally, this Court has repeatedly held in no uncertain terms that contracts and/or contractual provisions can be declared void and unenforceable due to their unconscionability, and circuit courts have uniformly followed in this course both before and after *Byrd v. Option one Mortgage Corp.*, No. 2:04-1058, slip op. (S.D. W. Va. Apr. 12, 2007). *See*, Syl. Pt. 5, *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 231, 511 S.E.2d 854, 856 (1998) (holding that, under West Virginia Code section 46A-2-121, certain agreements are "unconscionable and, therefore, void and unenforceable as a matter of law"); *see also, e.g.*, Syl. Pt. 20, *Brown v. Genesis Healthcare Corp.*, ___ W. Va. ___, ___S.E.2d ___, 2011 WL 2611327 (2011) ("A contract term is unenforceable if it is both procedurally and substantively unconscionable."); *Herrod v. 1st Rep. Mortg. Corp., Inc.*, 218 W. Va. 611, 624, 25 S.E.2d 373, 386 (2005) ("[T]he West Virginia Consumer Credit and Protection Act provides that a loan or any portion thereof may be voided if a court concludes that the loan was induced by unconscionable conduct or the loan contains unconscionable terms[.]") (Starcher, J., concurring); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 568, 567 S.E.2d 265, 284 (2002) (declaring an unconscionable contract void and unenforceable); *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va., Inc.*, 186 W. Va. 613, 618, 413 S.E.2d 670, 675 (1991) (holding an unconscionable contract provision "void for unconscionability"); *Bailey v. Greentree*, No. 04-C-23-N (Roane Co. W. Va. Jan. 26, 2009) (attached as Ex. 1); *Shelton v. CitiMortgage, Inc.*, No. 08-C-1190-K (Raleigh Co. W. Va. Aug. 24, 2009) (attached as Ex. 2); *Osburn v. Option One Mtg. Corp.*, No. 02-C-1164 (Kan. Co.

W. Va. May 19, 2005) (attached as Ex. 3); *Harper v. Conseco Fin. Serv. Corp.*, No. 01-C-1341 (Kan. Co. W. Va. May 12, 2002) (attached as Ex. 4).

It is equally clear that the circuit court has broad remedial powers to cure an unconscionable contract. *See Lang v. Derr*, 212 W. Va. 257, 260, 569 S.E.2d 778, 781 (2002) ("'If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, *or may so limit the application of any unconscionable term as to avoid any unconscionable result.*") (quoting Restatement (Second) of Contracts § 208 (1981)) (emphasis added). As a remedial statute, the WVCCPA was intended to extend the common law remedies available to consumers, not limit them. *See Casillas*, 186 W. Va. at 393-94, 412 S.E.2d at 794-95. As a result, as cited above, this Court has held that unconscionable terms are unenforceable both at common law and under the WVCCPA. In sum, Petitioner's cramped reading of the statutory provision would contravene the express language of the statute, the West Virginia Legislature's intent, and this Court's uniform interpretation of the provision.

The Amici and their members represent hundreds of West Virginia homeowners facing loss of their homes to predatory lenders. If Quicken's argument were accepted by this Court, it would dramatically limit these families' ability to avoid unconscionable and fraudulent loans that would otherwise certainly end in unjust foreclosures, despite their clear illegality. Consider the case of Carolyn Osburn. Ms. Osburn has a similar story to that of Respondent Brown. Osburn is a single mother living in Mercer County, West Virginia. She was induced by a fraudulently inflated appraisal into a predatory loan that contained an illegal balloon provision. As a consequence, Ms. Osburn faced a massive balloon payment due after fifteen years of payments on her home loan. Because the loan was well over the value of her property, when the balloon payment came due, the amount owed on the loan would have exceeded the fair market value of Ms. Osburn's property. Ms. Osburn, who lives on a fixed income, would have had no way to pay this large lump sum. Nor could she expect to obtain a refinance when the indebtedness far exceeded the value of her property.[22] *See Osburn*, No. 02-C-1164, slip op. ¶ 9.

Were Quicken's position accepted, the trial court would have been powerless to void the loan (or even the balloon feature when it came due) and foreclosure would have been inevitable. Ms. Osburn's case – and Respondents' case – are just two examples of thousands of West Virginians who have been victimized by predatory lending conduct over the last decade. Without voidance as a remedy, these victimized West Virginians would not be able to seek relief from the foreclosures that result from predatory lenders' illegal activities.[23] Such a result would clearly contravene the purposes of the WVCCPA and this Court's interpretations of the Act, as well as common law. This Court has stated repeatedly that unconscionable and fraudulent loans should be declared void and unenforceable. The trial court's decision below to void the loan is consistent with the long-standing principles followed by this Court. *See, e.g.*, Syl. Pt. 5, *Arnold*, 204 W. Va. at 231, 511 S.E.2d at 856 ("[T]he agreement is unconscionable and, therefore, void

[22] Likewise, should the Court read a rescission and tender requirement into the statute as Quicken suggests, it would essentially eliminate borrowers' remedies. In both Ms. Osburn's and the Browns' case (and in the cases of countless other victims of predatory lending), the loans exceeded the value of the property, making it impossible for the consumers to tender the loan proceeds.

[23] The Respondent Quicken has a history of engaging in the predatory conduct at issue in this case. Mountain State Justice, Inc. has represented other borrowers that have been induced into predatory loans with an inflated appraisal. *See Bishop v. Quicken Loans Inc.*, 2:09-CV-01076 (S.D.W. Va.); *Edmond v. Quicken Loans, Inc.*, No. 5:10-AP-05016 (Bankr. S.D.W. Va.); *Settle v. Quicken Loans, Inc.*, No. 10-C-1100-H (Kan. Co. W. Va.).

and unenforceable as a matter of law."). The ruling of the trial court below should therefore be affirmed.

D. The Circuit Court correctly included the compensatory award of attorney fees in determining that the punitive damages award was not excessive.

Consistent with the applicable state and federal precedent, the Circuit Court reviewed the award of punitive damages. As part of that review, the Circuit Court compared the punitive damage award of approximately $2.1 million to the compensatory damages found by the Court. In doing so, the Court included as part of the compensatory damages its award of $596,199.89 in attorney fees and litigation costs. On appeal, Quicken argues that it was improper to include attorney fees and costs in the determination of whether the punitive damages were excessive. Quicken's argument is that because an attorney fee award cannot be considered compensatory, it is inappropriate to use it to compare the compensatory award to punitive award. Quicken's argument is contrary to the majority rule. Moreover, it ignores the substantial body of cases from this Court finding such awards are compensatory and explicitly directing the Circuit Courts to include litigation expenses in their review of punitive damage awards.

1. This Court has explicitly authorized the inclusion of litigation costs as part of the review of a punitive damage award.

With respect to the review of a punitive damage award, this Court has set forth the following test:

> "Under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Thereafter, and upon petition, this Court will review the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*."

Syl. Pt. 5, *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996). With respect to the issue of the inclusion of attorney fees and costs, syllabus point 4 of *Garnes* is directly on point. Indeed, in *Garnes* the Court directed: "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors: (1) *The costs of the litigation. . . .*" Syl. Pt. 4, *Garnes v. Fleming, supra* (emphasis added). This holding has been repeatedly reaffirmed in the punitive damage decisions of this Court. *See, e.g., Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009); *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004); *Radec, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. 1, 552 S.E.2d 377 (2000); *Alkire v. First Nat. Bank of Parsons, supra.* Thus, the Circuit Court's inclusion of the award of attorney fees and costs in its review of the punitive damage award was not error as it amounts to the consideration of "the costs of litigation", a factor specifically mandated under *Garnes* and its progeny.

2. Awards of attorney fees and costs under the West Virginia Consumer Credit and Protection Act are Compensatory Awards.

The central premise of Quicken's argument is that it is improper to include an award of attorney fees and costs as part of the consideration of the excessiveness of a punitive award because the award of attorney fees and costs is itself punitive. Quicken is simply wrong. Quicken argues that attorney fees and costs are punitive in nature. With respect to statutory awards like the one entered here, this Court has consistently rejected such a view.[24]

[24]Quicken also argues that, because the award was based on the WVCCPA which does not provide for punitive damages, it is improper to include attorney fees in the review of the punitive award for excessiveness. Quicken cites no case for the proposition that a review for excessiveness is limited to the damages awarded under the cause of action supporting the punitive award. The question whether punitive damages are available under the WVCCPA is a

It is clear that attorney fee awards like the one here are made for compensatory purposes. The attorney fee award in this case was rendered pursuant to WVCCPA's fee shifting statute, W.Va. Code § 46A-5-104. This Court has emphasized that this provision is one of several fees shifting statutes enacted for "for the benefit and protection of the public." *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 n.15, 567 S.E.2d 265, 283 n.15 (2002). With respect to other similar provisions, it is clear that this Court considers statutory fee shifting as compensatory:

> Working people should not have to resort to lawsuits to collect wages they have earned. When, however, resort to such action is necessary, *the Legislature has said that they are entitled to be made whole by the payment* of wages, *liquidated damages, and costs, including attorney fees*. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated.

Farley v. Zapata Coal Corp., 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981) (emphasis added); *see also Heldreth v. Rahimian.* 219 W.Va. 462, 471, 637 S.E.2d 359, 368 (2006) ("The purpose of fee-shifting statutes, such as that involved here [W.Va. Code § 5-11-13(c)] is to *benefit the employee*. . . ." (citations and internal quotations omitted; emphasis added)); *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 58, 521 S.E.2d 543, 550 (1999) (This fee shifting statute [W. Va. Code § 29B-1-7], which is a marked departure from the general rule that each party bears his/her own litigation costs, *is intended to relieve some of the burden* associated with the public's pursuit of the right to access public records and to encourage

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wholly different one from what compensatory damages a reviewing court should use to determine if a punitive award is excessive. Indeed, in reviewing a punitive damage award a reviewing court is not limited to the damages incurred – let alone the damages awarded. The reviewing Court is explicitly is permitted to look at other factors such as the potential harm caused by the defendant's conduct. *See* Syl. pt. 1, in part, *Garnes v. Fleming Landfill, Inc., supra* ("[p]unitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions."). Finally, as noted above, *infra* Part D(1), costs of litigation are explicitly permitted as part of the review criteria.

the cooperation of public officials when requests for such records are made."(footnote omitted emphasis added)); *Orndorff v. West Virginia Dept. of Health*, 165 W.Va. 1, 4-5, 267 S.E.2d 430, 432 (1980) ("One obvious purpose of a provision for reasonable attorney fees [in a civil service reinstatement case] is *to provide a measure of restitution* to a civil service employee who has been wrongfully discharged or suspended and, as a result, forced to hire an attorney to seek redress. Equally apparent is another goal, to provide an inducement to the employee who has been wrongfully discharged to challenge the action since, *if successful, he is relieved of the burden of paying reasonable attorney fees*." (emphasis added)); syl. pt. 1, *Bettinger v. Bettinger,* 183 W.Va. 528, 396 S.E.2d 709 (1990) ("The purpose of W.Va.Code, 48-2-13(a)(4) (1986), [now 48-2-13(a)(6)(A) (1993)] is to enable a spouse who does not have financial resources to obtain reimbursement for costs and attorney's fees [incurred] during the course of the litigation.").

3. Including awards of attorney fees and costs as part of the comparison of a punitive award with the compensatory awards is consistent with the majority rule.

Finally, it is clear that the trial court's inclusion of attorney fees is consistent with the majority rule. In *Blount v. Stroud*, 395 Ill.App.3d 8, 27, 915 N.E.2d 925, 943-945, 333 Ill.Dec. 854, 872 - 874 (Ill.App. 1 Dist. 2009), the Court held: "We further note that the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the [excessiveness] analysis." The Court based this conclusion on established Illinois cases recognizing "that the amount of attorney fees expended in a case may be taken into account when assessing the propriety of a punitive damage award. A wealthy defendant can mount an extremely aggressive defense, and the prospect of costly litigation can deter lawyers from representing plaintiffs in such cases." *Id.* (citations omitted). Other Courts agree. *See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 236-37 (3d Cir.2005); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642 (10th Cir.1996); *Walker v. Farmers Insurance Exchange,* 153 Cal.App.4th 965, 973 n. 8, 63 Cal.Rptr 507, n. 8 (2007); *Girdner v. Rose,* 213 S.W.3d 438, 449 (Tex.App.2006). As the Tenth Circuit has recognized, nothing in federal case law prohibits consideration of the costs incurred by the plaintiff in bringing the legal proceedings to vindicate rights as part of the "actual harm" suffered. *Continental Trend Resources,* 101 F.3d at 642.

These decisions are consistent with this Court's punitive damage jurisprudence. In *Garnes,* this Court explained that including litigation costs in the analysis is important because: "We want to encourage plaintiffs to bring wrongdoers to trial." *Garnes*, 186 W.Va. at 668, 413 S.E.2d at 909. Similar reasoning supports other Courts' agreement that the inclusion of attorney fees and costs is an appropriate punitive damage consideration. *Willow Inn, Inc.*, 399 F.3d at 236 ("Section 8371's attorney fees and costs provisions vindicate the statute's policy by enabling plaintiffs such as Willow Inn to bring § 8371 actions alleging bad faith delays to secure counsel on a contingency fee."); *Blount v. Stroud, supra* ("The purpose of section 1988 is to ensure effective access to the judicial process for persons with civil rights claims and to encourage litigation to enforce the provisions of the Civil Rights Act and the Constitution."); *Continental Trend Resources, Inc.*, 101 F.3d at 642 ("A rich defendant may act oppressively and force or prolong litigation simply because it can afford to do so and a plaintiff may not be able to bear the costs and the delay. We have held that the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award.").

IV. CONCLUSION

For these reasons, the Amici signing this brief respectfully request that the Court affirm the judgment of the trial court.

Jonathan R. Marshall (WVSB 10580)
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110 (facsimile)
National Association of Consumer Advocates

(w/ permission)

Bren J. Pomponio (WVSB 7774)
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, WV 25301
(304) 344-3144
(304) 344-3145
Mountain State Justice, Inc.

(w/ permission)

Frances A. Hughes (WVSB 1816)
Chief Deputy Attorney General
Jill L. Miles (WVSB 4671)
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Building 1, Room 26-E
Capitol Complex
Charleston, WV 25305
(304) 558-2021
(304) 558-0140 facsimile
State of West Virginia ex rel. Darrell V. McGraw, Jr. Attorney General

494277

(w/ permission)

Anthony J. Majestro (WVSB 5165)
Powell & Majestro PLLC
405 Capitol Street, Suite 1200
Charleston, WV 25301
(304) 346-2889
(304) 346-2895
West Virginia Association for Justice

494277

EXHIBITS

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