No. 11-0910

OCT 2 1 2011

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL

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This case is about the predatory lending practices of Quicken Loans, Inc. ("Quicken"). Those practices resulted in keystone findings and conclusions of the trial court that are *not* the subject of this appeal. Specifically, Quicken *does not appeal* the trial court's conclusion that it "engaged in unfair methods of competition and unfair or deceptive acts or practices" in the following manners:

(a) Representing to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a "loan discount" on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken;

(b) Not disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment at closing; and

(c) Conducting a negligent appraisal review and approving a loan based on a grossly inflated appraisal.

See, Findings of Fact and Conclusions of Law entered on Feb. 25, 2010 ("2/25/10 Op.") at p. 20 (A145). Nor does Quicken take issue with the trial court's finding that Quicken made a mortgage loan in excess of the fair market value of Respondents' home in violation of W.Va. Code § 31-17-8(m)(8). Finally, Quicken did not object to the trial court's conclusion that it failed to make the "most pertinent disclosure" for this loan – the amount of and due date for a massive balloon payment that Quicken snuck into the transaction on the eve of closing the loan in violation of W.Va. Code § 46A-2-105(2). For all of these reasons (which are now unassailable having not been appealed) and for many other reasons discussed herein, Quicken's appeal of the trial court's findings that the subject loan transaction was unconscionable and fraudulent lacks merit – the trial court should be affirmed.

Quicken's primary argument is that the trial court did not have authority to cancel Quicken's July 7, 2006 loan to Lourie Jefferson and Monique Brown (the "Loan"). However, two separate consumer statutes expressly provide for exactly that relief. *See*, W.Va. Code § 46A-2-121 and W.Va. Code § 31-17-17. Quicken also includes a secondary claim petition for the due process review of the trial court's punitive damage award. Because the award is reasonable, and tailored to exact an equitable punishment against Quicken for its wide-ranging misconduct in this case and to deter it from future frauds against West Virginia consumers, this Court should affirm the award. Finally, Quicken is asking this Court for an offset for an entirely distinct settlement, but this relief was not timely sought from the trial court and should not be available in the first instance here. Furthermore, such relief is not substantively appropriate.

STATEMENT OF THE CASE

A. Background

At the time of the Loan, Lourie Brown (now "Jefferson") was a 42-year old single parent, who worked as a licensed practical nurse and earned on average $2,489 per month. *See*, PL Ex. 1-EE (A1551).[1] Lourie Jefferson has three children, two of whom were minors and another, Respondent Monique Brown, who is a disabled adult suffering a traumatic brain injury in 2001 which impaired her short term memory. *See*, 2/25/10 Op. at ¶ 1-2 (A128).

Ms. Jefferson and her mother, Lena Brown, bought their home at 118 12th Street, Wheeling ("the Property") in 1988 for $35,000. *Id.* at ¶ 3 (A128). They bought the Property together because it was a duplex; there were separate utilities and entryways. *Id.* at ¶ 4 (A128). In 1993, they transferred the Property to Monique, who paid off the $34,132 mortgage. *Id.* at ¶ 6 (A129).

In 2001, Ms. Jefferson was off work for several months while caring for Monique after Monique was ejected from her vehicle in a wreck. Ms. Jefferson stayed with her daughter in

[1] Monthly earnings were calculated from the reported $14.36 per hour wage and 40 average hours per week as reported by Wheeling Hospital.

Morgantown for seven months while Monique was first in a coma and then in rehabilitation. *See*, Vol. II at 180-181 (A910-911) (Jefferson). In 2002, Lena Brown passed away leaving Ms. Jefferson solely responsible for the household expenses, including utilities, maintenance, taxes and insurance for a large, older home. 2/25/10 Op. at ¶7 (A129). These difficult circumstances led Respondents to obtain a loan secured by their home with Citifinancial, as well as another, unsecured loan, also with Citifinancial. These loans were refinanced multiple times. *See*, *id.* at ¶¶ 8-12 (A129).

B. The Loan Origination and Promise of Refinancing

While on the internet, Ms. Jefferson saw a pop-up ad offering an attractive loan opportunity. She provided basic information and received telephone solicitations from different mortgage lenders. 2/25/10 Op. at ¶ 15-16 (A130). Ms. Jefferson chose Quicken because of its loan agent, or "mortgage banker", Heidi Johnson's ("Johnson") expressed willingness to help Ms. Jefferson. Quicken is a large national mortgage lender, headquartered near Detroit, Michigan. Quicken is part of a financial network and wholly owned by Rock Holdings, which is the same parent company that owns Title Source, Inc ("TSI"), an appraisal management company servicing Quicken. *Id.* at ¶ 14 (A130). Quicken had a "close relationship" with TSI and the two share office space. *See*, Vol. V at 29, 82-84 (A1143, 1156) (Lyon - Designated Corporate Representative for Quicken).

The loan process began on May 16, 2006. 2/25/10 Op. at ¶ 17 (A130). Ms. Jefferson did not "fill out" any Quicken paperwork. Information was taken over the telephone from her and entered by Johnson. Ms. Jefferson did not know the value of her home and she did not provide an estimate. Instead, she told Johnson the purchase price and provided a description of the home and improvements since purchasing it. *See*, Vol. II at 192-193 (A922-923) (Jefferson).

Accordingly, the "Anticipatory Property Value" listed on the Client Information Summary of $250,000 did not come from Ms. Jefferson. *See also*, Vol. V at 85 (A1157) (Lyon) ("I don't know if that information came from Ms. [Jefferson] or came from Ms. Johnson."). Days later, an appraisal was ordered from former co-defendant Dewey Guida and his company Appraisals Unlimited (collectively, "Guida"). The order included an estimated value for the property of $262,500. PL Ex. 1-A (A1448).

Quicken quoted Ms. Jefferson a higher monthly payment than she expected based on the pop-up advertisement. As a result, she became hesitant to do the loan. 2/25/10 Op. at ¶24 (A131). Beginning on May 24, 2006, Ms. Jefferson ceased returning Quicken's calls. *See*, PL Ex. 1-QQ, Q414-419 (A1590-1595). "On May 26, 2006, Guida concluded that the Property had a value of $181,700, using an analysis of comparables of distinctly different properties located in neighborhoods vastly superior to the Property's neighborhood." 2/25/10 Op. at ¶ 23 (A131). On May 30, 2006, Ms. Jefferson called Quicken and stated "that she no longer wants to go through with the loan." 2/25/10 Op. at ¶ 25 (A131); PL Ex. 1-QQ, Q420 (A1596).

The appraisal was approved on May 31, 2006. PL Ex. 1-QQ, Q421 (A1597) (risk decision based on 62% loan to value ratio ("LTV")). On June 1, 2006, Quicken left Ms. Jefferson a message stating that the appraisal came in where needed. *See*, PL Ex. 1-QQ, Q423 (A1599) ("we have appraisal done now though so maybe I can save"). Numerous additional messages were left for Ms. Jefferson but she did not respond. *See*, PL Ex. 1-QQ, Q426-429 (A1602-1605). Finally, there was another contact on June 6, 2006. The note to the file describes lengthy persuasion employed by Quicken to get this loan "closed:"

> Client finally reached me/she was being swayed by a broker and that's why she wanted to back out/client very timid and I just had to spend a lot of time explaining to her being taken advantage of/Adding more cash out and taking up to full 80% LTV and will have closure today.

PL Ex. 1-QQ, Q431 (A1607). *See also*, PL Ex. 4, Q2623 (A1795) (in referring to this conversation, Johnson states in an e-mail, I was "*trying to save her from going to the bank.*").

In her testimony, Ms. Jefferson completed and clarified this exchange by identifying a specific promise that fueled her change of heart and agreement to this illegal loan:

> She told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan.

Vol. II at 195 (A925) (Jefferson). "Lourie Jefferson understood Quicken's position to be that once her loan was in place, Quicken would be able to refinance the loan in three to four months and then she could get a cheaper rate." 2/25/10 Op. at ¶ 29 (A132). "The quid pro quo of the loan transaction between Quicken Loans and Ms. Jefferson, and which Ms. Jefferson relied upon, was that in accepting the loan offer by Quicken, she would be able to refinance the loan within three (3) to four (4) months from the date of closing, July 7, 2006." *Id.* at ¶31 (A132).[2]

In addition, Ms. Jefferson described how Quicken coaxed her into borrowing more money than she sought:

> Well, she – when they got the appraisal done, she said that it came in at $181,000, I believe. And she said that – she said: is there anything else that you're going to need because you have this money available to you? And I kind of thought about it at the time because, once I did the loan, I wasn't really going to have any money available to do anything extra with. And I had an SUV at the time that really cost me a lot of money in gas, and I decided to get a car that was going to last me for a while.

Vol. II at 196 (A926) (Jefferson).

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[2] Quicken's written training materials encourage "forward looking statements" and push the limit on promising refinancing. *See*, PL Ex. 8 at 879-80 (A2050-51). Specifically, Quicken's materials suggest telling borrowers that "your transaction with Quicken Loans/Rock Financial will assist you in your quest to reestablish a solid credit rating and the ability to transition into a conventional loan in a short period of time without a prepayment penalty." *Id.* at Q879 (A2050) ("Overcoming Objections").

Instead of sending someone to the closing who could explain the complex loan terms, Quicken sent only a third-party notary to Respondents' home to close the Loan. *See*, Vol. II at 200-201 (A930-931) (Jefferson). The closing package contained 81 pages. *See*, Vol. II at 202 (A932) (Jefferson). The notary opened the packet and instructed Ms. Jefferson to sign various documents, which were marked with "sign here" stickers. The closing took approximately 15 minutes. Ms. Jefferson felt rushed and the notary was unable to answer questions that she attempted to ask about the documents. *See*, Vol. II at 201-202 (A932-33) (Jefferson).

The first time Ms. Jefferson had any indication that there was a balloon payment on the Loan was during this rushed closing. At that time, she did not know what it meant and the Adjustable Rate Balloon Note dated July 7, 2006 [PL Ex. 1-P (A1477)] (the "Note") *did not include the amount of the balloon payment or its due date*. *See*, Vol. II at 203-204 (A933-934) (Jefferson). Despite seeing the term "balloon" at closing, Ms. Jefferson was not overly concerned because she was relying on Quicken's false promise of refinancing within three to four months. *Id.*

As is evident, the disparity of bargaining positions between Petitioner and Respondents was grossly unequal. "Gross inadequacy in bargaining power may exist where consumers are totally ignorant of the implications of what they are signing . . . or where the parties involved in the transaction include a national corporate lender on one side and unsophisticated, uneducated consumers on the other." *Herrod v. First Republic Mortgage Corp.*, 218 W.Va. 611, 616, 625 S.E.2d 373, 378 (2005) (quoting, *Hager v. American General Finance*, Inc., 37 F.Supp.2d 778 (S.D.W.Va. 1999)). Here, Quicken's own records make reference to Ms. Jefferson being "very fragile" and needing to be handled with "kid gloves." *See*, Vol. I at 130 (A557) (Saunders).

Johnson earned a commission on this loan of $834. Nuckolls Deposition at 43-44 (A362) (Designated Corporate Representative for Quicken). Commissions for Quicken employees were based on the loan amount, loan type and number of loans closed per month. *See*, *id.* at 22 (A358). The more loans and the higher the loan amounts or loan volume, the higher the commission. *Id.* at 23-24 (A358). High revenue, subprime loans, like this Loan, paid a *higher* commission than prime loans. *Id.* at 25 (A359), 35-37 (A360-361). In addition to base commission, loan agents earn additional sums on loans priced at a "*premium*" through discretionary "*discount*" points, which Johnson added to this Loan (see *infra*, at 11). *See*, Vol. IV at 182-183 (A1096) (Nuckolls). Finally, the threat of termination motivates loan agents. *See*, *id.* at 185-186 (A1097) ("Her responsibility was to close mortgages.").

C. A Broken Promise

In October 2006, Ms. Jefferson contacted Johnson to start the refinancing. However, Johnson was not responsive to Ms. Jefferson's repeated calls. 2/25/10 Op. at ¶ 37 (A133); Vol. II at 206 (A936) (Jefferson). Quicken's records confirm that Ms. Jefferson made numerous calls to Quicken and, specifically, Johnson, in October 2006 without success. The single returned call from Johnson to Ms. Jefferson lasted 37 minutes on October 11, 2006. *See*, 2/25/10 Op. at ¶ 38 (A133); PL Ex. 3, Q1994 (A1739). These logs corroborate Ms. Jefferson's testimony that she was promised a refinancing in 3 to 4 months from the closing that occurred on July 7, 2006 – matching the time frame perfectly. "Ultimately, Quicken Loans refused to refinance the . . . loan, [which] . . . constitutes a breach by Quicken of a pivotal ingredient of the loan transaction." 2/25/10 Op. at ¶ 39 (A133). Furthermore, Quicken refused the refinancing at a time when Ms. Jefferson had made all of her payments.[3]

[3] Nonetheless, Quicken attempts to fault Ms. Jefferson for missing payments presumably and hypothetically causing her credit score to drop. This, Quicken claims, is a failure on the part of Ms.

At trial, Quicken admitted that it never intended to keep its promise. In fact, Quicken's policies actually *prohibit* refinancing within 4 months because of contractual obligations with investors. *See*, Vol. IV at 175-178 (A1094-1095), 192 (A1098) (Nuckolls). Moreover, Quicken never even reported the Loan to the credit bureaus despite the fact that the premise behind the promise to refinance was that Ms. Jefferson's credit score would improve "virtually as soon as the consolidation was completed." Lyon Deposition at 105-106 (A390); *see also*, Vol. II at 142-143 (A872-873) (Saunders). Respondent's expert, Margot Saunders, who frequently testifies before Congress on consumer lending issues, explained that Quicken's failure to report its end of the debt consolidation and first two payments caused Ms. Jefferson's credit score to worsen. *Id.*

D. The Terms of the Loan

1. Adjustable Rate

On July 7, 2006, Quicken closed the Loan in the amount of $144,800. The initial, annual interest rate of 9.25% was fixed for 3 years and then adjusted every 6 months, thereafter, based on the market in London. *See*, PL Ex. 1-P (A1477-1478). The interest rate could increase to 16.25% and decrease only to 7.75%. *Id.* (A1478). The initial monthly payment on the Loan was $1,144, exclusive of taxes and insurance. PL Ex. 1-P (A1478). Ms. Jefferson's previous

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Jefferson to satisfy a condition of the promised refinancing. But there was no such condition and, in any event, it was only after Quicken declined to refinance Ms. Jefferson that Ms. Jefferson missed any Loan payment. *See*, Vol. II at 206-208 (A936-38) (Jefferson). Ms. Jefferson made the first two payments (September and October) to Quicken. *See*, Petitioner's Brief at 6. The next payment was not due until November 1, 2006, and by this time Quicken had already refused Ms. Jefferson's attempts to refinance. Moreover, the November payment was not late under the contract until November 17, which is after the four month time frame for refinancing. Further, the November payment could not be reported to the credit bureaus until December 1. *See*, Vol. IV at 63-70 (A1066-1068) (Winfree); Vol. II at 12-13 (A741-742) (Saunders).

In addition, there were no new delinquencies or other negative reporting for any of Ms. Jefferson's debts within four months of the July closing. *See*, Vol. IV at 63-70 (A1066-1068) & 88-92 (A1072-73) (Winfree)("There is nothing new on the [October 31, 2006] credit report"); Vol. II at 128, 130 (A858, 860) (Saunders)("these credit lines, were no different . . . after the Quicken loan than they were before.").

mortgage had a 30-year fixed rate of 9.75% and a monthly payment of $578. *See*, PL Ex. 18 (A2289). None of Ms. Jefferson's other debt was secured by her home. *See, infra* at 22-23

2. The Shocking Balloon Feature

Unbeknownst to Ms. Jefferson, the Loan contained an exotic feature known as a 40/30 balloon payment. There was no pre-closing disclosure of the balloon payment. *See*, Vol. V at 22 (A1141) (Lyon); Lyon Deposition at 35-36 (A372). In fact, the loan as disclosed prior to closing did *not* have a balloon feature. The loan as disclosed had a variable rate of 8.5% and an initial monthly payment of $799. *See*, PL Ex. 1-OO (A1576); PL Ex. 1-PP (A1577). When significant changes are made to a loan in processing, such as a new loan product, industry standards require that a revised good faith estimate be provided to the consumer. Quicken made no such disclosure to Ms. Jefferson. *See*, Vol. I at 120-121 (A547-548) (Saunders); Lyon Deposition at 96-98 (A387-388). Because there was no disclosure, the balloon feature was unknown to Ms. Jefferson until closing. 2/25/10 Op. at ¶ 46 (A134). And, then, it was not disclosed adequately.

West Virginia law requires conspicuous disclosure of balloon payments. The amount of the balloon payment and its due date must be stated specifically on the promissory note. *See*, W.Va. Code § 46A-2-105(2). Quicken's Note contains no such disclosure. *See*, PL Ex. 1-P (A1477-1481). As a result, Ms. Jefferson was unaware of the amount of the balloon payment and its due date when she closed the loan. *See*, Vol. I at 121-124 (A548-551) (Saunders).

Importantly, this was no ordinary balloon note. Because this loan product amortizes over 40 years, it leaves the borrower with a very large balloon payment when it becomes due in 30 years. A balloon payment of $107,000 would be due *after* 360 monthly payments ranging from $1,144 to $1,582 and totaling an estimated $550,084. *See*, PL Ex. 1-F (A1454). The total finance charge for this Loan was estimated according to federal standards at $520,065, which is nearly *four times the amount financed.* 2/25/10 Op. at ¶ 45 (A134). Saunders explained the 40/30 product was short-lived, rare, and considered dangerous. She further opined that it was an outrageous product with a huge finance charge. Vol. II at 113 (A843) (Saunders). Quicken pulled this product entirely in early 2007 – less than a year after it was introduced. *See*, Vol. V at 132 (A1168) (Banfield - Designated Corporate Representative for Quicken).

The Note further states that the lender is under no obligation to refinance the loan when the balloon becomes due. *See*, PL Ex. 1-P (A1477). Moreover, because the loan exceeded the fair market value of the home by $98,000 (see *infra* at 12), refinancing with any law-abiding lender would be impossible. Thus, Ms. Jefferson's fate and the fate of her disabled daughter were sealed at the Loan closing. *After paying more than half of a million dollars on the Loan, Ms. Jefferson at 72 years of age and Ms. Brown at 57 years of age and disabled, would have to come up with another $107,000 or face foreclosure.*

Quicken also failed to disclose to Ms. Jefferson that she qualified for essentially the same loan *without the balloon payment*. *See*, Vol. V at 133-135 (A1169) (Banfield). Eliminating the massive balloon would have cost Ms. Jefferson a mere $33 per month or approximately $12,000 over the life of the Loan. *See*, Vol. I at 94-95 (A521-522) (Saunders). Quicken's incentive for steering Ms. Jefferson away from a fairly conventional loan into a short-lived, rare and dangerous balloon loan was profit driven to the tune of $95,000.

3. Excessive Points and Closing Costs

Quicken charged Ms. Jefferson 4 points or 4% of the Loan for what it termed a "loan discount", which equals $5,792. *See*, PL Ex. 1-L (A1460). Discount points are intended to be in exchange for a reduction of the interest rate. Vol. I at 96 (A523) (Saunders). Consistent therewith, Quicken represented to Ms. Jefferson that if she paid more money towards the closing costs that the interest rate on the loan would be reduced. 2/25/10 Op. at ¶ 41 (A134). But, here, there was no benefit to Ms. Jefferson. 2/25/10 Op. at ¶ 42 (A134); *see also*, Vol. I at 96-98 (A523-525) (Saunders). According to the applicable pricing sheet, the standard pricing for the Loan was the 9.25% initial interest rate with only 2.5 "discount" points. *See*, Vol. V at 139-140 (A1170) (Banfield). In addition to standard pricing, Quicken expressly allows its loan agents to overcharge borrowers when they get the chance and at their discretion.

> (i) General Rule – As a general rule, Mortgage Bankers are required to adhere to Quicken Loans published daily rates in quoting rates, points, fees and programs to prospective clients.
>
> (ii) Premiums – Mortgage Bankers shall have the discretion to charge a rate/point/fee structure that exceeds the daily price sheet on certain products, provided that the price charged does not exceed the daily price sheet price by more than two points. The additional revenue resulting from the Mortgage Banker's proper exercise of such discretion is considered the "premium" for purposes of Section I B above.

PL Ex. 9, Q1010 (A2157).

Ms. Jefferson paid an additional 1.5 points without any corresponding interest rate deduction.

> Q. So they charge the highest rate they could given the standard amount of points is that what your testimony is, a standard 2.5 points and then they added a 1.5 percent premium within the points?
> A. Correct.

Banfield Deposition at 51-52 (A415).

This $2,100 was pure profit to Quicken from which Johnson received a share. Vol. V at 139-140 (A1170) (Banfield). Therefore, the premium had *nothing* to do with any increase in risk – as the risks were fully accounted for in Quicken's daily pricing sheets, which established the required, final qualifying price for the loan. The premium was purely an extra charge that Quicken encouraged its agents to get from whomever was unwary enough to pay it by giving the agent a cut. In all, the total closing costs to Ms. Jefferson were $8,889. PL Ex. 1-L (A1460-1461).

E. The Bogus Appraisal

1. The Appraiser-Lender Relationship

Guida appraised over 100 properties for loans made by Quicken. Vol. 1 at 178 (A605) (Saunders). Quicken provided TSI with an estimated value to provide to its appraisers, including Guida. *See*, Vol. V at 68 (A1152) (Lyon). Quicken offered the following as its reason for doing so: "It gives an appraiser an ability to see what they are going to potentially look at the property at." Vol. V at 69-70 (A1153) (Lyon). Whether or not this statement is an admission to influencing appraisers, Quicken plainly conceded that providing such an estimate was unnecessary. Lyon Deposition at 53 (A377). The trial court found that there is no bona fide purpose in providing an "estimated" value to an appraiser. *See*, 2/25/10 Op. at ¶ 50 (A135); *see also*, Vol. I at 229 (A657) (Saunders).

The TSI appraisal order form labels the target figure, as the "Applicant's Estimated Value." However, Ms. Jefferson provided no value and, even the value she allegedly provided ($250,000), was not the figure ($262,500) that TSI provided to Guida. *Compare*, QL Ex. 64 (A1295) to PL Ex. 1-A (A1448). The suggestion of $262,500 was nearly *$200,000 more than the highest sale in her neighborhood during the previous five years*. 2/25/10 Op. at ¶ 50 (A135). While Guida did not hit Quicken's target, it appears that he got the point by arriving at an inflated appraised value of $181,700, which was more than sufficient to make the Loan and to offer additional cash to Ms. Jefferson. Furthermore, there was evidence of direct contact between Quicken and Guida. Guida had a handwritten telephone number for Quicken notated in his appraisal file, as opposed to TSI's telephone number. PL Ex. 13 at B5107 (A2200) ("1-800-226-6308"). Quicken stipulated that this was its telephone number. Vol. V at 267-268 (A1202).

2. A Grossly Inflated Appraisal

The true market value for the Property was $46,000. 2/25/10 Op. at ¶ 56 (A136). "During the review process, Quicken Loans ignored obvious flaws in the inflated Guida appraisal. Furthermore, Quicken violated its own appraisal review standards and the Uniform Standards of Professional Appraisal Practice (hereinafter "USPAP")." 2/25/10 Op. at ¶¶ 57-59 (A136-139) (citing 3 pages of examples). Nonetheless, Quicken did not inquire of Guida after receiving the appraisal. *See*, Fica Deposition at 45 (A419) (Quicken's appraisal review analyst).

Moreover, there is substantial evidence of appraisal inflation within the loan file itself:

- Quicken obtained but did not consider an automated appraisal review that revealed *twenty areas of concern* – many of which echoed Respondents' appraisal expert, Troy Sneddon. *See*, PL Ex. 1-CC (A1534); Fica Deposition at 51-53 (A420-421).

- Quicken's appraisal analyst based her approval on a 62% CLTV (combined loan to value - here, equivalent to loan to value). *See*, Fica Deposition at 33-34, 45-47 (A418-419). Yet no further underwriting of the appraisal was undertaken after the cash out was increased on June 6 and the equity or cushion shrunk from 38% to 20% for the completed loan. *See*, Vol. II at 150-151 (A880-881) (Saunders).

- Quicken boldly ignored the assessed value of $20,640 for the Property in its file. *See*, PL Ex. 1-BB, Q292 (A1530).

Finally, in her notes, Johnson reveals that a Quicken employee actually identified valuation issues and suspended the loan for a time before being overruled by their director.

> This is the second time I have updated this loan from suspense status/. . . *first suspense was for low appraisal issues/director told me I was okay for the first one* and am following up for the second suspense/

PL Ex. 1-QQ, Q438 (A1614) (emphasis supplied). But in the end, Guida's value was fine by Quicken, which had every intention of increasing the Loan amount and selling the loan.

F. Quicken's Business Model

Quicken's goal is to sell 100% of its loans and to avoid "get[ting] stuck with loans." *See*, Vol. IV at 176 (A1094) (Nuckolls); Banfield Deposition at 16-17 (A411-412). "Quicken has the ability to do what's called interim servicing . . . But we do not have a strategy of holding services for the long term." *Id.* at 19 (A412). Quicken creates a pool of loans and sells the pool on the secondary market.[4] *See*, Banfield Deposition at 20-21 (A412-413). The larger the loan - the more Quicken makes in both points and sales. *See*, Vol. I at 187-189 (A614-616) (Saunders).

Quicken attempted to sell this Loan numerous times. *See*, Vol. V at 105-111 (A1162-1163) (Banfield). Initially, Quicken was not able to sell the Loan for compliance issues, including apparent non-compliance with the Truth in Lending Act and/or the West Virginia Tangible Net Benefit requirement. *See, id.* Subsequently, the Loan could not be sold because Ms. Jefferson defaulted. The appraisal in no way prohibited Quicken from selling the Loan. *See*, Vol. V at 105-107, 112 (A1162) (Banfield); PL Ex. 1-G (A1455).

On or about February 21, 2007, Quicken obtained a second appraisal from a state-licensed appraiser, Michael Doyle, in anticipation of foreclosure. Therein, Doyle opined that the Property had a value of only $56,000 – over $125,000 less than Guida's value. *See*, Vol. I at 149-150 (A576-577) (Saunders); PL Ex. 22 (A2325); PL Ex. 23, Q643 (A2349). Nevertheless, Quicken's efforts to sell the Loan continued into April of 2007. *See*, Vol. V at 111 (A1163) (Banfield). Thus, despite this independent opinion of appraisal inflation, Quicken still attempted to sell the Loan on the secondary market. *See*, Vol. V at 202 (A1186) (Borelli).

[4] Quicken sells loans subject to certain representations and warranties. In general, Quicken warrants that it properly processes appraisals. But Quicken does not warrant that the appraised value it obtains for collateral is reasonable or accurate in terms of fair market value. These standard representations and warranties were not sufficient to deter loan originators from obtaining inflated appraisals in order to make and sell loans. *See*, Vol. VI at 31-32, 37-41, 45-48 (A1220, 1222-24) (Saunders); *see also*, Vol. V at 131-132 (1168) (Banfield). Since Quicken does not hold loans, it has little incentive (or *skin in the game*) to make sure a loan is covered by the property. See, Vol. I at 105-107 (A532-34) (Saunders).

G. Foreclosure and Procedural History

Within months of closing the Loan, in January 2007, Ms. Jefferson underwent surgery. Because of a hemorrhage, she had to undergo a second surgery on an emergency basis. Ms. Jefferson was required to be off work for at least a few months. She advised Quicken of the same and asked for assistance. Several of her pleas for help over the next *six* months were in writing. *See*, PL Exs. 27 (A2362), 29 (A2365) & 32 (A2370). Though Ms. Jefferson was able to make payments in January and February, Quicken was unwilling to work with Ms. Jefferson in any manner. *See*, Vol. II at 210-214 (A940-944) (Jefferson); Vol. IV at 129-130 (A1083) (Nuckolls) (Quicken categorically did not make loan modifications); PL Ex. 28, (A2363). On July 27, 2007, Quicken issued a notice of acceleration of the balance through the Trustee named in the Deed of Trust. PL Ex. 33 (A2371).

In August 2007, Respondents provided statutory notice of a claim and afforded Quicken a right to cure under W.Va. Code § 46A-6-106(b). *See*, PL Exs. 34 (A2373) & 35 (A2375). No cure offer was made. Instead, the Notice of Foreclosure Sale was issued. *See*, PL Ex. 38 (A2380). Respondents were forced to file suit and obtain injunctive relief from the trial court to avoid the immediate loss of their home. *See*, PL Application for Preliminary Injunction (Feb 1. 2008) (A31). While the lawsuit was pending, Respondents voluntarily agreed to pay and did pay without delay $578 per month to Quicken. *See*, Vol. IV at 84-85 (A1071-1072) (Winfree); PL Exs. 39 (A2381-2399) & 53 (A2453).

The trial court conducted a 6 day trial beginning on October 5, 2009 in which the court heard from 9 witnesses, including 4 experts, and entertained hundreds of exhibits that included more than 5,000 pages of material.[5] In addition, six depositions were admitted into evidence.

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[5] In its appeal, Quicken does not a raise a single pretrial or evidentiary error. In fact, Quicken prevailed on most of the evidentiary rulings. The trial court excluded pattern and practice evidence offered under

Following the trial, the trial court set a briefing schedule and heard argument on December 2, 2009. On February 25, 2010, the trial court entered its 26 page Memorandum of Opinion.

Therein, the trial court determined the Loan to be unconscionably induced. The trial court also concluded that the Loan contained unconscionable terms, including: (1) excessive closing costs, (2) the premium charged for the phony "loan discount," (3) the $107,015 balloon payment after 30 years of high payments, and (4) the drastically inflated appraisal that led to a loan amount which prohibited Ms. Jefferson from ever refinancing or selling her home. The trial court also ruled that a 40/30 loan structure under a circumstance where an inflated appraisal makes refinancing impossible is "in and of itself unconscionable," as a borrower cannot avoid the massive balloon payment.

The trial court also determined Quicken's loan practices to be unfair and deceptive. Likewise, the trial court found Quicken liable for fraud with respect to the false promise of refinancing, the phony interest rate buy-down and the concealment of the balloon payment. The trial court went on to find a willful violation of § 31-17-8(m)(8) regarding the making of a loan in excess of a property's fair market value and a violation of § 46A-2-105(2) regarding non-compliance with the balloon payment disclosure.

As damages, the trial court ordered $17,476.72 in restitution of payments; cancelled the mortgage loan obligation; and awarded attorney fees under both W. Va. Code § 46A-5-104 and § 31-17-17(c). The trial court *did not* award emotional distress damages. Finally, the trial court concluded that the cumulative effect of Quicken's misconduct warranted "a" punitive damage award under *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996)

W.Va. Evid. Rule 404(b) regarding four other loans to Ohio County residents that were based on inflated appraisals obtained from Guida by Quicken around the same time as this Loan. It also denied a motion seeking an adverse inference regarding missing loan notes that Respondents contended would reveal that Quicken first obtained an appraisal from someone other than Guida that did not support the loan.

(affirming the *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) standard), a decision which was written by then – Justice Recht. Quicken does not contest the trial court's application of or conclusion under *Mayer* in its perfected appeal.

On Wednesday, September 1, 2010, the trial court held Phase II of the trial on the *Garnes* factors.[6] *See*, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Thereafter, the parties submitted briefs arguing the *Garnes* factors and reply briefs thereto. On February 17, 2011, after considering all the *Garnes* factors and engaging in the ratio analysis of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), the trial court issued its punitive damage award and entered judgment. Quicken timely filed post-trial motions, which were later denied, but failed to preserve the motion for an offset of settlement and the trial court did not reach the motion.

SUMMARY OF THE ARGUMENT

Quicken's first assignment of error addresses only the trial court's finding of unconscionable terms, which it attacks on substantive unconscionability grounds alone. Quicken's argument regarding substantive unconscionability is done in by the lethal combination of an inescapable loan (as a result of the vastly inflated appraisal) and massive balloon payment after 30 years of considerable monthly payments, which complement a heavy dose of procedural unconscionability.

In its second assignment, Quicken falls well short of proving that the trial court abused its discretion in its findings of fraud. The primary motivating and facilitating factor behind this Loan was Quicken's false promise to refinance it within three to four months of closing. Ms.

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[6] The trial court also took evidence regarding the reasonableness of plaintiffs' attorney fees and costs and ultimately entered a reduced award. The right to or reasonableness of this award has not been appealed despite some derogatory statements regarding the amount of the award in Petitioner's Brief at 8. *But see* Petitioner's Brief at FN 9, claiming for the first time that it had similar litigation costs.

Jefferson's testimony was supported by Quicken's loan notes, its call logs and its training practices. In addition, the trial court correctly concluded that the phony interest-rate-buy-down and hidden balloon payment were not only unfair and deceptive in violation of statute (which findings Quicken does not appeal) but also fraudulent.

For its third assignment of error, Quicken attempts to create issues of statutory interpretation and asks this Court to strip consumers of long-standing statutory remedies against abusive creditors. This Court rejected an analogous attack on consumers last term in *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577 (2011) and affirmed the historic principle that the West Virginia Consumer Credit and Protection Act ("WVCCPA" or "the Act") is a remedial statute and entitled to liberal construction to accomplish its purpose of protecting consumers. However, here, less construction is needed than in *Barr*, as W.Va. Code §46A-2-121 and § 31-17-17 are plain on their face and permit the voiding of illegal and unconscionable loans.

Fourth, Quicken argues that the trial court erred by "failing to apply the required factors under *Garnes*." The trial court conducted an evidentiary hearing specifically addressing the *Garnes* factors, which was followed by two rounds of briefing applying the *Garnes* factors to this case. Given this and the fact that the punitive claim was tried to the bench, as opposed to a jury, the trial court was correct that its initial 26-page Order of February 25, 2010 in conjunction with its Order of February 17, 2011, are sufficient to document the basis of the trial court's own punitive award. The canceling of the Loan and award of attorney fees were compensatory and remedial in nature, alleviating the harm caused, and, therefore, the trial court properly considered the same in its ratio analysis under *TXO*, 187 W.Va. 457, 419 S.E.2d 870.

Finally, Quicken's last assignment of error is improperly before this Court, as the motion for offset was never ruled upon by the trial court. Had the trial court reached the issue, it would likely have determined any offset waived as the motion was not timely filed under W. Va. Rule of Civil Procedure 59(e) or, alternatively, without merit as the elements for offset under *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990) are not present.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner's assignments of error largely involve claims of insufficient evidence or results against the weight of the evidence. Nonetheless, Respondents believe that the decisional process would be aided by oral argument and the case is appropriate for the Rule 20 docket because it involves issues of fundamental public importance to West Virginia consumers.

ARGUMENT

I. The Trial Court's Findings Regarding Unconscionability Were Supported By Overwhelming Evidence

The trial court held that the Loan was both "induced by unconscionable conduct" under W.Va. Code § 46A-2-121(1)(a) and "contained grossly unfair and unconscionable terms" under W.Va. Code § 46A-2-121(1)(b). *See*, 2/25/10 Op. at p. 17, ¶¶ 4, 5 (A142). Quicken appeals only the latter in limiting its argument to the trial court's findings regarding substantive unconscionability. For this reason, the Court can affirm the unconscionable inducement finding.

Ms. Jefferson expressly told Quicken that she was declining the loan and stopped taking Quicken's calls because she felt the quoted monthly payment was more than she could afford. After tipping off the appraiser and securing the vastly inflated appraisal, Quicken developed a plan to "save" the deal and, more specifically, "save her from going to the bank." First, Quicken convinced Ms. Jefferson that a broker she was dealing with was taking advantage of her. PL Ex.

1-QQ, Q431 (A1607). Second, Quicken falsely promised to refinance Ms. Jefferson at a better rate just as soon as this Loan, which paid off multiple debts, was reflected on her credit report. *See*, 2/25/10 Op. at ¶31 (A132). Third, Quicken baited Ms. Jefferson with an additional $27,000 in cash out based on the inflated appraisal. *Compare*, PL Ex 1-L (A1460) to 1-OO (A1576).

The WVCCPA states:

> (1) With respect to a transaction which is or gives rise to a . . . consumer loan, if the court as a matter of law finds:
>
> (a) The agreement or transaction to have been unconscionable at the time it was made, **<u>or</u>** to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, **<u>or</u>**
>
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

§ 46A-2-121 (emphasis supplied). The use of the word "or" means that unconscionable inducement alone is sufficient to hold an agreement unenforceable. *Compare*, § 46A-2-121 to W.Va. Code § 46-2-302 (Uniform Commercial Code) (omitting unconscionable inducement). "This Court has noted that the common law concept of unconscionability is largely the same as that articulated in the [U.C.C.]." *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749, fn. 3 (1986). However, the WVCCPA's express terms set up unconscionable inducement as a standalone claim under the § 46A-2-121 disjunctive test quoted above.

Brown v. Genesis Healthcare Corp., ---W.Va.---, --- S.E. 2d ---, 2011 WL 2611327, Syl. Pt. 20 (2011) ("A *contract term* is unenforceable if it is both procedurally and substantively unconscionable . . .") (emphasis supplied), relied on by Quicken, sets forth the *common law* unconscionability analysis. *Id.* ("The second area of the law we are asked to examine concerns the common-law doctrine of unconscionability."). *Genesis* did not examine unconscionable inducement as defined by the WVCCPA. In fact, this Court has expressly distinguished the *statutory* unconscionable inducement clause by identifying it as "fraud." *See*, *One Valley Bank v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) (§ 46A-2-121 "expressly deals with conduct that is 'unconscionable' which we have equated with 'fraudulent conduct.'"). Therefore, *Brown* does not expand what Jefferson must show to prevail – under the statute, unconscionable inducement is enough.

As for § 46A-2-121(1)(b), the facts demonstrated the substantive unconscionability of this Loan, as the Loan was a recipe for financial disaster for Respondents. Ms. Jefferson was charged nearly $9,000 upfront when the Loan closed, which included $2,100 for a sham reduction of the interest rate. Respondents were also subject to a grossly inflated appraisal that resulted in a lien on their home of nearly $100,000 more than the home's fair market value. Respondents were not just underwater – they were drowning.

In *Herrod*, 218 W.Va. 611, 625 S.E.2d 373, this Court reversed a trial court's grant of summary judgment to a mortgage lender, finding that there was sufficient evidence of excessive fees and an inflated appraisal leading to an underwater loan. *Id.* at 617-618, 379-380. Similarly, in *Bishop v. Quicken Loans, Inc.*, 2011 WL 1321360 (S.D.W.Va. 2011), Judge Copenhaver, citing this Court's decision in *Herrod*, denied summary judgment to Quicken on a similar unconscionability claim because of questions of fact regarding "the presence of excessive fees and excessive valuation render[ing] the terms of the ... note unreasonably favorable to Quicken." *Id.* at *5. What is more, neither the Herrods nor the Bishops faced a massive balloon payment that caps off a finance charge of over a half-million dollars – nearly 4 times the amount financed. 2/25/10 Op. at ¶ 45 (A134). And, because of the grossly inflated appraisal, there was no way to avoid the balloon popping. At age 72, when the $107,000 balloon payment came due, Ms.

Jefferson would simply have to pack her bags, while Quicken pocketed the half-million dollar finance charge, the Property and for good measure a deficiency judgment against Ms. Jefferson for the balance due. *It is the combination of the inflated appraisal and the 40/30 balloon payment that makes this Loan lethal.*

Accordingly, Quicken wisely attempts to focus the Court's attention on other terms. The gist of Quicken's argument is that the Loan cannot be substantively unconscionable because the Loan allegedly lowered Ms. Jefferson's interest rate, lowered her total monthly payments and provided her with money. The first two points are only a fraction of the story and the benefit of the money loaned was far outweighed by the cost. Further, the loans at issue in *Herrod* and *Bishop* similarly involved decreased (initial) interest rates, decreased (initial) monthly payments and money, but this did not prevent a finding of unconscionability. *See*, *Herrod*, 218 W.Va. at 614, 625 S.E.2d at 376; *Bishop*, 2011 WL 1321360, *2-3.

The Loan, here, converted a 9.75% fixed rate mortgage to a variable rate ranging from 7.75% to 16.25%. The initial rate of 9.25% for the Loan was good for only 3 years. Again, because of the inflated appraisal, there was no way to refinance with another law-abiding lender to protect against rate changes. At the highest rate, the monthly mortgage payment equaled $1,582 per month, exclusive of taxes and insurance, or 64% of Ms. Jefferson's income at the time the Loan closed. Thus, this variable rate feature had no real upside for the Respondents.

The argument that Ms. Jefferson's total monthly payments decreased is even more flawed. The initial $316 in monthly savings is short lived. With the exception of the Citifinancial mortgage, Ms. Jefferson's debts were all short term and, therefore, the purported savings was short term, as demonstrated in the chart below derived from the testimony of Quicken's financial expert, Morgan Winfree. *See*, Vol. IV at 74-82 (A1069-1071) (Winfree).

Number of Months From July 2006 Closing	Combined Monthly Payment for: CitiFinancial Mortgage & Unsecured Debts	Monthly Payment for: Quicken Loan (100% Secured)
1	$1,460	$1,144
10	$1,361	$1,144
29	$878	$1,144
33	$808	$1,144
60	$578	$1,582
360	0	$107,015
Total Payments	**$308,973**	**$657,099**

The total cost of the Loan when compared to Ms. Jefferson's combined prior debts was an additional $349,000 in monthly payments. *See, id.* at 82 (A1071) (Winfree) ("I think it is highlighted at the bottom of your chart there, the difference would be about $349,000").

Quicken's argument regarding the comparison of monthly payments before and after the subject refinancing is further flawed because it places secured and unsecured debt on equal footing. *See*, Vol. I at 117 (A544) (Saunders). Here, Quicken *doubled* Ms. Jefferson's home-secured monthly payments which the trial court found jeopardized the Respondents' home. Plainly, Ms. Jefferson's credit history showed an income problem beginning with being off work to care for her daughter and, culminating in her mother's death which transferred all of the household expenses to Ms. Jefferson. Securing these unsecured debts against the family home given Ms. Jefferson's income, obligations and poor credit history was unconscionable, as doing so was likely to cost the family their home.[7] However, the trial court in no way formulated a *per se* rule that consolidating debts is unconscionable as Quicken suggests. *See*, *Herrod*, 218 W.Va.

[7] This refinancing also denied Ms. Jefferson of the available option of discharging all of her unsecured debts in bankruptcy and leaving only the secured Citifinancial loan and its $578 monthly payment. By securing Ms. Jefferson's unsecured debts against her home, bankruptcy ceased to be a viable option. *See*, Vol. IV at 83-85 (A1071-1072) (Winfree).

at 617, 625 S.E.2d at 379 ("The particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.")(citation omitted). Certainly, debt consolidation can be a healthy and prosperous endeavor for a homeowner who can readily afford the increased mortgage payments and whose income is high enough to take advantage of the tax incentive. But Ms. Jefferson was not that homeowner, and she was better off protecting her home with a lower mortgage payment.

Thus, Petitioner is reduced to the issue of cash out. It is worth noting again that Ms. Jefferson took this money at Quicken's urging based on the spurious appraisal, and that Quicken benefits from higher loans in the form of increased volume and loan fees. Still, Quicken argues that Ms. Jefferson "needed an immediate cash payout" (Petitioner's Brief at 13), but it cites nothing in the record as support. Ms. Jefferson purchased a new Toyota because of fuel efficiency and longevity, not because of any immediate need for a new vehicle. *See*, Vol. II at 196 (A926) (Jefferson). With that said, the $40,000 in cash out cost Ms. Jefferson $349,000 in increased monthly payments and nearly $9,000 in up front closing costs. Thus, the cash that was largely used for an automobile upgrade was not a fair deal or anywhere near worth the cost.

While abundant evidence of both procedural unconscionability and substantive unconscionability exists, Respondents suggest that the false promise of refinancing, along with the appraiser influence, should be heavily weighted on the procedural side of the sliding scale under *Genesis Healthcare*. The record is clear – Ms. Jefferson had made a decision to walk away from Quicken until the deceptive sales tactics on June 6. Additionally, Quicken put Ms. Jefferson through a rushed closing, where new loan terms had been added, where only a notary was present, where none of her questions could be answered, and where she was simply told to sign where the sticky notes indicated. On the substantive side of the scale, it is the lethal combination of a vastly inflated appraisal and massive balloon payment after 30 years of considerable monthly payments that can lead to no other conclusion than that reached by the trial court. For these reasons, the trial court should be AFFIRMED.

II. The Trial Court Was Well Within Its Discretion In Finding Fraud Not Once, But Three Times

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard . . ." Syl. pt. 1, *Public Citizen, Inc. v. First National Bank*, 198 W.Va. 329, 480 S.E.2d 538 (1996). Quicken has failed to meet the standard for overturning the trial court's three findings of fraud.

A. Ms. Jefferson's Testimony Regarding the False Promise of Refinancing was Widely Corroborated and Quicken's Intent Conceded

Quicken makes two arguments regarding the trial court's conclusion that it defrauded Ms. Jefferson by falsely promising to refinance the Loan - (1) there was insufficient evidence of the false promise, and (2) there was insufficient evidence of intent. Neither argument is persuasive.

Respondents demonstrated that Quicken fraudulently promised Ms. Jefferson that it would refinance the subject loan. Ms. Jefferson testified specifically about this promise at trial.

> She told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and . . . everything started to be paid off, then I would be able to refinance my loan.

Vol. II at 195 (A925) (Jefferson). Ms. Jefferson's testimony was not "uncorroborated." Instead, it was consistent with Quicken's own notes, confirming that Ms. Jefferson declined the Loan until the June 6 promise. *See*, 2/25/10 Op. at ¶¶ 24-31 (A131-132).

Quicken's sales tactics, including the making of "forward looking statements," also corroborate Ms. Jefferson. The impact of these training manuals was conceded by Quicken at the punitive phase of the trial.

> Q. Since 2006, has Quicken Loans done anything to ensure these types of promises are not made again?
> A. Yes.
> Q. What is that?
> A. We don't train our mortgage bankers to make these forward looking statements... *so we ensure this won't happen again.*

Phase II at 148 (A2440) (Nuckolls) (emphasis supplied). Most of all, Ms. Jefferson's testimony was corroborated by the documented efforts to obtain the promised refinancing directly from Johnson beginning in October of 2006 - three months after the loan closed. *See*, 2/25/10 Op. at ¶¶ 37-38 (A133). Perhaps, most tellingly, Quicken failed to call Johnson at the trial to dispute Ms. Jefferson's testimony.

With respect to Quicken's intent at the time of making this false promise, Quicken quite candidly admitted that it never intended to follow through on any promise made. In fact, at various times when Quicken perceives the argument helpful (but not at other times), Quicken argues that Johnson had no authority to make such a promise. *See*, Petitioner's Brief at 32. Moreover, Quicken argued it has policies against its loan agents refinancing loans within 4 months of a closing because of contractual obligations to investors. *See*, Vol. IV at 29 (A1058) (Quicken's Opening Statement)("Quicken, except in the most extraordinary circumstances, which will be explained to the Court, and having nothing at all to do with the kind of conversation we are describing, cannot and does not refinance in under four months.").

In addition, the promise was based on the premise that Ms. Jefferson's credit score would improve "once that loan was in place" and the refinancing was calculated into her credit score. But, Quicken never even reported the Loan to the credit bureaus to allow for the increased credit score. *See*, *supra* at 7-8 & Fn. 3. Finally, Quicken's intent is established for the same levelheaded reason it was evident in *Bishop*, in which case Quicken made a similar false promise of refinancing to a West Virginia consumer.

> Nevertheless, plaintiffs have presented sufficient evidence that Quicken Loans materially misrepresented that it would refinance the December 2006 note to a fixed-rate loan before the adjustable interest rate could increase. Ordinarily, fraud "cannot be based on statements which are promissory in nature or which constitute expressions of intention." *Croston v. Emax Oil Co.*, 195 W. Va. 86, 464 S.E.2d 728, 732 (1995). Only if the plaintiff can show that the defendant did not intend to fulfill the promise at the time it was made may a promissory statement serve as the basis of fraud. *Id.* Here, in response to concerns raised by Mrs. Bishop, Mr. Snively assured plaintiffs that the December 2006 note would be refinanced to a fixed-rate loan before any increase in the adjustable interest rate. *That Mr. Snively failed to incorporate this promise into the official loan documents surrounding the December 2006 note (which, of course, bound plaintiffs to pay an adjustable interest rate) raises a question of material fact regarding Quicken Loans' intentions to fulfill the promise at the time it was made. See, England v. MG Invs., Inc.*, 93 F.Supp.2d 718, 722 [S.D.W.Va. 2000] (holding that lender's failure to include oral promise concerning interest rate into written loan documents raised question concerning lender's intent to abide by promise).

Bishop v. Quicken Loans, Inc., 2011 WL 1321360, *9 (emphasis supplied).

B. The Massive Balloon Payment was Fraudulently Concealed

The trial court concluded that Quicken fraudulently concealed the balloon payment prior to closing and then "the balloon payment amount and due date at closing." 2/25/10 Op. at p. 22 (A147). "Fraudulent concealment involves the concealment of facts by one with knowledge, or the means of knowledge, and the duty to disclose, coupled with an intention to mislead or defraud." *Trafalgar House Constr., Inc. v. ZMM, Inc.*, 211 W.Va. 578, 585, 567 S.E.2d 294, 301 (2002). Quicken argues that there was no concealment or intent to conceal the balloon payment.

Ms. Jefferson had no way of knowing that there was a balloon prior to receiving the Loan closing packet. In fact, the loan as disclosed *had no* balloon feature. It is undisputed and entirely logical that when significant changes are made to a loan in process, industry standards require a new good faith estimate. But, Quicken made no revised disclosure and, therefore, denied Ms. Jefferson of an opportunity to pursue other options prior to closing.

Quicken also breached its statutory duty to meaningfully and conspicuously disclose the balloon payment at closing. The trial court found that there was some disclosure of the balloon feature at the door to door, notary-conducted closing (i.e., the Note included the term "Balloon" in its title"), but such notice is wholly inadequate, as the consumer is left to sort through legal jargon only to perform an actuarial calculation of the balloon payment. For these reasons, the Legislature required a plain and simple disclosure of the due date and amount of the balloon.

As for intent, Quicken disregarded the statute, as well as industry guidelines, by concealing the balloon payment for as long as possible and as much as possible. *See*, Syl. Pt. 3, *Rogerson v. Rogerson*, 152 W.Va. 169, 150 S.E.2d 159 (1968) ("Fraud does not have to be proved by direct and positive evidence but may be established by circumstantial evidence"). The circumstances, here, are such that Quicken was able to perpetrate a well crafted bait and switch on the Respondents through the concealment of the *amount* of the balloon payment.

Quicken briefly addresses the element of reliance. Note, "[i]t is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representations contributed to the formation of the conclusion in the plaintiff's mind, that is enough...." Syl. Pt. 3, *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927). Further, in the context of fraudulent concealment, this Court has applied an objective "but for" standard to the element of reliance. *See*, *White v. Wyeth*, 227 W.Va. 131, 705 S.E. 2d 828, 837 (2010). *See also*, *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998) (Workman, J., concurring) (discussing reliance in concealment claim). Plainly, a $107,000 balloon payment after 30 years of considerable payments on a

$144,000 loan would not be tolerated by any reasonable person (especially, when the balloon saved her only $33 per month). Thus, Ms. Jefferson, like any reasonable person, would have declined but for the concealment of the balloon payment. The fact that she was distracted by another fraudulent act – the promise of refinancing - cannot exonerate Quicken.

C. Quicken Defrauded Ms. Jefferson with an Illusory Interest Rate Reduction

Quicken charged Ms. Jefferson 4 points for what the settlement statement portrayed as a "loan discount" fee. Points are intended to benefit the borrower by reducing the interest rate on the loan. But, here, at least 1.5 points had absolutely no benefit to Ms. Jefferson.

Ms. Jefferson qualified for the 9.25%, 40/30 loan with 2.5 points *after* the adjustments for whatever increased risk that Quicken incurred from the recently late Citifinancial monthly mortgage payment, which mortgage was pending payoff. Consistent with Quicken's incentive plan, which compensates loan agents for adding phantom points, Johnson then charged a discretionary 1.5 additional points or $2,100 above final, standard pricing without any corresponding interest rate reduction.

But, here, Quicken went a step beyond taking advantage of an unsuspecting consumer or mislabeling pure profit as a service. It affirmatively misrepresented the charge as an interest rate buy-down. The fact that Johnson afterwards shared her misrepresentation with a co-worker, noting Ms. Jefferson "knows she is buying the [interest] rate way down," confirms that this misrepresentation was material to Ms. Jefferson. *See*, PL Ex. 4 at Q2647 (A1819). Moreover, prior to the misrepresentation, Johnson noted that when "I give her the final numbers she prob[ably] won't want any of us" and "I am hoping she doesn't run like last time." PL Ex. at Q0002663 (A1835), 2666 (A1838). But, yet again, a well-trained Johnson was able to make Ms. Jefferson "excited" about the Loan. *See id.* at Q0002676 (A1848).

A matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Restatement Second, Torts § 538 (2010). Spending $2,100 is a material act to most anyone in West Virginia. Here, had Quicken been forthcoming about the fictitious "loan discount," Ms. Jefferson, who earned less than $2,500 per month, would have put an additional $2,100 in her pocket by avoiding this opportunistic and discretionary premium. Therefore, this is not "mislabeling" but systematically "overcharging" on a wide scale. Plain and simple, Ms. Jefferson paid for an interest rate discount that she did not receive. Thus, the "loan discount" that Ms. Jefferson unnecessarily paid to Quicken was material.

In addition to materiality, Quicken argues reliance. However, Quicken did not preserve this issue for appeal. In its post trial motions, Quicken argued only materiality. For this reason, the Court should decline to hear the issue. All the same, Ms. Jefferson plainly relied on this misrepresentation in gratuitously paying the $2,100 windfall to Quicken. She even showed excitement, as recorded in Johnson's e-mail. *Id.* Because the trial court determined the Loan, as a whole, should be declared unenforceable, it was unnecessary to separately award the $2,100 procured through this fraud. Nevertheless, Quicken's "discount points" were fraud.

III. The Trial Court Had Discretion To Hold This Unconscionable And Fraudulent Loan Unenforceable As A Matter Of Law

The trial court determined the Loan, specifically the Note and Deed of Trust, are "unenforceable as a matter of law" consistent with the remedies provided under § 46A-2-121, §46A-6-106 and common law fraud. The trial court further "canceled" the loan obligation under § 31-17-17(a); therefore, declaring the Note and Deed of Trust "void." Quicken contests the trial court's authority to order such relief.

A. The Consumer Credit and Protection Act

Respondents submit that § 46A-2-121 clearly and unambiguously authorized the trial court's remedy in this matter.

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if 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 court may refuse to enforce the agreement*, or
>
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, *the court may refuse to enforce the agreement*, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

W.Va. Code § 46A-2-121(1)(emphasis supplied). The crux of Quicken's argument is that the trial court's application of § 46A-2-121 in holding the Loan unenforceable cannot be reconciled with W.Va. Code § 46A-5-105, which provides

> If a creditor has willfully violated the provisions of this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, in addition to the remedy provided in section one hundred one of this article, the court may cancel the debt when the debt is not secured by a security interest.

Quicken builds its argument almost exclusively on *Byrd v. Option One Mortgage Corp.*, No. 2:04-1058 (S.D.W.Va. Apr. 12, 2007), an unpublished, federal district court opinion which overlooks two dispositive decisions from this Court.[8] Petitioner further relies on misquoted language from *Bolen*, 188 W.Va. 687, 425 S.E.2d 829. *Byrd* is incorrect and *Bolen* is dispositive

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[8] Quicken first mentions *Tomchin Furniture Co. v. Lester*, 172 W.Va. 575, 309 S.E.2d 73, 79 (1983)("We find no provision authorizing cancellation of the debt because of the failure to advise of the right to obtain property and life insurance from someone other than the creditor.") However, *Lester* is limited to a very narrow claim regarding statutory notice of a right to buy credit insurance from third parties opposed to a broad challenge to the making and enforceability of a consumer loan under § 46A-2-121. Naturally, failure to provide such a notice does not render a loan unenforceable.

of Quicken's argument, as it holds that Article 5 simply provides "*additional* damages" to those *self contained* in § 46A-2-121. *See*, *Bolen*, 188 W.Va. 687, 425 S.E.2d 829, Syl. Pts. 2 & 4.

Nevertheless, it's appropriate to begin with *Byrd.* West Virginia Code § 46A-5-105 by its own terms supplements the remedy provisions of W.Va. Code § 46A-5-101 and in no way limits any remedy under the Act (*i.e.*, the statute does not state "Only if a creditor ..."). *Byrd* recognized as much and begins with § 46A-5-101(5), which states "except as otherwise provided, a violation of this chapter does not impair rights on a debt." It is, here, where *Byrd* takes a wrong turn. *Byrd* overlooks the fact that the unconscionability statute, § 46A-2-121, expressly gives the court the power to "impair rights on debts" by refusing to enforce "consumer loans" or any part thereof.[9] This Court has approved of the use of this statutory power for many years in a variety of contexts. *E.g.*, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2003) (arbitration clause in consumer debt agreement unenforceable); *U.S. Life Credit Corp. v. Wilson*, 171 W.Va. 538, 301 S.E.2d 169 (1982) (waiver of consumer rights in debt agreement was unconscionable). It is clear that § 46A-2-121 "otherwise provides" for the impairment of "rights on debts," as that term is used in § 46A-5-101(5).

Accordingly, § 46A-2-121 can truly be read *in pari materia* with § 46A-5-105 without inventing a mythical and problematic tender-of-principal requirement and without limiting remedies provided for in the WVCCPA. As it stands, courts are free to fashion any number of remedies, whether minor or severe, under § 46A-2-121 on a case-by-case basis.

All the same, Respondents submit that the remedy provisions of § 46A-2-121 need not be read *in pari materia* with Article 5. Two of the Court's opinions make that point clear. In *U.S. Life Credit Corp.*, 171 W.Va. at 542, 301 S.E.2d at 172, the Court confirmed that § 46A-2-121

[9] Both § 46A-5-101(5) and § 46A-2-121 were part of the original enactment of Chapter 46A in 1974; both were amended and reenacted in 1996. §46A-5-105 was a late addition to the Act in 1994.

(along with other enumerated sections of the Act) has a "self-contained remedy" and held that Article 5 remedies are both separate from and in addition to the "self-contained remedy" for unconscionability. The conclusion that Article 5 simply provides "*additional* damages" to those "self contained" in § 46A-2-121 was later formalized in the Court's syllabus in *Bolen.*[10] Thus, the district court's conclusion in *Byrd* that "§ 46A-2-121 authorizes nothing more than is allowable under § 46A-5-101" is directly contradicted by this Court's decisions in *U.S. Life Credit Corp.* and *Bolen.*[11]

Because the Legislature, in adopting § 46A-5-105, was simply adding another remedy to Article 5, which applies broadly to most all violations of Chapter 46A, it did not intend to intrude on the more specific, "self contained" remedies codified in § 46A-2-121 itself.[12] Likewise, Article 6, governing unfair and deceptive acts and practices, has a self contained remedy codified in W.Va. Code § 46A-6-106(a). A consumer "may bring an action . . . to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper." § 46A-6-106(a). Here, again, § 46A-5-105 could in no way limit the trial court's discretion to provide equitable relief. Similarly, §46A-5-105 does not limit a consumer's remedies for common law fraud. *See, Casillas v. Tuscarora*

[10] 2. W.Va. Code § 46A-5-101 outlines the types of *additional* damages that may be recovered for various violations of Chapter 46A, and specifies illegal, fraudulent or unconscionable conduct.
4. Under W.Va. Code § 46A-5-101, the additional *damages* for fraud or unconscionable conduct are limited to actual damages and, if the court so determines, a penalty of not less than one hundred nor more than one thousand dollars. Consequently, *punitive damages are not available* under the fraud or unconscionable conduct provisions of W.Va. Code, 46A-2-121 [1974].
Bolen, 188 W.Va. 687, 425 S.E.2d 829, Syl. Pts. 2 & 4 (1992) (emphasis supplied).

[11] Respondents' reading of § 46A-5-105 does not render it "superfluous." For example, before § 46A-5-105, the only relief for a willful violation of the illegal balloon note statute was actual damages, if any, and a civil penalty under § 46A-5-101. After the passage of § 46A-5-105, unsecured balloon notes may be canceled.

[12] The "general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to same subject matter where the two cannot be reconciled." Syl. Pt. 4, *In re Chevie V.*, 226 W.Va. 363, 700 S.E.2d 815 (2010)(citation omitted).

Land Co., 186 W.Va. 391, 394, 412 S.E.2d 792, 795 (1991) ("defenses of the WVCCPA are not available . . . under the common law action"). For the forgoing reasons, the unpublished holding of *Byrd* is contrary to both statutory and common law.[13]

B. Statute Prohibiting Loans in Excess of Property's Fair Market Value

The Court also voided or canceled the Loan under § 31-17-17(a). Quicken challenges the trial court's authority and misconstrues its factual findings regarding the requirement of intent.

§ 31-17-17. Loans made in violation of this article void; agreements to waive article void

> (a) If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be cancelled by a court of competent jurisdiction.

Yet again, Quicken argues that this Court should legislate some vague tender obligation into the statute, despite the fact that its interpretation of Chapter 31 is inherently contradicted by its interpretation of Chapter 46A. In discussing § 46A-5-105, Quicken concedes that the word "cancel" means the entire debt, including principal, and argues that remedy is reserved for unsecured debts. *See*, Petitioner's Brief at 24-25. Having been confronted with a similar statute that by its terms applies to mortgage loans, Quicken's already flawed arguments become unworkable and, here, unsupported by any authority. *Cf.*, *Bailey v. Branch Banking & Trust Co.*, 2011 WL 2517253 (S.D.W.Va. 2011) ("jury's decision on these claims [subject to cancellation under Chapter 46A] will directly impact whether he is obligated to pay the principal and interest on his credit card").

[13] Should the Court determine that the trial court does not have authority to void this Loan, or that the void Loan, or any part thereof, cannot be included for punitive damage ratio purposes, then Respondents respectfully submit that the trial court should be given an opportunity to award in the alternative damages under § 31-17-17(c), § 46A-5-101(1), § 46A-6-106 and/or common law fraud. As demonstrated herein, Respondents were certainly harmed by this predatory loan and that harm should not go uncompensated nor should Quicken's malicious conduct go unpunished.

Essentially, Quicken argues that canceling a loan obligation does not mean voiding the obligation but means rescission of the loan, which would require repayment of principal. This interpretation is at odds with the very title of the statute – "Loans made in violation of this article void." Nor would the Legislature omit something of such significance (and logistical complexity) as repayment of the loan principal when providing for canceling of a loan. Furthermore, the Legislature knows how to limit consumer remedies to interest when it so intends. W. Va. Code § 47-6-6 provides that "[a]ll contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is permitted by law *shall be void as to all interest* provided for in any such contract or assurance." *Id.* (emphasis supplied). The absence of such qualifying language, here, is instructive of the legislative intent. Accordingly, this loan was properly voided under § 31-17-17(a).

Quicken also distorts the trial court's conclusions as to the multistep appraisal process. With respect to the act of providing an estimated value in the ordering of the appraisal, the trial court found Quicken's intent or "purpose" was "to inflate the true value of the property." 2/25/10 Op. at ¶ 50 (A135). Quicken is correct that the trial court found only negligence as to the manual appraisal review step. *Id.* at ¶¶ 57-59 (A136-139). However, as to the overall approval and use of the appraisal, the trial court found "sufficient evidence that the appraisal was not *bona fide*, including: . . . several indications that the appraisal was grossly inflated within the loan file itself." *Id.* at p. 23 (A148); *see also*, *supra* at 13. In these regards, the trial court later explained its conclusions:

> Where I am concerned is, on Item 5, where the mortgage loan between Quicken and the Plaintiffs exceed the fair market value of the property, and then the Defendant cannot meet its burden of proving the appraisal was bona fide. And it made an independent appraisal, or it was prepared in compliance with USPAP, and that is what I am talking about.

> And there was no finding there, that that was done negligently and, basically, really was the basis of enjoining Quicken from collecting any future payments under the loan.

Phase II at 118 (A2433). Accordingly, the trial court's findings were not limited to negligence. Willfulness has been established permitting the cancelation of the Loan.

IV. The Punitive Damage Award Was Well-Supported And Satisfied Due Process

A. Predicate Authority

The parties agree common law fraud is a proper predicate for a punitive damage award. The merits of the fraud claim were discussed above. In addition, a violation of W.Va. Code §31-17-1, *et seq.* may serve as the predicate cause of action for a punitive damage award. Quicken does not argue to the contrary and simply reiterates its position that no willfulness finding was made with respect to the appraisal.[14] This argument was also addressed above.

B. Quicken Loans was Afforded Procedural Due Process

Despite receiving a full evidentiary hearing, and a full opportunity to brief the *Garnes* issues post hearing, Quicken claims it was denied procedural due process merely because the trial court did not write a sufficiently detailed order. Respondents wanted more detail in the February 17, 2011 Order, as well, because they wanted to show this Court the full reprehensibility of Quicken's conduct. Nonetheless, the trial court determined that the record was sufficient, and its Order of February 17, 2011 does not stand alone. The trial court's initial 26-page Order of February 25, 2010, with its Findings of Fact and Conclusions of Law, must also be considered. *See*, Memorandum of Opinion and Order at FN 3 (Feb. 17, 2011) (incorporating previous Order) (A311). These two orders, taken together, are more than adequate to satisfy the procedural due process requirement. Furthermore, this Court is free to

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[14] To the extent Quicken may later attempt to raise this dispute, or the Court is otherwise interested, Respondents refer the Court to Plaintiffs' Reply to Quicken's Post-Hearing Memorandum on Attorney's Fees and Punitive Damages at 13-15, filed on Oct. 1, 2010 (A265-267).

consider the very same record that the trial court had, together with, the extensive briefing in the trial court on punitive damages, in its review.[15] Accordingly, any error is harmless inasmuch as Quicken's egregious conduct, if anything, would have supported a substantially larger award.

C. The Punitive Damage Award was Justified

"Petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." Syl. pt. 5, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897. Under this standard, Quicken has preserved, at most, three issues: (1) reprehensibility; (2) whether the void loan can be included in the ratio analysis; and (3) whether attorney fees can be included in the ratio analysis. The last two issues are addressed separately below.

The circumstances here warrant a substantial award of punitive damages. Under the *Garnes-Perrine* analysis, a multitude of aggravating factors is present. Importantly, we are not dealing with gross negligence or even recklessness on Quicken's part. Instead, Quicken "crossed the line from reckless disregard of an individual's rights to willful, mean-spirited acts." *Vandevender v. Sheetz, Inc*, 200 W.Va. 591 606, 490 S.E.2d 678, 693 (1997). Unfortunately, Quicken is characterized by a culture of fraud, trickery and deceit—encouraged by management and practiced on a grand scale by the rank and file. The trial court's conclusions of fraud are worth repeating:

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[15] *See*, Plaintiffs' Post Trial Brief Regarding Punitive Damages filed on Sept. 24, 2010 (A165) and Plaintiffs' Reply to Quicken's Post-Hearing Memorandum on Attorney's Fees and Punitive Damages at 16-22, filed on Oct. 1, 2010 (A268-274). Quicken's main brief and reply brief are also in the record at A198 & A298.

(a) Intentionally promising Lourie Jefferson it would refinance her within 3 to 4 months from the date of the closing and get her into a more affordable loan upon which she reasonably relied to her detriment in accepting the loan. Quicken had no intent at the time this misrepresentation was made of refinancing Mrs. Jefferson. Instead, the misrepresentation was made to prevent Mrs. Jefferson from walking away from the loan.

(b) Representing to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a "loan discount" on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken; and

(c) Not disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment amount and due date at closing.

2/25/10 Op. at pp. 21-22 (A146-147). This fraud was motivated by profit. The institutional directive was clear – say and do whatever is necessary "to close loans." The institutional goal was likewise clear – make as much as possible up front and sell these loans as fast as possible so as not to get "stuck with loans." While Quicken failed to sell this Loan, its intent to pass the buck was crystal clear when it was revealed that Quicken was still trying to dump the Loan on the open market even *after* it obtained a legitimate appraisal of the Property.

Furthermore, this Court should not allow Quicken to scapegoat Johnson. Johnson's involvement was merely at a low level and she was not responsible for: (1) training loan agents to make forward-looking statements; (2) implementing incentive plans that motivated employees to bilk consumers into paying premiums for their loans and/or borrowing more than is legal; (3) representing premiums or pure profit as interest rate discounts on HUD Settlement Statements; (4) failing to have procedures in place to systematically send out revised Good Faith Estimates when significant changes are made to a loan; (5) drafting the Note without the crucial disclosure of the amount of the balloon; or (6) systematically tipping off appraisers. Moreover, Johnson was only doing what she was trained and incentivized to do, and what Quicken usually does.

As Quicken's attorney stated in opening statement, "[f]rankly, what you will hear is that this was a loan, like many – there was nothing unusual about this loan…" *See*, Vol. IV at 36-37 (A1059-1060) (Opening Statement). In that chilling comment lies an admission that this Loan was business as usual for Quicken. What is not typical of Quicken is making amends with the vulnerable consumers it has harmed. Quicken declined to make a single offer of settlement prior to the trial court's decision of February 25, 2010. *See*, Phase II at 171-172 (A2446) (Nuckolls); PL Post Trial Brief Regarding Punitive Damages at 6 (A170). Instead, it chose to contest any and all forms of relief, even the foreclosure injunction, and denied any and all responsibility and liability at trial.

In the end, capitalism only flourishes when tempered by morality, or at a minimum, the rule of law. Here, Quicken's conduct represented not capitalism, or aggressive business practices, but rather the belief that it is law unto itself. Quicken's conduct should be both punished and deterred. "[T]o accomplish punishment and deterrence for … a wealthy company, a punitive damage award must necessarily be large." *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 555, 694 S.E.2d 815, 888 (2010). Given Quicken's financial wherewithal, the trial court showed considerable restraint in its award. *See*, PL Ex. 57 (A2455 - note error in Table of Contents) and Phase II at 131-135 (A2436-2437) (Saunders) for a summary of Quicken's financial condition.

For these reasons, the trial court's award was both fair and constitutional under *Garnes*. In its *TXO* ratio calculation, the trial court included the $227,000 loan balance and the $495,956.25 fee award in the denominator. Both were appropriate.

1. It is appropriate to include the void loan in the punitive damage ratio

The trial court determined the Loan was void under § 46A-2-121, § 46A-6-106, § 31-17-17(a) and common law fraud. The trial court incorporated the $227,000 balance of the Loan, which includes approximately $144,000 in principal and $83,000 in accrued interest, late charges and other fees[16], in its punitive damage ratio analysis. Quicken argues that it is improper as a matter of due process to include the $144,000 principal balance for ratio purposes. Quicken was silent as to the $83,000 in accrued finance charges.

First, Quicken correctly recognizes that the "relevant bench mark is the harm" to Respondents. But Quicken takes a narrow and cynical view of harm when it argues Respondents were not "harmed by receiving $144,800." Fortunately, the law is not so narrow-minded.

In a consistent line of cases, the Supreme Court of the United States has held that courts may consider both the *actual* harm and the *potential* harm in performing the ratio analysis. *See e.g., State Farm Mut. v. Campbell,* 538 U.S. 408, 424 (2003) (noting that the relevant ratio is "between harm, or potential harm, to the plaintiff and the punitive damages award"); *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993) ("it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded"). Likewise, this Court observed in Syllabus point 1 of *Garnes*, in part, that "[p]unitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." 168 W.Va. 656, 413 S.E. 2d 897.

This is exactly what the court did in *Vasquez-Lopez v. Beneficial Oregon, Inc.,* 152 P.3d 940 (Or. 2007). Like this case, *Vasquez* arose out of a predatory lending scenario. Unlike this

[16] *See,* Phase II at 124-125 (A2434-2435) (Saunders); PL Ex. 53, Q3486 (A2454). Quicken never challenged Saunders' opinion concerning the value of the loan, which came from Quicken's own records. To be precise the balance as of June 17, 2010 was $227,626.96, which included $144,313.05 in principal; $151.56 in late charges; $49,109.29 in other fees and $34,053.06 in accrued interest. Here, the trial court rounded down.

case, however, the plaintiff in *Vasquez* was able to avoid the consequence of the predatory loan through refinancing. Accordingly, it was unnecessary for the court to exercise its authority to void the loan. Nevertheless, in performing its ratio analysis, the trial court considered the potential harm to the plaintiffs. The court concluded that "the appropriate figure for potential damages is $326,751.57, the amount of interest [the lender] would have earned over the life of the loan." 152 P.3d at 958. *See also*, *Mitchell v. Fortis Ins.* Co., 686 S.E.2d 176 (S.C. 2009)(in a bad faith case involving termination of a health insurance policy, the maximum amount the insurer would have paid out in lifetime health benefits was treated as "potential harm").

This matter is even more compelling than *Vasquez.* Whereas the harm in *Vasquez* was merely potential, the harm to the plaintiffs here was quite real because they were saddled with an illegal loan that could not be refinanced. Thus, in determining the harm suffered by the Respondents, it is appropriate for this Court to consider the amount of interest that was payable over the life of the loan. Here, the trial court found the total finance charge for this loan was $520,065.61. *See*, 2/25/10 Op. at ¶ 45 (A134). Taking this figure alone, the ratio is a constitutionally permissible 4.17 to 1.[17]

Alternatively, the trial court considered the balance of the voided loan. After all, the balance of the voided Loan includes accrued finance charges and prohibits future interest from accruing. The trial court was simply being more conservative in its approach than the

[17] *See*, Syl. Pt. 15, *TXO*, 187 W.Va. 457, 419 S.E.2d 870 (setting the outer limit of the ratio for cases involving "extreme negligence or wanton disregard" to 5 to 1). This case is not one of extreme negligence or wanton disregard. In fact, the circuit court made express and pervasive findings of fraud. Thus, the 5 to 1 limit established in *TXO* is not applicable to this case. In *Sheetz*, the Court likened a plaintiff's wrongful retaliation claim to claims of "fraud, trickery or deceit" that are deserving of larger awards of punitive damages and upheld a ratio of 15-1. 200 W.Va. at 606, 490 S.E.2d at 693. Because Quicken fully embraced "fraud, trickery and deceit," ratios above 5-1 are permissible. For a detailed discussion of the same and survey of this Court's relevant opinions, see Plaintiffs' Post Trial Brief Regarding Punitive Damages at 16-20 (A180-84) and Plaintiffs' Reply to Quicken's Post-Hearing Memorandum On Attorney's Fees And Punitive Damages at 16-19 (A268-71).

Vasquez court by selecting the lower of two appropriate figures. Besides, the value of the voided loan may be included as part of the ratio because it represents the amount of illegal, unconscionable, and fraudulent debt the Respondents were compelled to shoulder as a result of Quicken's misconduct, which amount has now been awarded to Respondents as damages.

Quicken also characterizes the void loan as punitive, and for that reason urges this Court not to count it. However, refusing to enforce an illegal, unfair, deceptive, unconscionable and fraudulent debt is in no way punitive. In doing so, the trial court provided an appropriate remedy that addressed the vast inequities of this transaction, including: the $107,000 concealed balloon payment; the excessive and fraudulent closing costs; a principal loan balance that was $98,800 over its legal limit (*i.e.*, the fair market value of the residential property it was secured by); and an increase of $349,000 in finance charges to Ms. Jefferson after refinancing with Quicken. Thus, the Loan was an actual harm to the Respondents and the remedy was compensable.[18]

Next, Quicken in a roundabout way argues that equitable relief cannot be considered for ratio purposes, but does not cite any case holding as much. Instead, Quicken attempts to twist a rarely cited, ninety-year-old case discussing the parameters of equitable jurisdiction and a few more-recent cases merely discussing in abstract the nature of certain remedies to make its argument. However, courts that have considered the issue Quicken presents have been willing to include equitable relief in the ratio. *See e.g.*, *Martin v. Texas Dental Plans, Inc.*, 948 S.W.2d 799 (Tex. App. 1997) (recognizing that equitable relief may be considered for ratio purposes where the fact finder has assigned a value to that relief); *Gagnon v. Continental Cas. Co.*, 260 Cal.Rptr. 305, 309 (1989)("[w]ith the focus on the plaintiff's injury rather than the amount of

[18] Quicken's reliance on *Perrine*, 225 W.Va. 482, 694 S.E.2d 258, is also unavailing. *Perrine* held that punitive damages were unrecoverable in medical monitoring cases because the plaintiffs did not have a present harm, but only a risk of harm in the future. Here, the Respondents were, in fact, harmed the moment Quicken compelled them to sign an illegal note and a mortgage securing it.

compensatory damages, the [ratio] rule can be applied even in cases where only equitable relief is obtained"). In any event, the emphasis for ratio purposes is not the remedy, but the harm, even to include potential harm.

Quicken's argument also overlooks the all-important fact that Respondents prevailed on five legal claims against Quicken, including four statutory claims and their common law fraud claim. The fact that the trial court's remedy of choice may have been one that was also available in the old courts of equity changes nothing. The claims asserted by the Respondents herein were legal and, as a result of those claims, the trial court held the Loan unenforceable as a matter of "*law*" – not *equity*. Finally, this Court has equated the remedy provisions of § 46A-2-121 with compensatory "damages." *See*, Syl Pt. 4, *Bolen, 188 W.Va. 687, 425 S.E.2d 829* (holding § 46A-5-101 provides "additional *damages*" to those self contained in § 46A-2-121).

2. It is appropriate to include attorney fees in the punitive damage ratio

Quicken provides the following summary of its argument: "Because attorney's fees are not compensatory damages, there is neither a legal nor logical basis for the circuit court's [punitive damage] award." Petitioner's Brief, at 36. In reaching this conclusion, Quicken overlooks the purpose and structure of the CCPA and distorts the applicable case law.[19]

To begin with, Quicken makes the broad statement that "attorney's fees do not generally compensate for actual harm to the plaintiff." Petitioner's Brief, at 38. Two cases are cited, but neither of them answers the relevant question. The first case is *Boyd v. Goffoli,* 216 W.Va. 552, 608 S.E.2d 169 (2004). *Boyd* was a common law fraud case where a fee request was made

[19] Quicken also suggests--without citing any authority--that it is improper "to ground punitive damages on statutory attorneys' fees here, because the statute to which the fees were awarded [the WVCCPA] does not authorize punitive damage awards in the first place." Petitioner's Brief, at 36. But this is simply not the law. What Quicken really wants is a separate ratio analysis for each and every claim presented by the plaintiffs. Under *BMW of North America v. Gore*, 517 U.S. 559 (1996), all punitive damage awards must be reviewed, but this review only requires the court to compare the *total amount* of the compensatory award with the *total amount* of the punitive award. There is no requirement for a claim-by-claim analysis.

pursuant to *Sally-Mike Properties v. Yokum*, 179 W.Va. 246, 356 S.E.2d 246 (1986)(authorizing fee awards where the losing party "has acted in bad faith, vexatiously, wantonly or for oppressive reasons"). Quicken also cites *Bartles v. Hinkle,* 196 W.Va. 385, 472 S.E.2d 827 (1996). *Bartles,* however, was a sanction case where attorney fees were awarded as a result of discovery violations. Importantly, neither of these cases addressed an award of fees under the WVCCPA or the Residential Mortgage Lender, Broker and Servicer Act.[20] *See*, W.Va. Code §46A-5-104; W.Va. Code § 31-17-17. Fees awarded pursuant to these statutes are *compensatory* in nature, not punitive. This is so for at least three reasons.

First, the remedial purpose of the WVCCPA must be considered. West Virginia case law makes it clear that the WVCCPA is a broad, remedial statute intended to protect West Virginia consumers and compensate them fully for their losses. *See, e.g., Barr*, 227 W.Va. 507, 711 S.E.2d at 583 (noting that the act's "remedial" purpose is "to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue for relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action"). Second, the compensatory nature of a fee award under the WVCCPA is apparent from its basic structure. Chapter 46A, Article 5 provides for both criminal liability and civil penalties for WVCCPA violations. Fee awards, however, are covered in their own section, § 46A-5-104, which is separate and distinct from the WVCCPA's penalty provisions. Third, case law from other jurisdictions makes it abundantly clear that statutory fee awards made in consumer cases are, in fact, intended to provide compensation to the victims.[21]

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[20] The Residential Mortgage . . . Act is a companion statute to the WVCCPA and is similarly aimed at protecting consumers W.Va. Code § 31-17-18 specifically references the WVCCPA and makes it clear that the penalties and remedies codified in Chapter 31 "are not exclusive, but are cumulative with . . . the consumer protection laws in Chapter 46A of this code."

[21] *See, Jordan v. Transnational Motors, Inc.*, 537 N.W.2d 471, 473(Mich.Ct.App. 1995)(one of the purposes behind Michigan's consumer law "is to provide, via an award of attorney fees, a means for

Given the nature of the WVCCPA, the fees awarded here were intended by the Legislature to compensate consumers for having to retain an attorney and pursue their statutory remedies. Nevertheless, Quicken argues that "courts have consistently refused to count attorneys fees as compensatory in calculating the permissible ratio of compensatory to punitive damages." Petitioner's Brief at 37. This is a gross misreading of the case law. In fact, Quicken only cites three unremarkable cases as support for this allegedly "consistent" refusal.

Quicken's flagship case is *Campbell v. State Farm Mut. Automobile Ins. Co.*, 98 P.3d 409 (Utah 2001). Following remand, the plaintiff in *Campbell* asked to have the attorney fees treated as compensatory damages for ratio purposes. The state court refused, citing the United States Supreme Court's opinion in *Campbell*, 538 U.S. 408. This was an odd citation, to be sure, because the issue of attorney fees *was neither raised nor decided* by the Court. Furthermore, the state court did not have the benefit of the cases cited herein establishing a clear majority rule to include attorney fees. *See, e.g.*, *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill. Ct. App. 2009).

In any event, *Campbell* is missing an essential element for including attorney fees in the ratio. The cases cited by the Respondents herein rely on a *statutory* award of fees. It is the public policy underlying the statutory scheme that justifies including fees in the ratio. In *Campbell*, the fees were not granted by virtue of any statute. *See*, *Campbell v. State Farm Mut.*

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consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints"); *Jones v. General Motors Corp.*, 953 P.2d 1104, 1109 (N.M. 1998)(noting that the purpose of awarding fees under New Mexico's consumer law is, inter alia, "to reimburse the individual plaintiff and his counsel for enforcing the act"); *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000)(the purpose of an award of fees under Kentucky's consumer law is "to compensate the prevailing party for the expense of bringing an action under the statute"); *Parker v. INF Insulation Co.*, 730 N.E.2d 972, 978-979 (Ohio 2000)(the purpose of Ohio's consumer law is to make private enforcement available to consumers "who otherwise might not be able to afford or justify the costs of prosecuting an alleged...violation"); *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 584 (Va. 2003)(whereas punitive damages "are designed to punish offensive or unlawful conduct," the fee-shifting provisions of Virginia's consumer law "are designed to encourage private enforcement of the provisions of the statute"); *Gordan v. Archer*, 1999 Mass.App.Div. 154 (1999) (fees under consumer protection statute construed as strictly compensatory in nature).

Automobile Ins. Co., 65 P.3d 1134, 1168 (Utah 2001) ("the Campbells do not argue here, nor did they below, that a statute or contract authorizes them to recover attorney fees"). Thus, *Campbell* is easily distinguishable.[22]

Because the fees here were awarded under consumer protection statutes, they are compensatory in nature and may properly be included in the ratio analysis. This issue was thoroughly addressed by a federal appeals court in *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005). In *Willow*, the plaintiff sued its own insurer for bad faith in handling a property damage claim. The plaintiff prevailed and was awarded $135,000 in attorney fees and costs. No other compensatory damages were awarded as part of the bad faith litigation. The plaintiff also was awarded $150,000 in punitive damages. The appeals court held that the attorney fee award was compensatory in nature. Fee shifting was a part of Pennsylvania's statutory scheme--a way of furthering its public policy requiring insurers to "deal fairly...when their insureds submit claims in good faith." 399 F.3d at 235-36. Awarding fees to successful litigants "vindicate[s] the statute's policy by enabling plaintiffs such as Willow Inn to bring...actions alleging bad faith delays [and] to secure counsel on a contingency fee." *Id.* at 236. Thus, the court concluded, "attorney fees and costs awarded pursuant to [Pennsylvania's bad faith law] are compensatory damages for...ratio purposes." *Id.* at 237.

The court in *Blount,* 915 N.E.2d 925 applied a very similar analysis in a statutory civil rights case. *Blount* noted that awarding fees in civil rights cases is remedial, not punitive: citing *Willow,* the court had no difficulty concluding that the fees served a compensatory purpose and, thus,

[22] The two remaining cases cited by Quicken fare no better. Quicken first cites *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. Cir. 2003), an employment case. The court's discussion of the fee issue in *Daka* was dicta and was relegated to a footnote. The other case cited by Quicken is *Parrish v. Sollecito*, 280 F.Supp.2d 145 (S.D.N.Y. 2003). The court's analysis in *Parrish* consisted of a single sentence, and it cited no authority for the proposition that attorney fees by their nature "include a certain punitive element." *Id.* at 164. Furthermore, as in *Campbell*, the courts in *Daka* and *Parrish* did not have the benefit of the well-developed line of cases cited by the Respondents herein.

"should be counted on the compensatory side of the...ratio." *Id.* at 944-945 (citation omitted).[23] Importantly, *Blount* canvassed cases from across the country and concluded that its decision was in line with the majority:

> 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 *Gore* analysis. *See, e.g.*, . . . *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996); . . . Indeed, as the Tenth Circuit pointed out, nothing in *Gore* 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.

Id. at 943-44. *See also*, *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 Fed. Appx. 424 (3rd Cir. 2007)(another Third Circuit case affirming a $4,500,000 punitive damage award using a $1,100,000 attorney fee in its ratio analysis); *Diviney v. Nationsbank of Texas, N.A.*, 225 Bank.Rptr. 762, 777 (10th Cir. 1998)(in a bad faith banking case, the court held that "the costs of litigation to vindicate rights may be considered in determining the constitutional limits on the size of a punitive damage award"); *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007)(finding attorney fees to be "compensable in nature" and including them "as part of the measure of actual damages for the necessary comparison"); *In Re USA Commercial Mortgage Co.*, 2011 WL 2847505, *32 (D.Nev. 2011)("[i]n calculating the ratio between the plaintiffs' actual or potential harm and the jury's punitive damages awards, the court includes the jury's compensatory damages awards, as well as the court's post trial awards of prejudgment interest and attorneys' fees, costs, and expenses").

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[23] *Blount* recognized that there were other, equally valid reasons for considering attorney fees and other litigation costs as an element of compensatory damage when calculating the compensatory/punitive ratio. For example, a wealthy defendant can take unfair advantage of its resources by "mount[ing] an extremely aggressive defense." Awarding attorney fees makes it possible for civil rights victims to obtain counsel who are willing to fight against these well-funded opponents. Furthermore, giving an award of fees is realistically the only way "to make the plaintiff whole." 915 N.E.2d at 943.

The rationale of these cases applies with the same vigor here. Fees in cases brought under the WVCCPA are part of a remedial statutory scheme intended to provide protection to West Virginia consumers. Without fee shifting, victims of consumer fraud would be unable to retain attorneys to represent them and prosecute their claims. This is particularly so in light of the fact that those who perpetrate consumer fraud, like Quicken, are often large, well-funded corporations. Awarding fees to consumers who successfully litigate their claims is a form of additional compensation—not only providing a level playing field, but also insuring that consumers are, in fact, made whole.[24]

V. Any Settlement Offset Is Waived

On February 17, 2011, the trial court entered judgment in this matter. Quicken timely filed various post trial motions, which were later denied, but did not include a motion seeking an offset against the judgment for settlement amounts paid by Guida. The motion for offset was filed separately on April 8, 2011, some 50 days after the entry of judgment. *See*, Motion for Offset of Judgment (A340). Perhaps, recognizing it was tardy, Quicken never brought the motion on for hearing and, therefore, the trial court did not reach the motion.

A motion for offset of judgment is by its nature a motion to alter or amend a judgment. W.Va. Rule of Civil Procedure 59(e) provides that "[a]ny motion to alter or amend judgment shall be filed not later than 10 days after entry of judgment." Here, the motion was filed 40 days too late. The motion was untimely and any offset is waived. Thus, the issue Quicken seeks to raise, here, is defaulted. Furthermore, even if this were a viable issue, Quicken could not meet

[24] Quicken also suggests that the fee provisions in the WVCCPA are not compensatory because the court has "discretion to decline to award fees." Petitioner's Brief, at 39. But this is a *non sequitur*. Vesting the trial court with discretion does not destroy the compensatory nature of the fees. In fact, the Supreme Court of Kentucky interpreted its own version of the WVCCPA "to authorize, but not mandate, an award of attorney fees and costs" to the prevailing party. Thus, the decision of whether to award fees was "subject to the sound discretion of the trial judge." That said, the court had no difficulty in concluding that the fees were "intended to compensate the prevailing party." *Alexander*, 28 S.W.3d 303, 305.

the elements of "joint obligation" and/or "single indivisible injury" under *Zando*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

CONCLUSION

Because Quicken cannot meet its burden of showing factual or legal error on the part of the circuit court, the judgment in favor of Lourie Jefferson and Monique Brown should be AFFIRMED. Further, Respondents should be awarded attorney fees for defending this appeal under § 46A-5-104 and § 31-17-17.

LOURIE (BROWN) JEFFERSON
and
MONIQUE BROWN,
Appellees

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CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL was had upon the Petitioner herein by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 21st day of October, 2011, to the following:

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