BRIEF FILED
WITH MOTION

No. 11-0910

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and **MONIQUE BROWN,**

Plaintiffs below,

Respondents.

(From the Circuit Court of Ohio County, No. 08-C-36)

REPLY BRIEF OF PETITIONER QUICKEN LOANS, INC.

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INTRODUCTION

As shown in Quicken Loans' opening brief, the Circuit Court erred in both its liability findings and in the extraordinary and impermissible remedies it imposed. Its finding of unconscionability completely ignored the requirement of *substantive* unconscionability, and its finding of fraud was unsupported by evidence on multiple required elements of fraud, let alone by the necessary clear and convincing evidence. Further, the Circuit Court exceeded its authority in ordering the forfeiture of even the principal amount of the loan at issue. And the court's imposition of over $2 million in punitive damages—more than 100 times the compensatory damages—was made without even a perfunctory analysis of the required *Garnes* factors, and is unsustainable under either West Virginia law or the U.S. Constitution.

The arguments advanced by Plaintiffs in their effort to salvage the extraordinary windfall provided to them by the Circuit Court are all contrary to the record, contrary to established law, or both.

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE LOAN TO PLAINTIFFS WAS UNCONSCIONABLE.

Unconscionable contracts are – and should be – rare animals. As the classic definition of unconscionable contracts described them, they are "'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other[.]'" *Brown v. Genesis Healthcare Corp.*, --- W.Va. ----, --- S.E.2d ----, 2011 WL 2611327, at *-- (June 29, 2011) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750)). Unconscionable contracts reflect an "overall and gross imbalance, one-sidedness, or lopsidedness in a contract," *id.* at *--, and the contract must be so one-sided "'as to lead to *absurd* results.'" *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 603, 346 S.E.2d 749, 752 (1986) (emphasis added; quoting syl. pt. 2, in part, *Ashland Oil, Inc. v. Donahue*, 159 W.Va. 463, 223 S.E.2d 433 (1976)).

In its opening brief, Quicken Loans demonstrated that the loan brought immediate and substantial benefits to Ms. Jefferson that belie unconscionability. She received lower monthly payments, a better interest rate, and a large cash payout that she promptly put to good use, paying off high-interest debts and getting a new automobile. Just as the trial court failed to weigh these undisputed benefits against the costs of the loan, Plaintiffs likewise fail to balance the benefits and costs, as would be required to show that the loan is absurdly one-sided. Plaintiffs also ignore the recent case in which Judge Copenhaver held that a loan is not unconscionable under West Virginia law where the plaintiffs received similar benefits to those Ms. Jefferson received here. *See Croye v. GreenPoint Mortg. Funding, Inc.*, 740 F. Supp. 2d 788, 794 (S.D. W. Va. 2010).

Instead, Plaintiffs attempt to avoid the issue altogether by positing that the longstanding rule of *Brown* – under which substantive unconscionability is always essential to setting aside a contract term on that ground – does not apply here because of § 46A-2-121(1)(a)'s "disjunctive" treatment of unconscionable "terms" and unconscionable "inducement." However, this Court long ago put to rest any suggestion that unconscionability under the WVCCPA is any different than that at common law. Indeed, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), took pains to dispel the thought that the WVCCPA had created some freestanding concept of "procedural" unconscionability whereby a contract or a term thereof could be invalidated in the absence of gross substantive inequality in the contract's terms:

> We want to dispel the notion, which appears to have arisen in this case, that there are two distinct issues termed "procedural unconscionability" and "substantive unconscionability," either one of which can invalidate a contract. ... "[T]he question of 'procedural unconscionability' is an essential part of any determination of whether a particular clause or contract is unconscionable. A finding that the transaction was flawed, however, still depends on the existence of

> unfair terms in the contract. *A litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability."*

Arnold, 204 W.Va. at 236 n.6, 511 S.E.2d at 861 n.6 (emphasis added; quoting *Troy Mining Corp.*, 176 W.Va. at 603-04, 346 S.E.2d at 753).

Inasmuch as the word "unconscionable" cannot be divorced from substantive unfairness in the contract, the disjunctive makes sense (as Plaintiffs themselves recognize) only if "induced" by "unconscionable" conduct means induced by *fraudulent* conduct. *See One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) ("[Code 46A-2-121] expressly deals with conduct that is 'unconscionable' which we have *equated* with fraudulent conduct.") (emphasis added). In short, a claim of "unconscionable inducement" is a claim of fraudulent inducement, and Quicken Loans will address Plaintiffs' fraud claims shortly, just as it did in its opening brief.[1]

Furthermore, none of Plaintiffs' purported bases for unconscionability withstands scrutiny.

First, while the Guida appraisal was incorrect, over-appraisal of the property securing a loan does not divest the borrower of his or her vastly lowered interest rate on the consolidated debt or of the benefits of receiving additional funds to (in this case) retire existing debt and purchase a new car. Instead, it deprives the lender of its intended security for the loan, and hence it greatly increases the risk of loss to the lender. That great risk of loss, and the benefits to the borrower, foreclose any notion that an inflated appraisal makes a loan "absurdly" one-sided *in favor of the lender*. None of cases cited by Plaintiffs held otherwise; rather, they simply held

[1]Plaintiffs' contention that Quicken Loans has waived any challenge to their unconscionable inducement claim is therefore specious. In any event, Quicken Loans responded specifically to each of the trial court's supposed bases for unconscionable inducement. *See* Brief of Petitioner Quicken Loans, Inc. ("QL Br.") at 13-16.

that an erroneous appraisal—along with excessive fees—raised a factual issue on unconscionability that survived summary judgment. *See Herrod v. First Republic Mortgage Corp.*, 218 W.Va. 611, 617, 625 S.E.2d 373, 379 (2005) ("Only when there are no factual disputes in existence can an unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law . . . and resolved through summary judgment."); *Bishop v. Quicken Loans, Inc.*, No. 2:09–1076, 2011 WL 1321360, at *5 (S.D.W. Va. Apr. 4, 2011) ("Plaintiffs have also raised a question of fact as to whether the presence of excessive fees and excessive valuation rendered the terms of the December 2006 note unreasonably favorable to Quicken Loans."). Moreover, Plaintiffs ignore the point that there is a separate statute that deals with inflated appraisals, *see* W. Va. Code § 31-17-8(m)(8), and provides the appropriate remedies for a violation. *See* QL Br. at 15.

Second, the balloon payment was not unconscionable. A "balloon" simply represents the remaining principal of the loan given the payments of interest and principal to date. Here, Ms. Jefferson's note was due in thirty years, but its payments were amortized to eliminate the principal at forty years. Accordingly, on the due date, some of the principal would still be outstanding. Thus, the loan gave Ms. Jefferson a very long time before this payment of principal came due – far longer than is allotted in many other balloon payments – and she could have viewed that (and its *corresponding*, *long-term*, lower monthly payment) as a benefit. As for Plaintiffs' argument that she could not "avoid" the payment, in fact she could have made extra payments of principal at any time and watched the projected final balloon payment dwindle quickly. But because of the amortization schedule in the note, she did not automatically have to do so. A consumer is entitled to find that flexibility an attractive option, and to choose it. Here, of course, and self-evidently for reasons having nothing to do with the balloon, she could not make even the minimum payments required by the note.

Third, the closing costs charged were all within legal limits and were commensurate with the risk of the loan. Plaintiffs argue that the closing costs could have been lower, but there is no legal basis for their assumption that every borrower is entitled to the best possible deal, and that lenders must take pains to avoid making "too much" money off of a loan. Quicken Loans is a for-profit business, and it is allowed to pursue and make profits.[2] It is constrained, to be sure, by certain statutory boundaries on interest rates and fees – none of which was even remotely approached or transgressed by the loan at issue – and more directly by its many competitors.

II. THE CIRCUIT COURT ERRED IN FINDING THAT PLAINTIFFS PROVED FRAUD BY CLEAR AND CONVINCING EVIDENCE.

Plaintiffs fail to show the clear and convincing evidence required to support their claim of fraud, and for many of the tort's elements, fail to identify any evidence at all.

Plaintiffs continue to rest their fraud case most heavily on the supposed promise of refinancing within "three or four months." *See* Respondents' Brief in Opposition to Quicken Loans, Inc.'s Petition for Appeal ("Pl. Br.") at 17 (the alleged promise was the "primary motivating and facilitating factor" for the loan). However, Plaintiffs fail to prove the existence of the promise, its falsity, its materiality, or their reliance upon it by clear and convincing evidence.

First, the supposed promise is supported only by Ms. Jefferson's own self-serving testimony, and surely one of the primary purposes of the clear-and-convincing evidence standard is to prevent fraud from being so casually proved. Plaintiffs do not dispute the case law establishing that uncorroborated testimony does not satisfy the standard of clear and convincing

[2] These would necessarily include what Plaintiffs call "pure" profits – whatever those may be.

evidence. *See* QL Br. at 17-18 (citing *Merrill v. Dep't of Health & Human Res.*, 219 W. Va. 151, 161, 632 S.E.2d 307, 317 (2006); *Spaulding v. Spaulding*, 87 W. Va. 326, 104 S.E. 604, 606 (1920)). Instead, Plaintiffs contend that Ms. Jefferson's testimony was corroborated, but on examination, the supposed "corroboration" is illusory. Plaintiffs posit that the supposed promise was "consistent with Quicken's own notes, confirming that Ms. Jefferson declined the Loan until the June 6 promise." Pl. Br. at 25. Quicken Loans certainly has loan notes, but they do not identify any promise at all, and Plaintiffs' lone citation is to the trial court opinion, which says absolutely nothing on this point. Indeed, the lack of any documentation supporting this allegation—even though the record included numerous internal e-mails between Quicken Loans employees and e-mails from Ms. Jefferson herself—belies the allegation. *See* QL Br. at 17. Plaintiffs also point to training manuals that permitted mortgage bankers to make "forward-looking statements," but the manuals in no way instruct bankers to make promises, and they certainly prove nothing regarding whether any forward-looking statement—let alone the particular alleged promise—was made here. The only other supposed "corroboration" comes from the lack of testimony by Heidi Johnson—a former employee whom *neither* party called to testify. Of course, the *absence* of testimony corroborates nothing.

Second, Plaintiffs ignore the point that, even if the promise existed, it was far too vague for fraud because there were no "'definitive and ascertainable terms.'" QL Br. at 20 (quoting *Sayres v. Bauman*, 188 W.Va. 550, 554, 425 S.E.2d 226, 230 (W. Va. 1992)). Simply put, there is no evidence – much less clear and convincing evidence – of the terms of the new refinancing that Ms. Jefferson and Ms. Johnson allegedly negotiated, including the interest rate, term, and points, as well as whether there would be a balloon payment (or, absent a balloon, how much

Ms. Jefferson's monthly payments would increase, due to amortizing the loan over 30 years instead of 40).

Third, Plaintiffs fail to show that the alleged promise was false. Even if a clear agreement for refinancing upon definite terms had existed, Ms. Jefferson breached her side of the very deal that she described. Specifically, she did *not* make payments "for three or four months," and hence the condition precedent to Quicken's alleged performance was not met. Plaintiffs' only response is that, after the first two payments, "[t]he next payment was not due until November 1, 2006," and "was not late under the contract until November 17, which is after the four month time frame for refinancing." Pl. Br. at 8 n.3. However, Plaintiffs provide no citation for this allegation, and no explanation of why "late under the contract" is the time that matters for purposes of the alleged promise. The fact remains that Ms. Jefferson did not make payments for four months, as required under her own explanation of the terms of the promise.

Fourth, there is no evidence at all as to fraudulent intent, *i.e.*, that Quicken Loans intended to refuse a refinancing even if the promise were made and Ms. Jefferson had satisfied her end of the alleged bargain. Plaintiffs' only supposed evidence is an opening statement where Quicken Loans' counsel stated that Quicken Loans does not refinance "in *under* four months," Pl. Br. at 26 (emphasis added), but Quicken Loans explained in testimony that it can "refinance a loan *after* the four-month period." Testimony of Anthony Nuckolls, Vol. IV, p. 192-94 (A1098-99) (emphasis added). Accordingly, there was nothing to prevent Quicken Loans from refinancing here after four months, in accordance with the supposed promise. Plaintiffs try to draw support from *Bishop v. Quicken Loans, Inc.*, but in that case, the court did not find clear and convincing evidence of fraud, but only enough evidence to survive summary judgment. 2011 WL 1321360, at *9 (holding that there is "a question of material fact regarding Quicken Loans' intentions to fulfill the promise at the time it was made"). Here, Plaintiffs were required to do more than present a question of fact, and they failed to do so.

Plaintiffs' other purported bases for fraud also fail. As to the balloon payment, Plaintiffs do not dispute that Ms. Jefferson knew that the balloon existed when she signed the loan documents. Indeed, it was prominently disclosed – in the titles of two documents that Ms. Jefferson signed, and in the text of a third – and she admitted that she noticed it. This fact alone is dispositive because there can be no fraud when the plaintiff knows the truth. *See Martin v. ERA Goodfellow Agency, Inc.*, 188 W. Va. 140, 141, 423 S.E.2d 379, 380 (1992) ("If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and can not get relief against it."). While Plaintiffs complain that there was no "pre-closing" disclosure of the payment, Pl. Br. at 9, this assertion is legally irrelevant because a lack of *early* disclosure is not fraud. In any event, the assertion is factually erroneous because Ms. Jefferson conceded that she received the loan packet containing the disclosures one to two days before the closing. *See* Testimony of Lourie Jefferson, Vol. II, p. 201 (A931). Furthermore, the Circuit Court made no finding of reliance, and Plaintiffs present no evidence in support of such a finding. Plaintiffs argue that the balloon "would not be tolerated by any reasonable person," Pl. Br. at 29, but it plainly was tolerated by Ms. Jefferson, no doubt due to the benefits the loan provided to her. Finally, there is no proof at all of any fraudulent intent with respect to the balloon. Plaintiffs argue that Quicken Loans "disregarded the statute, as well as industry guidelines, by concealing the balloon payment for as long as possible and as much as possible," Pl. Br. at 28, but a statutory disclosure violation does not establish fraudulent intent, given that the balloon was actually and clearly disclosed in the closing documents.

As for the supposed fraud regarding closing costs related to loan discount points, again the amount of closing costs was accurately stated in the closing documents, and there is no evidence that Ms. Jefferson found the description of that amount to be material to her decision to enter into the loan. Plaintiffs object to Quicken Loans' pursuit of "pure profit," Pl. Br. at 29, but neither the law of fraud nor of unconscionability supports Plaintiffs' assumption that a lender is obligated to give a borrower the *most* advantageous deal that the lender can conceivably provide. Plaintiffs argue that the reliance issue was not preserved for appeal, but Quicken Loans clearly raised the issue in the trial court. *See* Reply Brief in Support of Defendant Quicken Loans Inc.'s Motions For Amendment of Findings of Fact and/or Conclusion of Law at 5 (Apr. 5, 2011) ("Ms. Johnson's *knowledge* of this [alleged discount rate] representation is wholly different from *reliance* on the representation, and the document provides no evidence of the latter, let alone clear and convincing evidence."). Thus, the lack of any finding or evidence on reliance establishes that the fraud claim cannot be upheld.

III. THE CIRCUIT COURT LACKED THE LEGAL AUTHORITY TO FORGIVE THE PRINCIPAL OBLIGATION OF A SECURED DEBT.

Plaintiffs do not dispute that, because the loan at issue is not a "regulated consumer loan," W. Va. Code § 46A-5-101(2), and the debt is "secured by a security interest," *id.* § 46A-5-105, this case does not fall within either of the two specific statutory provisions authorizing the voiding of a loan. Instead, Plaintiffs argue that these specific provisions are somehow irrelevant and collateral to other sections of the West Virginia Code that implicitly allow for forgiveness of the principal of a secured debt. However, basic tenets of statutory interpretation belie this argument.

Plaintiffs primarily assert that unconscionability under § 46A-2-121 is sufficient to forgive Mrs. Jefferson's debt, but § 46A-2-121 does not mention cancellation or voiding the loan. *See* Opening Br. at 24. When the West Virginia legislature wants to authorize debt cancellation, it does not mince words. Instead, it states expressly that "the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge," W. Va. Code § 46A-5-101(2), or "the court may cancel the debt." *Id.* § 46A-5-105. In contrast, § 46A-2-121 states only that the court may "refuse to enforce" an unconscionable agreement. Plaintiffs provide no explanation for this plainly different language, but the actual explanation is clear: an "unenforced" agreement cannot bestow benefits or impose obligations on *either* party. Here, that means Plaintiffs cannot both retain the loan proceeds *and* not repay any of the principal.

The case law confirms this textual interpretation of § 46A-2-121. Specifically, this Court has recognized that damages for "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." *Bolen*, 188 W. Va. at 692, 425 S.E.2d at 834. Plaintiffs argue that this sentence describes only "'*additional* damages' to those *self-contained* in § 46A-2-121." Pl. Br. at 31-32. However, the additional damages discussed in *Bolen* were additional damages *within Article 5* of the WVCCPA, not those in § 46A-2-121: specifically, the damages in § 46A-5-101, which could be added to those in § 46A-2-102(5) regarding a buyer or lessee's right of action. *See Bolen*, 188 W. Va. at 691-92, 425 S.E.2d at 833-34 ("Thus, while W. Va. Code, 46A-2-102(5) [1974], allows the consumer to recover an amount not to 'exceed the amount owing to the assignee at the time of such assignment,' *its exception for an additional amount because of fraud is controlled by W. Va. Code, 46A-5-101* [1974]. As we have seen under this latter section, the additional damages for fraud or unconscionable conduct are limited to actual damages . . . .") (emphasis added). *Bolen*'s reference to § 46A-2-121 comes earlier, when the Court recognizes that § 46A-5-101 provides the remedy for a violation of § 46A-2-121. *See id.*, 188 W. Va. at 691, 425

S.E.2d at 833 ("W. Va. Code, 46A-5-101 [1974] . . . outlines the types of additional damages that may be recovered for various violations of Chapter 46A, and specifies 'illegal, fraudulent or unconscionable conduct (§ 46A-2-121)[.]'"). Thus, § 46A-2-121 does not provide any remedies in addition to—and in conflict with—§ 46A-5-101. Moreover, cancellation of the debt is punitive (*see infra* Part IV), and thus is expressly prohibited by *Bolen*. *See id.*, 188 W. Va. at 692, 425 S.E.2d at 834 ("Consequently, punitive damages are not available under the fraud or unconscionable conduct provisions of W. Va. Code, 46A-2-121 [1974], and W. Va. Code, 46A-2-102(5).").

Plaintiffs assert that "[t]his Court has approved of the use of this statutory power for many years in a variety of contexts," Pl. Br. at 32, but no precedent supports their assertion. Both of the cited cases simply remand without prescribing any particular remedy, and neither mentions any authority for cancellation. *See U.S. Life Credit Corp. v. Wilson*, 171 W. Va. 538, 542, 301 S.E.2d 169, 173 (1982); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 569, 567 S.E.2d 265, 285 (2002). Indeed, *U.S. Life Credit* expressly recognized that the remedy would be provided by § 46A-5-101, not by § 46A-2-121. *See* 171 W. Va. at 542, 301 S.E.2d at 173 (directing that the trial court "enter summary judgment for the appellant on his state law claim and determine the amount of the civil penalty provided for by law, W. Va. Code, 46A-5-101(1)").

Furthermore, Plaintiffs' interpretation of § 46A-2-121 cannot be reconciled with the other provisions of the WVCCPA. *See* QL Br. at 24-25; *Byrd v. Option One Mortgage Corporation*, No. 2:04-cv-01058 (S.D.W. Va., April 12, 2007), slip op. at 22-23. Plaintiffs criticize *Byrd*, arguing that Judge Copenhaver "overlook[ed] 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." Pl. Br. at 32. In reality, *Byrd* quoted the "refuse to enforce" language, *see* slip op. at 21, and unremarkably concluded that it "should be construed *in pari materia* with the remedial sections of Article 5 pertaining to unconscionable, fraudulent and illegal acts," not to authorize a remedy of cancellation, *see id.* at 22-23. Plaintiffs argue that § 46A-5-101(5) prohibits impairment of debts "[e]xcept as otherwise provided," and § 46A-2-121 supposedly otherwise provides. *See* Pl. Br. at 32. However, this argument simply assumes the conclusion that § 46A-2-121 provides for cancellation, and it does not. Moreover, it fails to explain why § 46A-5-105 expressly provides for cancellation *only* for unsecured debt, a provision that would be superfluous if cancellation based on unconscionability were allowed for *all* debt under § 46A-2-121. *See Byrd*, slip op. at 23.

Cancellation of the loan also cannot be based on a violation of the appraisal statute because there was no "willful" violation, as required under W. Va. Code § 31-17-17(a). *See* QL Br. at 25. Plaintiffs assert that "[w]illfulness has been established," Pl. Br. at 36, but there was no such finding by the Circuit Court. Indeed, the Circuit Court repeatedly stated that the appraisal violation was merely negligent. *See* Findings of Fact and Conclusions of Law entered Feb. 25, 2010 ("2/25/10 Op.") at 15, 17, 20 (A140, A142, A145). While Plaintiffs argue that the negligence finding was limited to the "manual appraisal review step," Pl. Br. at 35, the Circuit Court made clear that for "*the whole question of the appraisal* . . . [i]t was, basically, a finding of negligence . . . rather than a finding of willful, wanton disregard." Sept. 1, 2010, Hearing Transcript, Hon. Arthur Recht, pp. 117-118 (A2433) (emphasis added). Plaintiffs quote the court's discussion of whether the appraisal was "bona fide," where the court stated "there was no finding there, that that was done negligently." *Id.* at 118 (A2433). However, Plaintiffs omit the next paragraph, where the court actually discusses willfulness, and states: "[I]f you . . .want to somehow suggest that that conduct may have been willful, wanton, deliberate to civil obligations all under Mayer versus Frobe, I will permit that because there was no finding, but the bulk of the findings relating to the appraisal, there have been findings, and that is, it was a done process, and conduct, reliance were all negligent." *Id.* Simply put, the court explained that while Plaintiffs could make the argument, "there was no finding" of willfulness and "there have been findings" of negligence. Absent a willfulness finding—indeed, the word willful is not used at all in the Circuit Court's actual opinion—there is no basis for "cancellation" under § 31-17-17(a).

Plaintiffs also try to defend the forfeiture based on W. Va. Code § 46A-6-106(a)'s allowance for "equitable relief," Pl. Br. at 33, but the principle of *in pari materia* applies equally here. *See Byrd*, slip op. at 22. In any event, Plaintiffs ignore the well-established principle that forfeiture is not an equitable remedy. *See* QL Br. at 26-27. They likewise ignore that forfeiture here would be plainly inequitable because the $144,800 in principal from Quicken Loans that Mrs. Jefferson no longer has to pay back is a windfall for her. *See* QL Br. at 27-28; *see also infra* Part IV.

Finally, in a single sentence, Plaintiffs make a token effort to defend the forfeiture as a remedy for fraud because "defenses of the WVCCPA are not available" for common-law fraud. Pl. Br. at 34 (quoting *Casillas v. Tuscarora Land Co.*, 186 W.Va. 391, 394, 412 S.E.2d 792, 795 (1991)). But the issue here does not concern a defense, but rather the remedy for fraud, which is defined by the WVCCPA. *See* W. Va. Code § 46A-5-105 ("If a creditor has willfully violated the provisions of this chapter applying to illegal, *fraudulent* or unconscionable conduct or any prohibited debt collection practice, . . . the court may cancel the debt when the debt is not secured by a security interest.") (emphasis added). Moreover, even if the WVCCPA were inapplicable, and the finding of fraud could be upheld (which it cannot), forfeiture of the principal of a loan is not a permissible remedy for common-law fraud. Plaintiffs provide no argument, let alone precedent, to dispute the basic principle that one seeking to void a contract based on fraud must return any benefit received under the contract. *See* QL Br. at 27.

IV. THE PUNITIVE DAMAGES AWARD WAS UNSUPPORTED BY ANY VALID CLAIM AND WAS GROSSLY EXCESSIVE.

A. The Circuit Court erred in awarding punitive damages because only the unsupported fraud claim supported punitive damages.

Quicken Loans established in its opening brief that none of Plaintiffs' statutory claims permits an award of punitive damages, leaving only their fraud claim as a potential basis for such damages. QL Br. at 29. Plaintiffs do not contest this, and appear to expressly concede the point with respect to their WVCCPA claims. Pl. Br. 43 at n.19. And, as demonstrated earlier (*see supra* Part II), the Circuit Court's fraud finding cannot be sustained. Accordingly, the punitive damages award should be vacated in its entirety.

B. The Circuit Court failed to perform the required *Garnes* analysis.

As established in Quicken Loans' opening brief, where a circuit court does not make the required *Garnes* findings, its decision to award punitive damages is "reversible error." *State ex rel. Harper-Adams v. Murray*, 224 W. Va. 86, 93-94, 680 S.E.2d 101, 108-09 (2009). Here, the Circuit Court did not make the necessary findings, most conspicuously in its failure to address *Garnes*' "relationship to the harm" factor — including its failure to explain why Plaintiffs' attorney's fees and the already-punitive loan forfeiture were deemed "harm" to be multiplied in calculating punitive damages.

Plaintiffs make no claim that this cavalier treatment of the massive punitive damages award satisfied *Garnes*, instead arguing only that the failure to satisfy *Garnes* did not violate procedural due process or, alternatively, was "harmless." Pl. Br. at 36-37. These arguments cannot salvage the Circuit Court's punitive damages award, in light of this Court's holding in

Harper-Adams — which Plaintiffs fail even to cite — that a failure "to make the necessary findings required by *Garnes* constitutes reversible error." 224 W. Va. at 94, 680 S.E.2d at 109.

C. The Circuit Court's award of punitive damages was grossly excessive.

Quicken Loans' opening brief established that the punitive award was grossly excessive under both West Virginia law and the U.S. Constitution. The award was vastly out of proportion to the reprehensibility of the alleged conduct — an unauthorized promise by a single employee in violation of Quicken Loans' policy — and wholly disproportionate to the harm at issue. In particular, the Circuit Court improperly inflated the award by multiplying two forms of relief (both based on statutory claims that do not authorize punitive damages) that more properly should have *mitigated* the award: the loan forfeiture and the payment of Plaintiffs' attorney's fees. The ratio between the punitive award and the *actual* compensatory damages in this case was an unsustainable 120-to-1. *See* QL Br. at 33-34.

In response, Plaintiffs rely on purported "facts" that are wholly unsupported by the record, and seek to inflate the harm at issue through arguments that defy both law and logic.

1. Plaintiffs' attempt to depict Quicken Loans as "encourag[ing]" fraud is completely unsupported by the record.

Apparently recognizing that an employee's wrongful conduct that does not reflect corporate policy cannot support a large award of punitive damages, Plaintiffs assert, without record support, that "Quicken is characterized by a culture of fraud, trickery and deceit—encouraged by management and practiced on a grand scale." Pl. Br. at 37; *see also id.* at 38-39. The Circuit Court made no such finding, and Plaintiffs' only apparent support for this claim is a statement by Quicken Loans' counsel that "'there was nothing unusual about this loan.'" *Id.* at 39 (quoting A1059-1060). But that statement, of course, was made in support of counsel's contention that there was *no* fraud in connection with the loan – *i.e.*, that the alleged promise that

Ms. Jefferson could refinance was never made. Plaintiffs' attempt to portray it as an admission that *fraud* was routine is self-evident sophistry. Indeed, the only record testimony on point was that Quicken Loans trained its mortgage bankers *not* to make such promises. (A1076.) Plaintiffs cannot salvage the award by weaving a tale of widespread fraud out of whole cloth.

2. The Circuit Court improperly inflated the punitive award by treating cancellation of the loan and attorney's fees as compensatory.

The Circuit Court erred in multiple ways when it included the forfeiture of the loan balance and the attorney's fees award as measures of "harm" to Plaintiffs for purposes of calculating punitive damages. The only claim that can support punitive damages is the fraud claim, and therefore the only compensatory damages relevant to the punitive damages ratio are the damages for that claim. Both of the remedies at issue here, however, related to Plaintiffs' *statutory* claims, and those claims, as noted above, do not permit punitive damages. In any event, even aside from this problem, neither the loan forfeiture nor Plaintiff's attorney's fees can properly be considered "harm" for purposes of the compensatory-to-punitive ratio inquiry required by both West Virginia law and the U.S. Constitution.

a. Relief granted on claims that do not authorize punitive damages cannot be used to justify an inflated punitive award.

As Quicken Loans argued in its opening brief (at 36), any punitive damages must rest solely on Plaintiffs' fraud claim, yet both the award of attorney's fees and the loan forfeiture were based on Plaintiffs' statutory claims. The fee award was expressly made pursuant to W. Va. Code § 46A-5-104. *See* 2/17/11 Op. at 1-2 (A309-10). And Plaintiffs make only a perfunctory argument that the loan could be cancelled as a remedy for fraud. (*See* p. 13, *supra*.)

Plaintiffs nonetheless contend that the fees and loan cancellation were properly used as compensatory damages in the punitive-to-compensatory ratio, claiming that the denominator of that ratio need not relate to the claim on which punitive damages are awarded. Rather, they contend, the court need only "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." Pl. Br. at 43 n.19 (emphasis in original).

The law is to the contrary. In *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997), this Court made clear that the required review to ensure that punitive damages "bear a reasonable relationship to compensatory damages," Syl. Pt. 3, 200 W. Va. at 594, 490 S.E.2d at 681 (internal quotation marks omitted), must be applied to the damages for each claim separately. In *Vandevender*, this Court considered the punitive-to-compensatory ratio with respect to the plaintiff's unlawful termination/failure to rehire claims separately from the ratio applicable to the plaintiff's retaliation claim. *Id.*, 200 W. Va. at 606-07, 490 S.E.2d at 693-94. Notably, this Court held that the ratio on the former claims was excessive, *focusing solely on the damages awarded for that claim.* *Id.*, 200 W. Va. at 606, 490 S.E.2d at 693. It did *not* simply "compare the total amount of the compensatory award with the total amount of the punitive award." Pl. Br. at 43 n.19 (emphasis omitted). Likewise, in *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), this Court carefully distinguished between medical monitoring claims and property damage claims, and calculated the applicable ratio for the property damage claims by considering *only* the value of the relief awarded on those claims. 225 W. Va. at 557, 694 S.E.2d at 890.

Here, the only relief even arguably awarded on the fraud claim was the $17,476.72 in restitution, and that is therefore the only relief that can be considered in applying the requirement of "fundamental fairness" that punitive damages "bear a reasonable relationship to compensatory damages." *Vandevender*, Syl. Pt. 3, 200 W. Va. at 594, 490 S.E.2d at 681.

b. The amount of the loan forfeiture is not "compensatory damages" or "harm" that may be included in the relevant ratio.

As demonstrated in Quicken Loans' opening brief (at 34-36), the loan cancellation cannot rationally be included as a measure of "the harm . . . from the defendant's conduct," *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 461, 419 S.E.2d 870, 874 (1992), syl. pt. 13, in assessing the punitive damages award's "proportionality to the harm." *State Farm*, 538 U.S. at 427. Unlike such items as allegedly excessive fees or interest payments, there is no coherent theory on which a borrower's receipt of $144,800 in loan principal—which the Circuit Court later turned into a windfall that need not be repaid, even interest-free—can be deemed a measure of "harm" suffered by the borrower. The Circuit Court's decision to forgive the principal in its entirety cannot be anything but a naked penalty; it plainly did not compensate for any "concrete loss" suffered by Plaintiffs.[3] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

Plaintiffs make no claim that the principal forgiven *does* constitute harm. Instead, they offer an alternative justification that entirely ignores the loan *principal* forgiven by the Circuit Court, claiming instead that the proper measure of harm is the entire "amount of interest that was payable over the life of the loan," *i.e.*, $520,065.61. Pl. Br. at 40-41. As an initial matter, this theory has no basis in the Circuit Court's opinions, which never adopted any such expansive view of "harm." In any event, the notion that the entire finance charge for a mortgage loan can be considered a harm suffered by the borrower defies reason. The finance charge simply represents the cost of borrowing $144,800 for 30 years, and Plaintiffs made no claim that the

[3]Plaintiffs contend that the loan forfeiture totaled $227,000, including a purported $83,000 in "accrued interest, late charges, and other fees" as of June 2010 (a date after the court had already ordered cancellation of the entire loan). Pl. Br. at 40. Plaintiffs appear to have simply "reverse-engineered" their conclusion from the total punitive damages awarded by the Circuit Court. The Circuit Court made no such findings, let alone any findings on treating such illusory interest and charges as actual harm or relating them in any rational way to punitive damages.

interest rate on the loan—for a borrower with Ms. Jefferson's income and credit history—was unconscionably high. Interest payments at a market rate of interest represent the legitimate price of borrowing money, not a "harm" to the borrower.[4]

Plaintiffs' primary support for this expansive notion of "harm" is an Oregon intermediate appellate decision that, upon scrutiny, offers them no support at all. Plaintiffs contend that *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. App. 2007), holds that all interest payable over the life of the loan is the correct measure of potential damages, *see* Pl. Br. at 40-41, but *Vasquez-Lopez* held no such thing. *Vasquez-Lopez* expressly *declined* to address the correct measure of potential damages, and instead simply "accept[ed] plaintiffs' figure" on the ground that the defendant failed to properly raise any contrary argument. 152 P.3d at 958. The other case cited by Plaintiffs, *Mitchell v. Fortis Ins. Co.*, 686 S.E.2d 176 (S.C. 2009), is even less apposite, as it simply held that—where a health insurer fraudulently rescinded a policy to avoid paying benefits to an HIV sufferer—the harm was, quite logically, the present value of the payments the defendant fraudulently avoided. *Id.* at 187.

Moreover, the notion that Plaintiffs' potential harm was 30 years of interest payments flatly conflicts with their theory of the case: According to Plaintiffs, it was evident that Ms. Jefferson would *not* be able to make those payments and would inevitably suffer foreclosure. Notably, Plaintiffs do not contend—as the logic of this theory would suggest they should—that the potential harm was the loss of Ms. Jefferson's house. Presumably, this is because Ms. Jefferson *already* had little or no equity in the house: she owed $69,349.82 to CitiFinancial on her existing mortgage (A1276), and according to Plaintiffs' own evidence the house was worth

[4] Moreover, even if there *had* been a finding that the interest rate was excessive, the only legitimate harm would be the amount of the excess—or, more accurately, the present value of the excess payments over time—not the entire interest payment.

only $46,000 (*see* Pl. Br. at 13). Moreover, given that Ms. Jefferson defaulted on her Quicken Loans mortgage payments of $1,144 per month, she very likely would have defaulted on her pre-existing loans, which required monthly payments of $1,460. In short, the Quicken Loans mortgage was not the cause of Ms. Jefferson's default, and she had no equity in the house to lose. *See Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 73-75 (Cal. 2005) ("potential harm" under *TXO* is limited to harm that is likely to be *caused* by the defendant's conduct).

Finally, Plaintiffs contend that, alternatively, the "value of the voided loan" may be counted as harm "because it represents the amount of illegal, unconscionable, and fraudulent debt the Respondents were compelled to shoulder." Pl. Br. at 41-42. This is a non sequitur that confuses liability with harm. That aspects of a loan are held to be improper hardly means that the loan *principal* received by the borrower—here, cash from Quicken Loans that Plaintiffs used to retire existing debt and buy a new car—is harm to the borrower.

c. The amount of attorney's fees is not "compensatory damages" or "harm" that may be included in the relevant ratio.

Quicken Loans also demonstrated in its opening brief that the award of attorney's fees to Plaintiffs cannot properly be treated as compensatory damages under either the U.S. Constitution or West Virginia law. *State Farm v. Campbell* itself declined to treat attorney's fees as compensatory damages in the relevant ratio, and attorney's fees are not a measure of the "harm" caused by the defendant. To the contrary, because punitive damages and attorney's fees serve many of the same purposes—attorney's fees have a significant punitive component, and one purpose of punitive damages is to offset the plaintiff's litigation costs—an award of attorney's fees favors a *reduced* punitive award. QL Br. at 36-39. Plaintiffs have no convincing response to these points.

First, it bears reiteration that the attorney's fees award rests *solely* under the WVCCPA (*see* A309-10); hence, even if it could be considered "compensatory" in some sense under that Act, it still cannot support a punitive damages award, because punitive damages awards may not be based on violations of the Act. *Bolen*, 188 W.Va. at 692, 425 S.E.2d at 834.

Second, Plaintiffs dismiss the U.S. Supreme Court's exclusion of punitive damages from the ratio in *State Farm* by claiming that "the issue of attorney fees *was neither raised nor decided* by the Court." Pl. Br. at 45 (emphasis in original). But the issue of attorney's fees *was* raised in *State Farm*: the plaintiffs in that case expressly argued that the Court should include attorney's fees in the denominator of the ratio, *see* Brief of Respondents at 17 n.5, 2002 WL 31387421, yet the Court excluded them and stated that the $1 million compensatory damages award "was complete compensation," 538 U.S. at 426. In addition, as argued in Quicken Loans' opening brief (at 37), *State Farm* analogized the relevant ratio to statutory double and treble damages penalties, *id.* at 425, which rarely, if ever, include attorney's fees in the amount to be doubled or trebled. Plaintiffs fail to address this point.

Third, Plaintiffs fail to rebut Quicken Loans' showing that punitive damages and attorney's fees serve many of the same purposes, such that an award of attorney's fees *reduces* rather than increases the appropriate size of a punitive award. *See, e.g., DeCurtis v. Upward Bound Int'l, Inc.*, No. 09 Civ. 5378(RJS), 2011 WL 4549412, at *6 (S.D.N.Y. Sept. 27, 2011) (fact that "Plaintiff did not suffer physical violence, and she is being awarded compensatory damages and attorney's fees" favored lower punitive award); *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (award of fees "favor[s] a lesser rather than greater award"). Indeed, *State Farm* itself cautioned against allowing punitive awards that duplicate other forms of relief. 538 U.S. at 425.

Plaintiffs' denial of the overlap between the purposes of attorney's fees and punitive damages is squarely contrary to this Court's cases. As an initial matter, Plaintiffs deny that the discretionary nature of attorney's fees under the WVCCPA imports punitive considerations into such fee awards, *see* Pl. Br. at 48 n.24, but this Court has specifically found the exercise of discretion under the WVCCPA to turn, at least in part, on whether the defendant's actions constitute "egregious conduct." *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 305, 512 S.E.2d 217, 227 (1998); *see also Boyd v. Goffoli*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004) ("An obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged.").

In addition, Plaintiffs fail to address the fact that one of the recognized purposes of punitive damages is to cover plaintiffs' litigation costs—a purpose that disappears when, as here, the Plaintiffs have *already* been awarded their fees. As this Court explained in *Muzelak v. King Chevrolet, Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988), "punitive damages are designed in part to subsidize litigation costs," and "are often awarded to off-set litigation expenses." *Id.*, 179 W.Va. at 347, 368 S.E.2d at 717; *see also Harper-Adams*, 224 W. Va. at 94, 680 S.E.2d at 109 (same). Likewise, *Garnes* focuses on punitive damages' purpose of ensuring payment of plaintiffs' litigation costs, directing that the amount of such costs is relevant to the appropriate size of a punitive award because "[w]e want to encourage plaintiffs to bring wrongdoers to trial." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991). Again, where attorney's fees have *already* been awarded to the plaintiff, this purpose of punitive damages disappears and a *lower* punitive award is appropriate, not an increased one—let alone one increased, as in this case, by *trebling* the already-reimbursed attorney's fees.

Fourth, Plaintiffs' contention that attorney's fees are a proper measure of harm is inconsistent with the practices of the numerous states that have adopted statutory ratios limiting the amount of punitive damages. Those state statutes consistently define the denominator of the ratio—*i.e.*, the "harm" part of the equation—by reference to compensatory damages or actual damages, and do *not* include attorney's fees as part of that figure. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 615-619 (1996) (Ginsburg, J., dissenting) (listing multiple state statutory caps); Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 Suffolk Univ. L. Rev. 855, 882-895 (2010) (similar).

Fifth, Plaintiffs' position—that a plaintiff's attorney's fees are a relevant "harm" for ratio purposes when there is a fee award, but not when there is no fee award, *see* Pl. Br. at 43-48—produces the anomaly that the very same attorney's fees can be deemed "harm" or "not harm," depending solely on an unrelated after-the-fact determination of whether the court will order them reimbursed. In addition, it produces the further anomaly that a plaintiff who has been more fully compensated (by receiving damages and attorney's fees) will receive substantially *greater* punitive damages than one who has been less fully compensated. *See State Farm*, 538 U.S. at 426 (*lower* punitive award appropriate where there already has been "complete compensation").

Sixth, Plaintiffs' cases treating attorney's fees as part of a punitive damages ratio are inapposite. Their primary case, *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005), turns on a specific feature of Pennsylvania law that treated attorney's fees as part of the compensatory damages for insurance bad faith claims. *Id.* at 236-37. The same is true of *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 Fed. App'x 424 (3d Cir. 2007) (an unpublished opinion that merely applied *Willow Inn* to the same bad faith statute), and *Action*

Marine, Inc. v. Continental Carbon Inc., 481 F.3d 1302, 1321 (11th Cir. 2007) (relying on a similar feature of Georgia law). As one court recently explained, cases like these are irrelevant outside of their unique settings. *Chasan v. Farmers Group, Inc.*, No. 1 CA-CV 07-0323, 2009 WL 3335341, at *11 n.4 (Ariz. App. Sept. 24, 2009) (specifically addressing *Willow Inn* and *In re Diviney*, 225 B.R. 762, 777 (B.A.P. 10th Cir. 1998)). Yet another of Plaintiffs' cases, *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), did *not* include attorney's fees in its calculation of the ratio, *see id.* at 640, and appears to have considered litigation costs in the same way they are considered under *Garnes*. *Id.* at 642.[5]

Finally, Plaintiffs fail to address the fact that if attorney's fees and the loan forgiveness are to be counted as compensatory, the compensatory damages in this case total over $700,000, placing this case squarely within *State Farm*'s instruction that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. Damages exceeding $700,000 are plainly "substantial," particularly for a loan of less than $150,000 and a home valued by Plaintiffs' evidence at $46,000.

V. THE CIRCUIT COURT ERRED BY FAILING TO OFFSET COMPENSATORY DAMAGES AWARDED AGAINST QUICKEN LOANS WITH THE SUMS PREVIOUSLY PAID TO PLAINTIFFS BY SETTLING CO-DEFENDANTS

Quicken Loans is entitled as a matter of law to an offset of compensatory damages and the loan cancellation based on the settlement of Plaintiffs' claims against Appraisals Unlimited,

[5] The other case on which Plaintiffs primarily rely, *Blount v. Stroud*, 915 N.E.2d 925 (Ill. App. 2009), is simply in error. In particular, it mischaracterizes every one of the out-of-state cases it cites (*id.* at 943-44) as holding that attorney's fees should generally be included in the ratio denominator: neither *Willow Inn* nor *Continental Trend Resources* supports that proposition, for the reasons stated above; *Walker v. Farmers Insurance Exchange*, 63 Cal. Rptr. 3d 507, 512 n.8 (Cal. App. 2007), *notes* what the ratio would be with attorney's fees included, but in fact *excludes* those fees from the ratio on which it bases its holding, *see id.* at 514 (reducing punitive damages to $1.5 million, based on 1:1 ratio with $1.5 million compensatory damages award); and *Girdner v. Rose*, 213 S.W.3d 438, 449 (Tex. App. 2006), declined to decide whether attorney's fees should be included.

Inc., and Dewey Guida. *See* QL Br. at 39-40. Plaintiffs' only response on the merits is the conclusory statement that "Quicken could not meet the elements of 'joint obligation' and/or 'single indivisible injury' under *Zando*, 182 W.Va. 597,390 S.E.2d 796 (1990)." Pl. Br. at 48-49. However, Plaintiffs fail to identify any injury other than the single injury allegedly caused by the existence of the Loan, which necessarily incorporates the damage from the allegedly inflated appraisal by Guida. Indeed, Plaintiffs repeatedly point to the appraisal as the source of the damages here. *See* Pl. Br. at 21-25. Thus, Defendants are entitled to setoff because "[a] plaintiff may not recover damages twice for the same injury." *Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 349, 419 S.E.2d 8, 13 (1992) (internal quotation marks omitted); *see also id.*, 187 W.Va. at 350, 419 S.E.2d at 14 ("[W]e find that the plaintiff, Lisa Pennington, did suffer a single indivisible loss as the result of the actions of multiple parties. Her loss — a fractured clavicle and the ensuing complications — resulted from the actions of two successive and independent tortfeasors . . . .").

Furthermore, the offset issue was properly preserved for review because it was clearly raised in Quicken's Post-Trial Motion for Offset of Judgment filed on April 8, 2011. Plaintiffs argue that Defendants waived the offset argument by failing to raise it within 10 days of the judgment under W.Va. Rule of Civil Procedure 59(e). *See* Pl. Br. at 48. However, they cite no precedent for this argument, and this Court has made clear that the time bar of Rule 59(e) does not apply to an offset claim. *See Savage v. Booth*, 196 W.Va. 65, 468 S.E.2d 318 (1996). In *Savage*, the defendant filed a post-trial motion for offset almost three months after the judgment was entered, and the trial court held that the motion was untimely under Rule 59. *See id.*, 196 W.Va. at 67, 468 S.E.2d at 320. This Court reversed, holding "as a matter of law that upon the defendant's motion the trial court was required to deduct the settlement amount from the jury verdict prior to entering the final judgment." *Id.*, 196 W.Va. at 70, 468 S.E.2d at 323. The time bar of Rule 59(e) was inapplicable because "[t]he trial court's initial failure to give such credit [for offset] was a mere oversight and does not arise to the level of more substantial errors which must be considered pursuant to Rule 59(e) or Rule 60(b)." *Id.* Instead, "the trial court should have corrected the error pursuant to Rule 60(a)," *id.*, which has no time bar. Likewise, here, the trial court was required to correct the error and grant the offset, and the 10-day requirement of Rule 59(e) is inapplicable. Its refusal to do so[6] was reversible error.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed as to liability for fraud and unconscionability, the award of damages should be vacated to eliminate punitive damages and cancellation of the Loan, and damages should be offset by the judgment as to former defendants.

[6] Respondents suggest that the Circuit Court "did not reach" the motion for offset. Pl. Br. at 48. To the contrary, the Court's May 2, 2011, clearly denies "all" post-trial motions filed by defendants. (A 343.)

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CERTIFICATE OF SERVICE

I, Johnny M. Knisely II, counsel for Petitioner Quicken Loans Inc., certify that on this 10th day of November, 2011, I served the foregoing "Petitioner Quicken Loans Inc.'s Motion to Exceed Rule 38(c)'s Default Page Limit for the Reply Brief of Petitioner Quicken Loans Inc." and "Reply Brief of Petitioner Quicken Loans Inc." by sending true and correct copies thereof via United States Mail, addressed as follows:

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