

13-0764

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

LOURIE BROWN and  
MONIQUE BROWN,  
Plaintiffs,

vs.

Civil Action No. 08-C-36  
Judge David J. Sims

QUICKEN LOANS, INC.,  
Defendant.

2013 JUN 18 PM 9 29  
BRENDA L. MILLER  
CIRCUIT COURT  
OF OHIO COUNTY

**OPINION AND ORDER**

This matter comes before this Court upon remand from the West Virginia Supreme Court of Appeals decision in *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W.Va. 2012), which affirmed in part and reversed in part, the Memorandum of Opinion and Order entered by Judge Arthur M. Recht on February 25, 2010, and the Memorandum of Opinion and Order (Attorney Fees/ Punitive Damages) entered by Judge Recht on February 17, 2011, in the above matter and remanded with directions.

**I. The Quicken Loans Decision**

In *Quicken Loans*, the Supreme Court affirmed the Circuit Court's conclusion that the Plaintiffs had proven, by clear and convincing evidence, that Quicken Loans committed fraud in that: 1) Quicken Loans failed to properly disclose to Plaintiffs the amount of the balloon payment due on the loan; and 2) Quicken Loans falsely promised Plaintiffs that it would refinance their loan in three to four months after closing and that Plaintiffs were justified in relying on that promise. *Id.* at 655.

The Supreme Court further found that Quicken Loans misrepresented to Plaintiffs the extent to which they were buying down their interest rate, conduct which the Supreme Court found to be "distasteful and opportunistic." *Id.* at 656. However, the Supreme Court determined that the

Plaintiffs failed to prove, by clear and convincing evidence, that they relied upon the misrepresented discount points when they entered into the loan. In so holding, the Court otherwise affirmed the Circuit Court's rulings that the evidence relating to the concealment of the balloon payment and promise to refinance were acts of fraud and were proven by clear and convincing evidence. *Id.*

On the issue of unconscionability under West Virginia Code §46A-2-121, the Supreme Court affirmed the Circuit Court's finding that, given the particular facts involved in this case, the terms of the loan and the loan product, in and of itself, were unconscionable. *Id.* at 659.

The Supreme Court also addressed the Circuit Court's decision to cancel the Plaintiffs' loan obligation. The Supreme Court found that: 1) because the Circuit Court found Quicken Loans' violation of West Virginia Code §31-17-8(m)(8) to have been "negligent" rather than "willful", the Circuit Court committed error in canceling Plaintiffs' mortgage obligation under that particular statute. *Id.* at 660; 2) the Circuit Court had the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121, but the clear language of the statute did not allow the Circuit Court to cancel Plaintiffs' debt obligation and, therefore, the Circuit Court erred in canceling Plaintiffs' debt obligation under said statute. *Id.* at 661; 3) Plaintiffs failed to offer any legal authority supporting forfeiture of the loan principal as an equitable remedy under the unfair and deceptive acts under West Virginia Code §46A-6-104, and that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible. *Id.* at 662.

The Supreme Court remanded this matter on the issue of punitive damages stating:

"Because the circuit court's order on punitive damages lacked the necessary analysis and findings required by *Garnes*, this Court is unable to conduct a meaningful and adequate review of the punitive damages award. *See State ex rel. Harper-Adams v. Murray*, 224 W.Va. 86, 680 S.E.2d 101 (2009). Because the circuit court failed to conduct a proper analysis under *Garnes*, such an analysis must be conducted upon remand." *Id.* at 664.

While Quicken Loans did not challenge on appeal the amount of attorney fees and costs awarded in this matter<sup>1</sup>, it did appeal the Circuit Court's decision to include attorneys fees and costs in its calculation of the compensatory damages to punitive damages award ratio. The Supreme Court rejected said challenge holding that, in general, fee-shifting statutes are compensatory and not punitive "in nature", and attorneys fees and costs awarded under West Virginia Code §46A-5-104 shall be included in the compensatory to punitive damages ratio, in cases such as this one, where punitive damages are available due to the Circuit Court's finding of common law fraud. *Id.* at 666.

Finally, the Supreme Court held that Quicken Loans is entitled to a credit for the settlement between Plaintiffs and the appraisal Defendants, but that any credit for the settlement between Plaintiff and Quicken Loans' co-Defendants is not to be applied to any punitive damages which may be awarded upon remand in this case. *Id.* at 668.

## **II. Issues Presented on Remand**

The parties generally agree that there are three (3) issues for this Court to address on remand:

- 1) The remedy for the finding that the loan terms and loan product were unconscionable;
- 2) Apply the standards set for in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), to determine whether a punitive damage award is warranted by the facts of this case, and, if so, the appropriate amount of a punitive damage award;
- 3) The appropriate amount of the offset against any award of compensatory damages.

In addition, this Court will address a 4<sup>th</sup> issue of whether additional attorney fees and costs should be awarded to the Plaintiffs for attorney fees and costs incurred subsequent to the entry of the final Memorandum of Opinion and Order (Attorney Fees/Punitive Damages) entered by Judge Recht on February 17, 2011.

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<sup>1</sup> See footnote 37 of *Quicken Loans*.

### III. Discussion<sup>2</sup>

#### A. Remedy for the Unconscionable Loan<sup>3</sup>

In *Quicken Loans*, the Supreme Court, having already found that Quicken Loans “acted fraudulently in inducing Plaintiff[s] into entering into the loan”, concluded that “there is no merit to Quicken's contention that it did not violate West Virginia Code §46A-2-121 in this regard.” *Quicken Loans* at 658. The Supreme Court held that “the circuit court correctly found that, given the particular facts involved in this case, the terms of the loan described above and the loan product, in and of itself, were unconscionable” pursuant to under West Virginia Code §46A-2-121. *Id.* at 659.

However, the Supreme Court reversed the Circuit Court’s decision to cancel Plaintiffs’ debt obligation under West Virginia Code 46A-2-121 finding that:

“(A)lthough the circuit court had the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121, the clear language of the statute simply does not allow the court to cancel Plaintiff’s debt obligation.” *Id.* at 661.

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<sup>2</sup> This matter was tried as a bench trial before Judge Recht beginning October 5, 2009, lasting 6 days, and concluding on October 12, 2009. In addition, on December 1, 2009, Judge Recht heard arguments on the Proposed Findings of Fact and Conclusions of Law submitted by the parties subsequent to the bench trial. This Court, as directed by the Supreme Court, obtained from counsel for the parties, copies of the complete transcripts of the trial and the December 1, 2009 hearing, along with the exhibits admitted into evidence at the trial. This Court has read the relevant trial transcripts and admitted exhibits. As directed by the Supreme Court, this Court is making an independent determination as to whether punitive damages were warranted by the evidence presented at the trial of this matter, and, if warranted, the amount of punitive damages. This Court is not bound by Judge Recht’s prior rulings on these issues.

<sup>3</sup> It is not necessary for this Court to make specific findings of fact on this issue for the reason that the findings of fact previously made by the circuit court have been affirmed on appeal, but remanded due to the circuit court’s error in ordering that the debt obligation be canceled as a remedy under W. Va. Code §46A-2-121.

West Virginia Code §46A-2-121 states, in relevant part, that:

“(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.”

This Court must now fashion a proper and lawful remedy to address the conclusive findings that the loan terms and the loan product in question were unconscionable and in violation of West Virginia law.

The Plaintiffs assert that they are still entitled to some equitable remedy in light of their proving fraud and that the loan was unconscionable by clear and convincing evidence. Plaintiffs urge this Court to reform the Note and Deed of Trust to provide for no interest or fees of any kind and further reform the loan to amortize fully over 40 years leaving no balloon payment. This Court rejects this approach for the reason that West Virginia Code §46A-2-121 does not provide clear authorization to this Court to reform the Note and Deed of Trust or any clear guidance as to how such reformation should be accomplished.

Quicken Loans asserts that the most appropriate remedy is to simply restore the parties to their original positions in this matter and to erase the transaction altogether. Quicken Loans urges this Court to order the Plaintiffs to use their recovery in this matter to rid themselves of the Note obligation. The Court also rejects this approach for the reason that Quicken Loans has conclusively engaged in unlawful and egregious conduct in the matter and the Plaintiffs are entitled to some form of meaningful relief other than the status quo.

Having rejected both the Plaintiffs' and Quicken Loans' proposed remedies, this Court adopts a portion of the ruling of the Supreme Court in *Quicken Loans* holding that this Court has the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121(1)(a). *Id.* at 661. The Plaintiffs shall have no further legal obligation to repay to Quicken Loans the Note executed by the Plaintiffs, and Quicken Loans shall have no further legal rights under the terms of said Note and Deed of Trust. The Deed of Trust executed by the Plaintiffs shall remain a valid lien on the Plaintiffs' real property. In the event of the sale of Plaintiffs' real property by Plaintiffs, or their heirs, successors or assigns, said sale must be a valid, open market, arms-length transaction with the selling price being at or near fair market value at the time of the sale. At the time of the closing of the sale, Quicken Loans will be entitled to receive all of the net proceeds<sup>4</sup> from the sale up to the principal amount of the loan made to Plaintiffs (\$144,800.00). At said closing, and upon receipt of the net proceeds, Quicken Loans shall deliver to Plaintiffs, or their heirs, successors or assigns, a full and final release of the said Deed of Trust and shall discharge the said Note as fully paid and satisfied.

#### B. Punitive Damages

In *Quicken Loans*, the Supreme Court held that "the circuit court's order on punitive damages lacked the necessary analysis and findings required by *Garnes*"; therefore the Court could not conduct "a meaningful and adequate review of the punitive damages award." The Supreme Court directed that such an analysis must be conducted upon remand.

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<sup>4</sup> Net proceeds means the amount Plaintiffs, their heirs, successors or assigns would otherwise receive after all standard closing costs and adjustments, including but not limited to, all taxes, assessments, expenses, fees, costs, commissions, etc., are deducted at closing from the sales price. In other words, the bottom line on sellers' side of page 1 of the HUD-1 settlement statement.

In syllabus point three of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897

(1991), the Court held as follows:

“When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.”

In syllabus point four of *Garnes*, the Court also held that:

“[w]hen the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.”

1. Garnes Syllabus Point 3 analysis

a. Reasonable Relationship to Likely or Actual Harm

It is uncontroverted that Quicken Loans committed fraud and engaged in unconscionable conduct in this matter. The mere terms of the loan made to the Plaintiffs boggles the mind. The original loan amount was \$144,800.00, on a home with a legitimate appraised value of \$46,000.00, less than one-third (1/3) of the loan amount. The loan was a 30 year loan, amortized over 40 years, with monthly payments ranging from \$1,144.00 to \$1,582.00. The total amount of the required 360 monthly principal and interest payments was approximately \$550,084.00. Shockingly, after paying over half a million dollars over 30 years, the Plaintiffs were still obligated to make a balloon payment of \$107,015.00. The Plaintiffs’ payment of \$550,084.00 would reduce their principal due by only \$37,785.00.

It is nearly impossible to calculate the total cost of the loan because, after 30 years of payments, it is highly unlikely that the Plaintiffs would have \$107,015.00 readily available to them to make the balloon payment. Therefore, they would be required to refinance to make the balloon payment and possibly procure a similar loan with the same unfavorable terms. The finance charge over the life of the original loan totals \$520,065.61. To call this conduct unconscionable is to minimize the egregious and despicable nature of it. It is borderline criminal.

The nature of the likely financial harm here is enormous, and the fact that it falls upon low income individuals is heartbreaking and must be condemned. Judge Recht summarized it best in his

Memorandum of Opinion and Order, when he concluded that the “loan converted \$25,000 in unsecured debt to secured debt and raised [Plaintiffs’] secured monthly debt obligation from \$578 to \$1,114; thus, putting the Plaintiffs’ home at risk.” P. 18, ¶ 45.

After much prodding from Quicken Loans, the Plaintiffs completed the loan, which was, nearly from the outset, unmanageable. The fact that the loan far exceeded the legitimate fair market value of the home, left the Plaintiffs unable to refinance the loan or sell the home. Their only likely future option was foreclosure and the loss of their home. Their only recourse to save their home was litigation.

The likely and actual harm in this case goes beyond financial harm. The fear and stress of being unable to manage a mortgage loan and the looming threat of losing one’s home, can only cause incalculable psychological harm and mental distress. The Plaintiffs described in detail the toll this took on them emotionally.

One does not need to be reminded of the significant adverse impact the financial crises of 2008 had on the global economy. “Sub-prime” loans and high-risk loans played a major role in triggering the crises. The economic damage was far-reaching and the effects are still felt everywhere nearly five (5) years later.

b. Reprehensibility of Quicken Loans' Conduct

As has been stated above, Quicken Loans’ conduct in this matter is reprehensible at best. The findings and conclusions that Quicken Loans engaged in fraudulent and unconscionable conduct were definitively affirmed on appeal. There is a recklessness and inherent greed in Quicken Loans’ conduct. Quicken Loans has shown no concern for any of the consequences of its’ conduct. Quicken Loans’ only motive in procuring Plaintiffs’ mortgage loan was to turn an immediate profit

and then quickly unload what it had to know would eventually be a non-performing loan, to some other entity.

Quicken Loans knew or should have known that the conduct that it was engaged in was illegal. According to the HUD-1 Settlement Statement,<sup>5</sup> (Trial Exhibit 1-L) the loan closing was conducted at the Plaintiffs' home on July 7, 2006, by an individual from a company called Lender's Services Inc., (hereinafter referred to as "LSI"). It is clear from the testimony in this matter that LSI was retained by Quicken Loans to perform a "title abstract", issue title insurance,<sup>6</sup> and to conduct the loan closing. The individual who conducted the closing, a notary public named Michael S. Miller,<sup>7</sup> was either an employee of LSI or an independent contractor hired by LSI. It is equally clear that no attorney or any other individual knowledgeable about the content of the 81 pages of loan closing documents was present at the 15-minute closing. In fact, there is no evidence in the record that an attorney was ever involved in the loan closing process from the beginning.<sup>8</sup>

Quicken Loans required the Plaintiffs to purchase a lender's policy of title insurance, insuring the amount of the loan (\$144,800.00) at Plaintiffs' sole cost of \$357.74.<sup>9</sup> This policy insured

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<sup>5</sup> The HUD-1 Settlement Statement was approved on behalf of Quicken Loans by Michael Lyon, Vice President of Mortgage Operations.

<sup>6</sup> LSI was apparently a title insurance agent for Chicago Title.

<sup>7</sup> It should be noted that Mr. Miller incorrectly notarized certain loan closing documents by indicating the documents were signed in Brooke County. It is uncontroverted that the documents were signed at the Plaintiffs' home in Ohio County.

<sup>8</sup> The practice of sending a notary public with no legal training and under no legal supervision to simply "witness" signatures on 81 pages of legal documents at a closing, is poor at best. It may not constitute the unlawful practice of law or violate statutes, but it is an obvious disservice to mortgage loan consumers, particularly when the notary can not even properly notarize the documents. For a closing fee of \$525, the Plaintiffs' deserved far better.

<sup>9</sup>The "Title Commitment Summary" issued by LSI lists the lender as "Title Source", a subsidiary of Quicken Loans, and lists the assessed value of the real property at \$20,640.00. (Trial Exhibit 1-BB.)

Quicken Loans against any title defects and was mainly to the benefit of Quicken Loans. According to the HUD-1, the title insurance policy was to be issued by LSI. LSI charged \$260.00 for an "Abstract or title search" fee, which was actually for the work performed by a non-lawyer.<sup>10</sup> This is illegal and in violation of West Virginia statute.

W.Va. Code §33-11A-11 (c) states as follows:

"No title insurance shall be issued until the title insurance company has obtained a title opinion of an attorney licensed to practice law in West Virginia, which attorney is not an employee, agent, or owner of the insured bank or its affiliates. Said attorney shall have conducted or cause to have conducted under the attorney's direct supervision a reasonable examination of the title. In no event shall the authority of a state-chartered bank to sell title insurance exceed the authority of a nationally chartered bank to do so."

There is no evidence in the record that either Quicken Loans or LSI obtained a title opinion of an attorney licensed to practice law in West Virginia prior to issuing or obtaining the title insurance policy<sup>11</sup> for the Plaintiffs as is required by W.Va. Code §33-11A-11 (c). Neither actually performed, or caused to be performed, a title examination that is legal or recognized under West Virginia law. Yet, the Plaintiffs were charged for such legal services.

Quicken Loans is a large corporation sophisticated in matters pertaining to real estate and mortgage loans. Quicken Loans does business in West Virginia and is clearly familiar with the laws of this State with regard to mortgage loans and loan closings. It is unfathomable and disturbing that Quicken Loans would willfully fail to comply with West Virginia law in the closing of Plaintiffs'

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<sup>10</sup> According to the HUD-1, LSI charged Plaintiffs \$250.00 for an "Addl Endorsement Fee." Although it is unclear what this fee is for, its amount is exorbitant. LSI also charged \$525.00 as a closing fee for a 15-minute closing by a notary public, which fee is also exorbitant.

<sup>11</sup> This Court could find no evidence in the record that either a title insurance commitment or title insurance policy was ever issued by LSI for the Plaintiffs' mortgage loan.

mortgage loan and/or recklessly retain a third party closing agent engaged in the same illegal conduct.

Quicken Loans' "chase and dump" style of making mortgage loans clearly demonstrates a business model that the Supreme Court succinctly classified as "distasteful" and "opportunistic." Quicken Loans's own business policies openly encouraged its employees to engage in this type of conduct. Perhaps the most glaring example of this conduct is Quicken Loans's policy of encouraging its loan agents to charge surplus "discount points" to borrowers without providing a reduction in the interest rate. Quicken Loans is not only aware of its employees engaging in this "distasteful" conduct, but it provides financial incentives for them to do so.

Throughout this litigation, Quicken Loans has refused to concede that it has engaged in any improper or illegal conduct despite overwhelming evidence to the contrary. Quicken Loans continues, post-appeal, its' attempts to minimize its culpability in this matter. In Quicken Loans' Opening Brief on Remand, Quicken Loans claims that one of the Plaintiffs (Mrs. Jefferson) supplied the appraised value on her property of \$250,000.00. Quicken Loans holds fast to it's contention that the promise to refinance the Plaintiffs' mortgage loan was unsupported by any evidence other than Mrs. Jefferson's own testimony. Quicken Loans also continues to fault Mrs. Jefferson for failing to read the 81 pages of loan closing documents. Finally, Quicken Loans blames the settling co-Defendants stating "the gravamen of [Mrs. Jefferson's] complaint against those settling codefendants (*sic*) was that, but for *their* malfeasance, she would not have incurred the obligation to Quicken Loans in the first place." (Emphasis supplied.)

Quicken Loans proceeds to argue against any punitive damage award in this matter stating that "[I]n short, this case presents - at worst - a single instance of a mistaken promise by one employee, and a disclosure that was not precise enough until after closing" and that "[A]ny

substantial award is therefore disproportionate to the actual misconduct in this case and to the statutory penalties for such misconduct.” Nonsense.<sup>12</sup>

Quicken Loans further argues that its’ conduct in this matter “measures low on the reprehensibility scale: it reflected isolated, one-time wrongdoing by lower-level employees, not repeated activity or company-wide policy.” It blames the failure to disclose the balloon payment on a flawed closing process. Quicken Loans contends that the Plaintiffs failed to execute the Truth-in-Lending Statement at the closing and that said failure was partially the fault of a “great deal of inattention from Plaintiffs.” Quicken Loans fails to acknowledge that the flawed closing process was the result of its’ own failure to ever involve an attorney in this mortgage loan transaction. Instead, with reckless indifference, Quicken Loans hired LSI to perform an “abstract or title search” and to issue title insurance in direct violation of West Virginia statute. Quicken Loans also did not care that a notary public, without any legal training or under any legal supervision, conducted a 15-minute “witness only” closing, with 81 pages of legal documents, some improperly notarized, and declined to answer any of the Plaintiffs’ questions about the said loan closing documents.

The *coup de grace* of Quicken Loans’s argument is the bald assertion that its’ litigation costs have been “extensive, and they now include the cost of the appeal, which was in substantial part successful.” (Emphasis added.) The temerity of Quicken Loans in making this assertion renders this Court nearly speechless. The only conclusion that can be reached is that Quicken Loans just does not get it and that Quicken Loans refuses to accept responsibility for its’ actions. There is no

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<sup>12</sup> It is unimaginable that the Plaintiffs’ mortgage loan and closing process was the only one of its type in West Virginia and that Quicken and LSI did not engage in the same unlawful conduct in other loans made in the State. It is fortuitous for LSI that it is not a party to this litigation. Both Quicken and LSI are fortunate that this is not a class action litigation.

accountability on the part of Quicken Loans, which is likely the reason this matter has reached this stage.<sup>13</sup>

c. Quicken Loans's Profit from Wrongful Conduct

As is discussed above, the total potential finance charge on the Plaintiffs' mortgage loan was \$520,065.00. This is an enormous potential profit, which Quicken Loans could have reaped had the Plaintiffs not instituted this litigation. While Quicken Loans never realized said profit, its' efforts to sell the loan on the secondary market clearly demonstrates Quicken Loans' intention to profit from a mortgage loan that has been conclusively found to be unconscionable and fraudulent.

Further, Quicken Loans received from the Plaintiffs payments for fees and costs totaling \$17,476.72, which amount Judge Recht ordered returned to the Plaintiffs. *Garnes* directs that punitive damages should remove Quicken Loans' profit from its' wrongful conduct and should be in excess of the profit, so that the award discourages future bad acts by Quicken Loans.

d. Reasonable Relationship to Compensatory Damages

Aside from constitutional arguments against an award of punitive damages in this matter, Quicken Loans' main argument is that the proper ratio of punitive damages to compensatory damages in this case should be no greater than 1 to 1. Quicken Loans' Brief's on Remand does not address specific West Virginia cases expressly permitting higher ratios. Plaintiffs argue that this Court is well justified in utilizing a ratio as high as 9-1 in its consideration and review of any punitive damage award in this matter.

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<sup>13</sup> Quicken Loans' posture on remand reminds the Court of the tale of Shoichi Yokoi, a Japanese sergeant in the Imperial Japanese Army during World War II, who was among the last Japanese holdouts to be found after the end of hostilities in 1945, discovered in the jungles of Guam in January 1972, almost 28 years after US forces had regained control of the island.

In Syl. pt. 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419

S.E.2d 870 (1992) the Court held:

“The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.”

In *TXO*, the Court essentially set forth two distinct standards of conduct with regard to the analysis of the ratio of punitive damages to compensatory damages. The first concerns a defendant who has engaged in conduct that can be classified as “extreme negligence or wanton disregard but with no actual intention to cause harm.” The second concerns a defendant who “has acted with actual evil intention.”

In this matter, there is insufficient evidence to find that Quicken Loans has acted with actual evil intention. Therefore, in performing a “ratio” analysis, this Court concludes that Quicken Loans should be judged by the former standard of conduct.

Quicken Loans’ conduct in this case has been conclusively found to be fraudulent and unconscionable and is analogous to the standard of extreme negligence or wanton disregard but with no actual intention to cause harm. Therefore, this Court concludes that it should be guided by the ratio set forth in *TXO* of an outer limit of roughly 5 to 1.<sup>14</sup>

e. The Financial Position of Quicken Loans

Quicken Loans objects “on both logical and federal constitutional grounds” to this Court considering the financial position of Quicken Loans “to the extent that this might be interpreted as allowing punitive damages to be increased based on the defendant’s wealth.” Quicken Loans argues

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<sup>14</sup> Neither of Quicken Loans’ two (2) Briefs on Remand address the *TXO* decision in the context of the ratio of punitive damages to compensatory damages.

that its' financial position should not be considered "an aggravating factor." This Court agrees with Quicken Loans' position on this issue. The law is clear that the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

This Court will consider Quicken Loans' financial position solely for the purpose of whether Quicken Loans has the ability to pay a fair and reasonable punitive damage award within the confines of *Garnes* and *TXO*. This Court does not intend to "enhance" the punitive damages award.

In addressing this factor, the Court will consider only Quicken Loans' net worth (subtracting total liabilities from total assets) to determine its "financial position." Quicken Loans' website claims that it is the nation's largest online retail mortgage lender and the third largest overall retail home lender in the United States with \$70 Billion in home loan volume in 2012.<sup>15</sup>

Plaintiffs have provided the Court with a summary of Quicken Loans' financial statements that have been admitted into evidence as Plaintiffs' Exhibit #57 and have been ordered sealed. The following paragraph of this Order will be redacted from the original Order filed with the clerk.

2. *Garnes* Syllabus Point 4 analysis

a. The costs of the litigation

The total cost of this litigation to the Plaintiffs is set forth below and is substantial. Included in these costs are out-of-pocket expenses in excess of \$100,000, which were advanced by Plaintiffs' counsel. It is obvious that Plaintiffs could not have afforded to pursue this matter if they were

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<sup>15</sup> www.quickenloans.com

required to pay the hourly fees of counsel or to advance litigation costs out of their own pockets. The Court agrees with Plaintiffs' argument that few attorneys would have been willing to pursue this matter given the complexity, time commitment, and significant financial and other resources necessary to bring this matter to a full conclusion. This matter was, and continues to be, aggressively defended by Quicken Loans utilizing highly competent, intelligent and skilled counsel.

b. Any criminal sanctions imposed on Quicken Loans for its' conduct

The parties agree that Quicken Loans has not been charged with, or suffered, any criminal sanctions as a result of its conduct in this matter. Accordingly, this mitigating factor is irrelevant.

c. Other civil actions against Quicken Loans based on the same conduct

The parties agree that Quicken Loans has not had other civil actions against it based on the same conduct. Accordingly, this mitigating factor is irrelevant.

d. The appropriateness of punitive damages to encourage settlement

Quicken Loans argues that this Court must not make a punitive damage award that goes beyond that which is necessary to encourage "fair and reasonable" settlements where a "clear wrong" has been committed. Quicken Loans argues that the complexity of this case mitigates against a punitive damage award. Quicken Loans does concede that much of the Plaintiffs' case was "eventually successful", but stubbornly argues that their case "consisted of self-serving testimony and conjecture." Quicken Loans digs deeper claiming that its' "decision to take the case to trial and appeal *vindicated* its good-faith positions on a number of important factual and legal issues." (Emphasis supplied.) Quicken Loans finally argues that a punitive damage award will set an example for others "not... contemplated by this *Garnes-Perrine* factor." *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010) .

Quicken Loans essentially argues that this was a complex case, that the Plaintiffs' evidence was weak, and that Quicken Loans was, for the most part, right in this matter and that, therefore, a punitive damages award against it is not warranted. This Court disagrees. Based upon Judge Recht's rulings and the subsequent decision in *Quicken Loans*, it is apparent that Quicken Loans did not accurately evaluate the egregiousness of its conduct, its potential liability, and the potential for a large damages award against it.

Quicken Loans has had, and continues to have, an opportunity to resolve this matter by way of settlement. There is no evidence before this Court that it has ever shown any interest in settling this matter with the Plaintiffs. Quicken Loans instead, as it is clearly entitled to do, chooses to do battle, to hold fast to its' position that it has done little or no wrong in this action, and has caused minimal damage. Quicken Loans chose to fully litigate this matter at trial and on appeal, and now chooses to fight on, post-appeal, as is its' right. However, it can not now complain that it was somehow "vindicated" and, therefore, should not be subject to a punitive damage award. Quicken Loans proceeded in this matter, at its own peril, when others reached compromises, with full knowledge of the consequences should it not prevail. Quicken Loans did not prevail and must now face the music.

This Court concludes that under the full *Garnes* analysis, as directed by the Supreme Court in *Quicken Loans*, a punitive damages award is just, proper and fundamentally fair based upon the all of the facts and evidence in this matter.

### 3) Offset

The Supreme Court in *Quicken Loans* ordered that Quicken Loans is entitled to full credit against any award of compensatory damages for the sums already paid to Plaintiffs by settling co-

Defendants. *Quicken Loans* at 668. The Supreme Court did not direct this Court as to how said offset was to be made.

Plaintiffs contend that Quicken Loans did not raise the issue of whether it was entitled to an offset for attorney fees and costs awarded in this matter and that, therefore, Quicken Loans has waived the issue. Plaintiffs also assert that their fees and costs can be properly apportioned between the claims against Quicken Loans and the claims against the settling co-Defendants. The Plaintiffs urge this Court to limit Quicken Loans's offset to the restitution award of \$17,476.72, and to the \$98,800.00 that the Court should now award under §31-17-17(c) in lieu of loan cancellation.

The issues before this Court are: 1) whether a non-settling defendant is entitled to offset an award of attorney fees and costs under the West Virginia Consumer Credit and Protection Act, §46A-1-101 *et seq.*, (hereinafter referred to as "WVCCPA"), a fee-shifting statute, where the defendant has conclusively engaged in fraud and unconscionable conduct; and 2) whether an award of attorney fees and costs is "compensatory in nature" only for the purposes of considering the ratio of punitive damages to compensatory damages, or is fully compensatory damages subject to an offset for a prior settlement. These are issues of first impression in West Virginia.

The Supreme Court in *Quicken Loans* clearly recognized that an award of attorney fees and costs under fee-shifting provisions, such as the WVCCPA, are "compensatory in nature." The Supreme Court cited a string of cases from other jurisdictions interpreting fee-shifting statutes and affirming similar holdings. The public policy behind such fee-shifting provisions is to encourage private enforcement of statutes and to ensure effective access to the legal system.

In *Quicken Loans*, the Court cited *Farley v. Zapata Coal Corp.*, 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981), for the proposition that fee-shifting statutes, such as WVCCPA, have been

considered by the Court to be “compensatory in nature.” See also, *Orndorff v. West Virginia Dept. of Health*, 165 W.Va. 1, 267 S.E.2d 430, 432 (1980).

The Supreme Court also noted that cases from other jurisdictions permitted attorney fees and costs awarded pursuant to a fee-shifting statute to be included as compensatory damages when considering the ratio of punitive damages to compensatory damages. Many of those cases affirmed the public policy behind fee-shifting provisions in statutes to enable plaintiffs to pursue legal actions where statutes have been violated and to ensure effective access to the legal system.

In *Quicken Loans*, the Supreme Court held that:

“[I]n light of the foregoing, and considering this Court’s past recognition that, in general, fee-shifting statutes are compensatory and not punitive in nature, we find persuasive the argument that the attorneys fees and costs awarded under West Virginia Code §46A-5-104 shall be included in the compensatory to punitive damages ratio where, as here, punitive damages are available to Plaintiff because there was a finding of common law fraud. Accordingly, we hold that attorneys fees and costs awarded under West Virginia Code §46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio in cases where punitive damages are available.” *Quicken Loans* at 666-667.

While the Supreme Court held that attorney fees and costs are “compensatory in nature” and shall be used in considering the punitive damages to compensatory damages ratio in this matter, the Supreme Court did not address the issue of whether an award of attorney fees and costs under a fee-shifting statute, such as the WVCCPA, were fully compensatory damages subject to an offset for a prior settlement.

In *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884 (C.A.2 (Conn.), 1988), the Court considered the issue of whether a non-settling defendant is entitled to offset an attorney fees award by the amount already paid by settling defendants. The *Auwood* Court held:

“We have considerable doubt as to the availability of such relief, since the statutory provision for an award of attorneys’ fees is designed to protect a damage award from the inroads such fees would otherwise make, see, e.g., *International Travel Arrangers, Inc. v. Western*

*Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir.), cert. denied, 449 U.S. 1063, 101 S.Ct. 787, 66 L.Ed.2d 605 (1980), and granting such an offset would penalize the pursuit of valid legal claims by a plaintiff who could establish that the nonsettling defendants were liable to it but could not sufficiently prove a high amount of damages.” 850 F.2d at 894.

This Court concludes that where attorney fees and costs are awarded for fraud and unconscionable conduct in violation of the WVCCPA, a prior settlement should not impact the Plaintiffs’ ability to recover said attorney fees and costs. To permit so would be contrary to the clearly stated legislative and public policy of enabling Plaintiffs to pursue legal actions where statutes have been violated and of ensuring effective access to the legal system and would have a chilling effect on said policy.

#### 4. Additional Attorney Fees and Costs Award

Quicken Loans did not challenge on appeal the amount of attorney fees and costs awarded in this matter. An award of additional attorney fees and costs on remand is discretionary. However, given that the Plaintiffs have substantially prevailed on appeal, particularly on the issues of fraud and unconscionability, the Court concludes that an award of additional attorney fees and costs is wholly fair and justified. This Court will utilize the same standards applied by Judge Recht in his Memorandum of Opinion and Order (Attorney Fees/ Punitive Damages) entered February 17, 2011, in awarding additional attorney fees and costs in this matter.

The Plaintiffs’ Motion for Attorney Fees and Costs from February 17, 2011, to present, is again reviewed within the context of *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Syllabus point 4 of *Pitrolo* provides:

“Where attorney’s fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney’s fees is generally based on broader factors such as (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or

contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

This Court, following Judge Recht's prior Order, accepts the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks. This Court awards the hourly rates requested by the Plaintiffs, with slight modification, as follows:

- 1) James G. Bordas, Jr. - Four Hundred Fifty Dollars (\$450.00);
- 2) Jason E. Causey - Three Hundred Dollars (\$300.00);
- 3) James G. Bordas, III - Four Hundred Dollars (\$400.00);
- 4) James B. Stoneking - Three Hundred Dollars (\$300.00);
- 5) Scott S. Blass - Four Hundred Dollars (\$400.00);
- 6) Geoff Brown - Four Hundred Dollars (\$400.00);
- 7) Michelle Marinacci - Three Hundred Dollars (\$300.00);
- 8) Christopher J. Regan - Four Hundred Dollars (\$400.00);
- 9) Samantha Winter - Two Hundred and Fifty Dollars (\$250.00);

At the above permitted rates, the award for additional attorney fees and costs are as follows:

1) James G. Bordas, Jr.	\$ 59,850.00
2) Jason E. Causey	\$142,050.00
3) James G. Bordas, III	\$ 4,600.00
4) James B. Stoneking	\$ 42,000.00
5) Scott S. Blass	\$ 1,400.00
6) Geoff Brown	\$ 1,200.00
7) Michelle Marinacci	\$ 10,575.00
8) Christopher J. Regan	\$ 12,800.00
9) Samantha Winter	<u>\$ 1,500.00</u>
Lodestar Total	<u>\$275,975.00</u>
Costs	<u>\$ 3,058.55</u>
Total Award	<u><u>\$279,033.55</u></u>

Added to the prior attorney fees and costs award, the total award is as follows:

February 17, 2011 award of attorney fees:	\$495,956.25
February 17, 2011 award of costs:	\$100,243.64
Additional award of attorney fees:	\$275,975.00
Additional award of costs:	<u>\$ 3,058.55</u>
Total Attorney Fees and Costs Award	<u><u>\$875,233.44</u></u>

It is accordingly

**ORDERED** that the Plaintiffs shall have no further legal obligation to repay to Quicken Loans the Note executed by the Plaintiffs, and Quicken Loans shall have no further legal rights under the terms of said Note and Deed of Trust. It is further

**ORDERED** that the Deed of Trust executed by the Plaintiffs shall remain a valid lien on the Plaintiffs' real property and that in the event of the sale of the Plaintiffs' real property by Plaintiffs, or their heirs, successors or assigns, said sale must be a valid, open market, arms-length transaction with the selling price being at or near fair market value at the time of the sale. It is further

**ORDERED** that at the time of the closing of the sale, Quicken Loans will be entitled to receive all of the net proceeds from the said sale up to the principal amount of the loan made to Plaintiffs (\$144,800.00) and that, at said closing, and upon receipt of the net proceeds, Quicken Loans shall deliver to Plaintiffs, or their heirs, successors or assigns, a full and final release of the said Deed of Trust and shall discharge the said Note as fully paid and satisfied. It is further

**ORDERED** that for all of the foregoing reasons, a punitive damage award is supported by the facts and evidence presented in this matter pursuant to the factors set forth in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991). It is further

**ORDERED** that the Plaintiffs are granted a judgment for punitive damages against Quicken Loans in the amount of Three Million Five Hundred Thousand Dollars (\$3,500,000.00) and finds that this amount fully applies the *Garnes* and *TXO* standards, is fundamentally fair, and bears a reasonable relationship to the compensatory damages in this matter.<sup>16</sup> It is further

**ORDERED** that the attorney fees and costs awarded in this matter result from Quicken Loans' fraudulent and unconscionable conduct in violation of the WVCCPA, and, therefore, Quicken

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<sup>16</sup> The punitive damages award is approximately three and one-half (3½) times the amount of compensatory damages awarded in this matter.

Loans is not entitled to an offset for the amount of attorney fees and costs awarded in this matter.

It is further

**ORDERED** that the Plaintiffs are granted a judgment for compensatory damages in the amount of \$116,276.72, being the total of the restitution award previously made in the amount of \$17,476.72, and being the difference between the original loan amount (\$144,800.00) and the legitimate appraised value of the home (\$46,000.00) in the amount of \$98,800.00. It is further

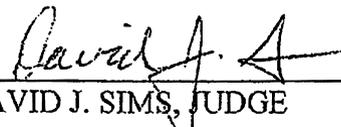
**ORDERED** that Quicken Loans is entitled to full credit against the award of compensatory damages in the amount of \$116,276.72, for the sums already paid to Plaintiffs by settling co-Defendants. It is further

**ORDERED** that the Plaintiffs are awarded a judgment for attorney fees and costs against Quicken Loans in the amount of Eight Hundred Seventy-Five Thousand Two Hundred Thirty-Three Dollars and Forty-Four Cents (\$875,233.44). Interest shall accrue on the initial attorney fees and costs award of Five Hundred Ninety-Six Thousand One Hundred Ninety-Nine Dollars and Eighty-Nine Cents (\$596,199.89), at the legal rate, from February 17, 2011, until paid. Interest shall accrue on the additional attorney fees and costs award of Two Hundred Seventy-Nine Thousand Thirty-Three Dollars and Fifty-Five Cents (\$279,033.55), at the legal rate, from the date of the entry of this Order until paid. It is further

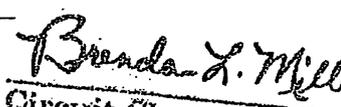
**ORDERED** that the Clerk of the Circuit Court of Ohio County shall provide an attested copy of this Order to Counsel of Record for each of the Parties.

To which rulings, the respective objections of the parties are hereby noted.

ENTER this 17<sup>th</sup> day of June, 2013.

  
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DAVID J. SIMS, JUDGE

A copy, Teste:

  
\_\_\_\_\_  
Brenda L. Miller  
Circuit Clerk