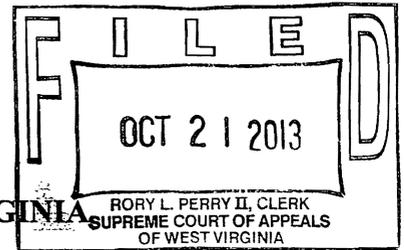


No. 13-0764



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)**

**BRIEF OF PETITIONER QUICKEN LOANS, INC.**

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## ASSIGNMENTS OF ERROR

1. The Circuit Court's \$3.5 million award of punitive damages – in a case with actual damages of less than \$18,000 – was grossly excessive and deprived Petitioner of substantive due process.
2. The Circuit Court acted contrary to law, justice, and Quicken Loans' right to due process of law by increasing the amount of punitive damages on remand, effectively punishing Quicken Loans for taking a lawful, good-faith, and partially successful appeal.
3. The Circuit Court deprived Quicken Loans of its right to substantive due process of law by repeatedly citing and relying on lawful conduct in supposed justification for its punitive damages award.
4. The Circuit Court erred by considering evidence of Quicken Loans' wealth in levying punitive damages; moreover, to the extent *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010), classified a defendant's wealth as an "aggravating" factor for purposes of punitive damages, it irreconcilably conflicts with the precedents of the United States Supreme Court and should be overruled.
5. The Circuit Court deprived Quicken Loans of its substantive right to due process by basing its reprehensibility finding on conduct dissimilar from that upon which liability for punitive damages was premised, as well as on harm or potential harm to persons other than Plaintiffs.
6. The Circuit Court's *Garnes* review was flawed in numerous respects, including failure to address the third *Gore* "guidepost" at all, and misconstruction of one factor so as to punish Quicken Loans for lawfully litigating the case.

7. The Circuit Court failed to obey the mandate of this Court that neither law nor equity permitted cancellation of Plaintiffs' debt; moreover, cancellation of a secured debt is impermissible in any event for the reasons explained by this Court in its November 21, 2012, opinion ("Opinion").
8. The Circuit Court failed to obey the mandate of this Court that the law does not favor forfeitures, and that a balancing of the equities in this case "requires" the restoration of the status quo as nearly as possible; moreover, the law disfavors forfeitures and requires restoration of the status quo for the reasons stated in the Opinion.
9. The Circuit Court erred by refusing to offset attorneys' fees with the settlement amount paid to Plaintiffs by co-defendants, given that this Court previously found those attorneys' fees to be compensatory.
10. The Circuit Court failed to obey the mandate of this Court that implicitly rejected Plaintiffs' request for an award of fees and costs on appeal and explicitly directed that each party would bear its own costs; moreover, as the Court's express mandate reflects, neither party substantially prevailed over the other in the prior appeal.
11. The Circuit Court's award of attorneys' fees was an abuse of discretion because it accepted without question or scrutiny time records that were vague, reconstructed, and in some instances inscrutable; much of the time claimed was in pursuit of punitive damages for common-law fraud, rather than a claim for which statutory fee-shifting is permitted; and it approved, without explanation, hourly rates considerably in excess of those previously found reasonable by Judge Recht.

## INTRODUCTION AND STATEMENT OF THE CASE

This appeal is about the State of West Virginia's commitment to rational, fair remedies, and to proportional, fair punishments.

The decision on remand was an outrageous departure from those commitments and from this Court's explicit instructions designed to effectuate those commitments. In its apparent zeal to unload its grievances with the entire mortgage lending industry onto Quicken Loans – and to punish Quicken Loans for having the temerity to defend itself – the Circuit Court repeatedly defied this Court's directives, and imposed an extraordinary \$3.5 million punitive damages award based on a series of shocking departures from law and basic fairness. Among other things, the Circuit Court:

- Imposed a \$3.5 million penalty wildly out of proportion to the actual, purely economic, harm to plaintiffs – actual damages of less than \$18,000 – based on isolated conduct by a single low-level employee;
- *Increased* the punitive damages by more than \$1 million over the original massive punitive award, thereby improperly punishing Quicken Loans for pursuing a good faith, partially successful appeal;
- Improperly punished Quicken Loans for continuing to defend itself, observing that Quicken Loans “must now face the music” for failing to settle and comparing it to a Japanese soldier continuing to fight World War II;
- Completely ignored, without explanation, the third *BMW v. Gore* guidepost, which requires comparison of the punitive award to the civil statutory penalties for similar conduct – when W.Va. Code § 46A-5-101 permits a maximum penalty of *less than \$5000* for such conduct.

- Unconstitutionally punished Quicken Loans for harm to others not before the Court, going so far as to condemn Quicken Loans for the nationwide hardship resulting from the sub-prime mortgage crisis;
- Unconstitutionally punished Quicken Loans for wholly lawful conduct, including the collection of lawful rates of interest, the offense of being a business seeking to earn profits, and conduct never challenged by Plaintiffs as unlawful; and
- Blatantly ignored this Court’s directives, including this Court’s rejection of forfeiture of the loan and instruction to restore the parties as nearly as possible to the *status quo ante*, this Court’s ruling that Quicken Loans is entitled to an offset of compensatory damages, and its rejection of fees and costs on appeal.

This Court’s cases make clear that even after a determination of liability, strict principles of fairness, proportionality, and due process constrain the remedial phase of judicial proceedings, and forbid unconstrained or disproportionate punishments. The Circuit Court’s extraordinary and intemperate decision on remand badly disserved those principles, and the West Virginia judicial system’s fundamental commitment to the rule of law. The judgment should be vacated, and the case should again be remanded for further proceedings consistent with the law, the federal and state constitutions, and this Court's original mandate.

*Nature of the Case.* In 2006, Respondent Lourie Brown (now Jefferson) contacted Petitioner Quicken Loans about refinancing her Wheeling home. L. Jefferson, Transcript Volume (“Vol.”) II at 191 (A0001479<sup>1</sup>); A. Nuckolls, Vol. IV at 111-113 (A0001636-1637). She wanted to consolidate her debts – many of them high-interest, unsecured loans – into a new mortgage. Quicken Loans eventually lent her \$144,800. She used the money to retire

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<sup>1</sup> Appendix pages are designated as “A\_\_.”

\$69,349.82 in prior debt secured by her house, as well as high-interest, unsecured debts totaling \$26,091.69. In addition, Lourie Brown walked away from closing with almost \$41,000 in cash, which she used to buy a new automobile. The transaction reduced Ms. Brown's monthly debt service by over three hundred dollars, from \$1,460 to \$1,144. *See, e.g.*, QL Exs. 1, 4, 9-11, 13 (A0001831-1846).

Ms. Brown made two timely payments and then, even though her monthly debt payments were far lower than they had been before the refinancing, defaulted. Yet today she possesses a judgment against Quicken Loans for approximately \$4.5 million, as well as the proceeds of a \$700,000 settlement with a former codefendant, subject to a minor offset – in other words, over **\$5 million** (with interest accumulating). And she need not pay back the loan, either. All in a case involving only conduct by a low-level corporate employee, no physical injury to anyone, and in which Plaintiffs dropped their claim for intentional infliction of emotional distress. How could our judicial system produce this astonishing result?

Plaintiffs filed this case in response to Quicken Loans' efforts, after Plaintiffs' missed payments, to foreclose on the collateral pledged for its loan. She contended generally that she had been the victim of an alleged "predatory lending" scheme, asserting primarily that Quicken Loans had lent her *too much* money given the value of her home, and that Quicken Loans had reneged on an alleged oral promise to refinance the loan after only three or four months. After a bench trial and subsequent hearing on fees and punitive damages, the Circuit Court canceled Plaintiffs' debt to Quicken Loans, and awarded Plaintiffs restitution of \$17,476, attorneys' fees and costs of \$596,199, and \$2,168,868 in punitive damages. In a post-trial motion, Quicken Loans asserted its right to an offset of the judgment on account of the

codefendants' settlement, which the Circuit Court summarily denied. Quicken Loans appealed to this Court (No. 11-0910).

On appeal, this Court affirmed most liability findings, although it narrowed the grounds for the Circuit Court's finding of common-law fraud. *Quicken Loans, Inc. v. Brown*, 230 W.Va. 306, 737 S.E.2d 640 (2012) (“*Quicken I*”). This Court also held that an award of attorneys' fees under the Act constitutes compensatory damages and can be used in the “ratio” for purposes of punitive damages analysis. Syl. pt. 11, *id.* On the other hand, this Court found that the Circuit Court had seriously erred in several ways with respect to the relief awarded to the Plaintiff. First, this Court held that the debt cancellation was not authorized by law or equity under these circumstances. *Id.*, 737 S.E.2d at 659-662. Second, this Court held that forfeitures are not a favored remedy, and that – *in this case* – “a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible.” *Id.* at 662. Third, this Court held that the Circuit Court had failed to perform a meaningful *Garnes*<sup>2</sup> procedural due process review of its punitive damages award, rendering the award utterly incapable of appellate review. *Id.* at 663-664. Finally, this Court held that because Plaintiffs had suffered a single, indivisible injury, they could receive only one recovery, and Quicken Loans was therefore entitled to a full offset of the proceeds of the codefendants' settlement against all compensatory damages. *Id.* at 668.

In their brief on that first appeal, Plaintiffs also requested that this Court award them fees and costs for defending the appeal. This Court did not; instead, it directed that each party bear its own costs, and it remanded with instructions that the Circuit Court dispose of the case in a manner consistent with its opinion. *Id.*; *see also* Mandate, *Quicken Loans Inc. v. Brown*, No. 11-0910 (Dec. 24, 2012).

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<sup>2</sup> *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

On remand, the Circuit Court received briefing on the issues on remand and, at its request, on the question of awarding the Plaintiffs additional fees and costs. (A0000551-715, 759-890, 2292). A status conference was held on April 9, 2013, before the Circuit Court had reviewed the record. (A000716-758). No other hearings were held. In an order entered June 18, 2013 (“Remand Op.”), the Circuit Court held that (i) notwithstanding this Court’s directive to return the parties to the status quo, Plaintiffs would be freed of any obligation to repay the money loaned to them, leaving Quicken Loans with only a “valid lien” if the property is ever sold by the Plaintiffs “or their heirs, successors or assigns”; (ii) Plaintiffs should be awarded \$3.5 million in punitive damages; (iii) Quicken Loans is not entitled to an offset of the attorneys’ fee award, notwithstanding its “compensatory” character as determined by this Court; (iv) Plaintiffs were awarded “compensatory” damages in the amount of \$116,276, consisting of \$17,476 in restitution and a new award of \$98,800 under Code 31-17-17(c), which award(s) were subject to the \$700,000 offset; and (v) Plaintiffs were awarded an additional \$279,033 in attorneys’ fees and costs, bringing the total award of such fees and costs to \$875,233. (A0000891-914, 2993).

In attempting to justify the \$3.5 million punitive damages award, the Circuit Court purported to perform an analysis under *Garnes*, but ignored the third due process guidepost under *BMW of North America, Inc. v. Gore*, 517 US 559 (1996) (“*Gore*”), dealing with the civil penalty imposed for the conduct at issue. As for the factors that the Circuit Court did consider:

First, the Circuit Court held that there was a reasonable relationship between the punitive damages and actual or potential harm because it deemed *all* of the interest payments on the Loan to constitute harm. *See* Remand Op. at 8-9 (A0000898-899). Moreover, “[t]he 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.” *Id.* at 9 (A0000899). In addition, and notwithstanding that the interest rate on the Loan was perfectly lawful and had nothing to do with this *Garnes* factor, the Circuit Court called the interest payments “egregious,” “despicable,” and “borderline [*sic*] criminal.” *Id.* at 8 (A0000898). The court also looked at the harm to the economy as a whole from the subprime mortgage crisis: “‘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.” *Id.* at 9 (A0000899).

Second, the Circuit Court held that Quicken Loans’ conduct was “reprehensible at best” because “Quicken Loans’ only motive in procuring Plaintiffs’ mortgage loan was to turn an immediate profit.” *Id.* The court further focused on a supposed violation of the title insurance statute, *id.* at 10-11 (A0000900-901), which was not litigated and for which there was never a finding of any violation. The court also held that “the most glaring example of this [mis]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.” *Id.* at 12 (A0000902). The court failed to mention that this Court had held that there was no valid finding of fraud regarding how Quicken Loans determined the price for Plaintiffs’ discount points. *See Quicken I*, 737 S.E.2d at 655-56. Finally, the court emphasized that “Quicken Loans has refused to concede that it has engaged in any improper or illegal conduct,” and therefore lacks “accountability.” Remand Op. at 12, 14 (A0000902, 904).

Third, the Circuit Court held that Quicken Loans had an enormous potential profit, which rested on its treatment of all of the interest payments that Plaintiffs were supposed to make as “profit.” *Id.* at 14 (A0000904).

Fourth, the Circuit Court held that there was a reasonable relationship between punitive and compensatory damages because there is a permissible ratio of 5:1 under of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992). Remand Op. at 15 (A0000905).

Fifth, the Circuit Court emphasized that Plaintiffs had significant attorneys' fees, *id.* at 16-17 (A0000906-907), utterly ignoring that it was simultaneously ordering Quicken Loans to pay all of those fees.

Sixth, the Circuit Court held that Quicken Loans' refusal to settle also justified the punitive damages award here. *See id.* at 18 (A0000908).

#### **SUMMARY OF ARGUMENT**

The Circuit Court's disposition of the remand should have been relatively straightforward. This Court had mandated and instructed it to (1) avoid debt cancellation and such inequitable forfeitures, and instead attempt to equitably restore the parties to the status quo; (2) apply an offset to all compensatory damages awarded for the settlement with Quicken Loans' co-defendants; and (3) perform the required due process analysis and review of any punitive damages award. Remarkably, the Circuit Court repeatedly defied this Court's simple directives. To be clear, the Circuit Court did not merely interpret this Court's opinion in an unconventional way; rather, the Circuit Court repeatedly did exactly what this Court forbade. The Circuit Court did not hide its motives, either: it sought to punish Quicken Loans for all of the ills of the sub-prime mortgage crisis, for having a profit motive, and for having the temerity to defend itself in this case. Indeed, the Circuit Court went out of its way to disparage Quicken Loans with inflammatory remarks – calling Quicken Loans' conduct “boarderline [*sic*] criminal,” inviting class action litigation, and comparing Quicken Loans' belief in the merit of its case to Japanese soldiers who fought on from their jungle hideouts long after everyone else stopped fighting

World War II. *See* Remand Op. at 8, 12, 14 n.13 (A0000898, 902, 904 n.13). It should go without saying that these rhetorical excesses do not provide useful benchmarks to cabin rational decisionmaking, much less a permissible basis for ignoring the dictates of this Court and basic principles of law.

A number of specific errors require this Court's intervention:

First, the \$3.5 million punitive damages award is absurd and a plain violation of due process. The Circuit Court performed a wholly inadequate – and materially incomplete – *Garnes* analysis that repeatedly substituted intemperate rhetoric for reasoned inquiry, and punished Quicken Loans on a series of improper bases. To begin with its incompleteness: the Circuit Court ignored that the legislatively prescribed *maximum* civil penalty for the conduct at issue was less than \$5,000, a key due process consideration. It then compounded its error by committing numerous other errors with respect to the factors it did address. For example, it found reprehensible Quicken Loans' pricing of discount points, which this Court had already held did not support the fraud claim for which punitive damages could be awarded; it treated Quicken Loans' "potential" profit (and a grossly inflated calculation of potential profit, at that) as an aggravating factor, even though this Court's precedents required the Circuit Court to look at actual profit; it treated Quicken Loans' refusal to settle this case as an aggravating factor, even though the court was supposed to look at the effect on settlements in *other* cases under this Court's precedents; and it treated Plaintiffs' litigation costs as an aggravating factor, even though it is Quicken Loans, not Plaintiffs, that has been ordered to pay those costs.

More generally, it is impossible that Quicken Loans could have had advance *notice* that it would be subject to a \$3.5 million punitive damages award in a case with actual damages of (at most) \$17,476.72, and such notice is the touchstone of substantive due process.

Furthermore, the Circuit Court's decision to increase the punitive damages award on remand is itself a violation of due process, as it punishes Quicken Loans for exercising its right to appeal – in this case, an appeal that was successful on several issues.

Second, the Circuit Court's cancellation of Plaintiffs' debt is flatly contrary to this Court's holding that cancellation was impermissible and its directive that the parties be restored to the status quo. Indeed, the Circuit Court openly relied on a statute – and an interpretation of that statute – that this Court expressly rejected as a basis for debt cancellation.

Third, the Circuit Court acted contrary to this Court's holdings in refusing to offset attorneys' fees with the settlement amount paid by co-defendants. The offset is required by the combined effect of two holdings of this Court: (a) compensatory damages are subject to offset; and (b) attorneys' fees are compensatory.

Fourth, the Circuit Court's award of attorneys' fees and costs on appeal and remand openly conflicts with this Court's holding that the parties should bear their own costs. It also conflicts with the rule that fees are awarded only to a substantially prevailing party, inasmuch as the results of the appeal were mixed and the remand focused almost exclusively on issues for which Quicken Loans had prevailed on appeal. Moreover, even if fees on appeal and remand were permissible, the Circuit Court's acceptance of all supposed fees without scrutiny was an abuse of discretion.

Fifth, the Circuit Court's new award of an additional \$98,800 in purportedly "compensatory" damages (the difference between the amount of the Loan and the actual value of the Property) has no legal basis. Compensatory damages were not a proper subject for remand because they were not at issue on appeal, and, in any event, the \$98,800 was a windfall to Plaintiffs – Quicken Loans' provision to Plaintiffs of \$98,800 more than their property was

worth (much of which Mrs. Jefferson used to purchase a new car) was in no sense a harm, and certainly not a “harm” that could be “compensated” by (first) relieving them of any obligation to pay the money back and (second) providing them with yet another \$98,800. This “award” was simply another punitive forfeiture prohibited by law, equity, and this Court’s mandate. For it to then be used as a predicate for a further punitive damages award is bizarre.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Quicken Loans respectfully submits that this case must be set for argument under Rule 20 of the West Virginia Rules of Appellate Procedure. This case involves (1) issues of fundamental public importance, including whether the Circuit Court’s decision defied this Court’s mandates; and (2) important constitutional issues regarding a \$3.5 million punitive damage award in a case with actual damages of (at most) \$17,476.72, and whether increasing a punitive damages award by well over \$1 million on remand violates due process where the only intervening event is the defendant’s good-faith, partially successful appeal.

### **ARGUMENT**

- 1. The Circuit Court’s \$3.5 million award of punitive damages – in a case with actual damages of less than \$18,000 – was grossly excessive and deprived Petitioner of substantive due process.**

This Court is constitutionally required to review the Circuit Court’s award of punitive damages *de novo*. See *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (noting that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), “mandated appellate courts to conduct *de novo* review” of awards of punitive damages applying the guideposts announced in *Gore*, 517 U.S. 559).

The grossly disproportionate \$3.5 million punitive damages award in this case demonstrates why such “[e]xacting appellate review”<sup>3</sup> is so necessary to constrain the temptation to punish excessively or on improper grounds, and as a corrective to the tendency to justify any and all punishment by uncritically labeling the conduct at issue as particularly reprehensible.

All fraud is of course wrongful and potentially worthy of punishment, but the law requires a careful judgment, a reasoned assessment of *how* blameworthy the fraud is. Here the Circuit Court disregarded numerous factors placing the purported fraud at issue toward the low end of the reprehensibility scale: the fraud claim on which the award was based turned on low-level conduct specific to Mrs. Jefferson’s loan, not on any company-wide policy; only economic harm, and no physical harm, was implicated; and the conduct at issue was not an elaborate scheme but, at worst, a single instance of a mistaken promise and a disclosure that may not have been precise enough until after closing. The Circuit Court also disregarded that our Legislature has made clear that the maximum penalty for this kind of consumer fraud is approximately \$4,744 – a critical consideration under *BMW v. Gore*, and, at least since *Perrine*, an integral part of a comprehensive *Garnes* analysis. *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815, 895 (2010); *see* W.Va. Code §§ 46A-5-101, 106. Any substantial award is therefore disproportionate to the actual misconduct in this case and to the statutory penalties for such misconduct. And, as discussed below, it would also be grossly disproportionate to the actual harm to Plaintiffs.

To guide courts in assuring that punitive damages awards comport with due process, *Gore* announced three “guideposts” for substantive due process review of a punitive damages award:

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<sup>3</sup> *State Farm*, 538 U.S. at 418 (emphasis added).

- the degree of reprehensibility of the conduct;
- the disparity between the award and the harm or potential harm suffered;  
and
- the difference between the award and the civil penalties authorized or imposed in similar cases.

517 U.S. at 575. All of these factors – the third of which the Circuit Court ignored entirely – establish that the Circuit Court’s extraordinary punitive damages went far beyond the bounds of due process and cannot be sustained. Multiple other ways that the Circuit Court’s decision runs afoul of due process are discussed as separate assignments of error below.

**Reprehensibility.** Under any proper analysis, the conduct at issue in this case measures low on the reprehensibility scale. The Supreme Court has instructed courts examining reprehensibility to

consider[] whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*State Farm*, 538 U.S. at 419.

These factors point overwhelmingly toward a conclusion contrary to that reached by the Circuit Court. Here, there was no physical harm, and no threat to health or safety. The conduct at issue was one-time conduct by lower-level employees, not wrongdoing that was authorized by company officers or that represented corporate policy. There was no evidence, and no finding, that any other borrower has been made a promise of refinancing, by Heidi Johnson or anyone else. There was also no proof that any other borrower *may not* have seen the

amount of a balloon payment because the federal Truth-in-Lending disclosure *may not* have been presented before closing.<sup>4</sup>

The isolated nature of the alleged misconduct necessarily makes it significantly less reprehensible than persistent wrongdoing or conduct authorized by corporate decisionmakers. *See State Farm*, 538 U.S. at 419 (distinguishing “repeated actions” from “an isolated incident”); *Perrine*, 694 S.E.2d at 895 n.93 (misconduct of defendant had “occurred over a long period of time,” unlike cases relied on by the defendant which involved “isolated events”). The conduct at issue necessarily ranks low on the scale of reprehensibility.

**Disparity Between Award and Harm.** The disparity between the award and the only legitimate harm in this case – less than \$18,000 in restitution – is vast. None of the other amounts cited by the Circuit Court to inflate the purported harm withstands scrutiny. The loan principal of \$144,800 plainly cannot constitute a harm because any such harm was immediately offset by Plaintiffs’ receipt and beneficial use of every penny of the loan. The Circuit Court suggested that *all* of the scheduled interest payments constituted harm, *see* Remand Op. at 8 (A0000898), but treating the entire finance charge for a mortgage as harm defies reason. Interest payments at a market rate of interest – and there is no claim the interest rates were

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<sup>4</sup> In finding that the amount of the balloon payment was concealed until after closing, this Court relied heavily on its observation that the federal Truth-in-Lending disclosure in the Jefferson loan file, although bearing the date of the closing, was not actually signed until several weeks later. 737 S.E.2d at 654 n.27. From this delayed signature, the Court concluded that “it *appears* that Plaintiffs was not *presented* with this document prior to or on the date of closing.” *Id.* (emphasis added). With all respect to the Court, the record suggests otherwise. The very *first* page of *Plaintiffs’* Exhibit 5 – which they described as the “Browns’ Copy of the Closing File” (A0000155) – is an unexecuted copy of the Truth-in-Lending Statement. (A0002437). In other words, although it is undeniable that Plaintiffs did not sign the Statement at closing, it is highly likely that they had been “presented” with it in advance thereof.

unconscionably high – represent the legitimate price of borrowing money, not a “harm” to the borrower.<sup>5</sup>

The Circuit Court likewise erred in relying on harm that had nothing to do with this case. In particular, the Circuit Court pointed to the “economic damage” of the sub-prime mortgage crisis. But there is no relationship between the conduct here and the sub-prime mortgage crisis, and, in any event, harm to others is an unconstitutional basis for punitive damages. *See Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007).

**Civil Penalty.** Under *Gore*, the relevant civil penalty amount has great significance because it represents a considered societal judgment of the appropriate sanction for a given offense. *Gore*, 517 U.S. at 583; *see United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (“judgments about the appropriate punishment for an offense belong in the first instance to the legislature”). In *Perrine*, this Court gave this guidepost little weight on the facts before it, citing the great disparity between the conduct at issue in the case and the typical conduct contemplated by the analogous statutory civil penalty. 694 S.E.2d at 895. But here, unlike in *Perrine*, the third *Gore* guidepost should carry considerable weight. Rather than an extraordinary case far outside of the purview of the statute containing the penalty provision, this case is precisely the sort of single-plaintiff, single-transaction consumer case for which the

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<sup>5</sup> Similarly, the facts belie the Circuit Court’s conclusion that Plaintiffs’ risk of losing their house constituted potential harm. According to Plaintiffs’ own evidence, Plaintiffs had no equity in the home to lose before the Quicken Loans refinancing: she owed \$69,349.82 to CitiFinancial on her existing mortgage (*see* A0002438), and her house was worth only \$46,000 (*Quicken I*, 737 S.E.2d at 648). 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 US 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).

WVCCPA's penalties were designed. The paradigm for application of the third guidepost is this very case.

Alas, the Circuit Court ignored this guidepost – rendering its *Garnes* analysis incomplete *per se* – and which, when applied, demonstrates that the punitive damages award here is wildly excessive. The penalty set forth by the legislature for fraudulent conduct by a creditor is quite modest:

If a creditor has violated the provisions of this chapter applying to . . . illegal, fraudulent or unconscionable conduct, . . . the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

W.Va. Code § 46A-5-101. Although the maximum penalty can be adjusted upward for inflation since 1974 in the discretion of the court (*id.* § 46A-5-106), that maximum now stands at only about \$4,744.<sup>6</sup> Thus, the \$3.5 million punitive damages award is approximately 738 times the civil penalty. This disparity demonstrates not only that the award is excessive for the conduct alleged, but that notice of the size of the punitive damages award would have been impossible.

**2. The Circuit Court acted contrary to law, justice, and Quicken Loans' right to due process of law by increasing the amount of punitive damages on remand, effectively punishing Quicken Loans for taking a lawful, good-faith, and partially successful appeal.**

The Circuit Court's decision to increase the punitive damages award on remand, above the previous award of \$2,168,868.75, following a lawful, good-faith, and partially successful appeal, imposed an unjust and unconstitutional "chilling impediment" on "the right to appeal." *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1199 (9<sup>th</sup> Cir. 1986). Penalizing an appeal by imposing an increased punitive damages award – especially

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<sup>6</sup> See [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (accessed October 13, 2013). The maximum penalty at the time of trial would have been approximately \$4,350, and at the time of the loan just \$4,090. *Id.*

where the proceedings on remand were all devoted to issues upon which that appeal was *successful* – is fundamentally unfair and violates due process.

Furthermore, the Circuit Court’s use of attorneys’ fees incurred on appeal to support an increase in punitive damages compounds this error. The inclusion of such fees in the punitive-to-compensatory damages ratio directly punishes Quicken Loans for exercising its right to appeal. Due process does not permit forcing a party to choose between accepting a punitive damages award that (as this Court held) improperly failed to apply the law, and facing a larger punishment for challenging the original, unlawful award.

**3. The Circuit Court deprived Quicken Loans of its right to substantive due process of law by repeatedly citing and relying on lawful conduct in supposed justification for its punitive damages award.**

No one may be punished for doing what the law plainly allows. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Gore*, 517 U.S. at 572-73: The Circuit Court not only did so, but appeared to focus its displeasure on Quicken Loans’ decisions to litigate this matter and pursue all legal redress for what it has believed (and continues to believe) to be the Circuit Court’s serious legal errors and consequent unjust judgments. “[F]or an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional.” *Bordenkircher*, 434 U.S. at 363 (quotation omitted). Likewise, the Circuit Court’s reliance on Quicken Loans’ use of discount points, *see* Remand Op. at 12 (A0000902), ignores the fact this Court held that this conduct did not support a claim of fraud. *Quicken I*, 737 S.E.2d at 655-56.<sup>7</sup> And the Circuit Court further relied on a supposed violation of W.Va. Code § 33-11A-11(c) in how Quicken Loans obtained title insurance (*see* Remand Op.

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<sup>7</sup> More generally, the Circuit Court’s emphasis on the idea that Quicken Loans’ “motive in procuring Plaintiffs’ mortgage loan was to turn an immediate profit,” Remand Op. at 9 (A0000899), is irrelevant because a profit motive is not only lawful, but is the foundation of our free enterprise economy.

at 10-12 (A0000900-902)), yet the trial court never found any violation of this statute, and Plaintiffs did not argue on remand that Quicken Loans violated this statute.<sup>8</sup>

4. **The Circuit Court erred by considering evidence of Quicken Loans' wealth in levying punitive damages; moreover, to the extent *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010), classified a defendant's wealth as an "aggravating" factor for purposes of punitive damages, it irreconcilably conflicts with the precedents of the United States Supreme Court and should be overruled.**

Although syl. pt. 3 of *Garnes* deemed "the financial position of the defendant" to be merely "relevant," *Perrine's* sorting of factors made it into an "aggravating" one. To the extent that this might be interpreted as allowing punitive damages to be increased based on the defendant's wealth, this Court clearly erred. It is patently improper and unconstitutional for wealth alone to be used as an "aggravating" factor in the imposition of punishment. A state court may never use a defendant's wealth as a stand-alone basis for enhancing an award – *never*. Although the defendant's wealth is commonly mentioned in *Haslip*-derived lists of relevant factors for procedural due process analysis, it is conspicuously *absent* from the *Gore* substantive due process guideposts that define the outer limit of constitutionally permissible punishment. Why? Because, as the *State Farm* Court explained, "[t]he wealth of a defendant cannot justify an *otherwise unconstitutional* punitive damages award." 538 U.S. at 427 (emphasis added).<sup>9</sup> In other words, once the maximum punishment permitted by the Constitution for given misconduct causing a given amount of harm is determined (using the *Gore* guideposts), it has been determined for *all defendants*, and a given defendant's ability to pay more cannot warrant a higher penalty.

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<sup>8</sup> Moreover, this statute cannot support punitive damages, which are based solely on the fraud claim.

<sup>9</sup> See also *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) (lamenting that "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express bias against big businesses, particularly those without strong local presences").

If its conduct warrants punishment, Quicken Loans may be punished for that conduct, but it may not be punished simply because it is a successful business. Because Quicken Loans does not contend – and has never contended – that it would be unable to pay an “*otherwise constitutional*” punitive damages award, this *Garnes* factor can be of no consequence to any court’s punitive damages analysis.

Although it purported to “agree” with Quicken Loans that wealth cannot justify an otherwise unconstitutional punitive damages award, the Circuit Court nonetheless considered it, ostensibly to assure that Quicken Loans “has the ability to pay a fair and reasonable punitive damages award.” But again, because Quicken Loans *did not contend otherwise*, and wealth is *not* one of the *Gore* guideposts, any use of evidence of wealth could *only* have contributed to the unconstitutionally excessive award that resulted. Moreover, if the Circuit Court obeyed *Perrine*, then that is precisely what happened. In reversing the award, this Court should take this opportunity to correct *Perrine*’s misclassification of wealth as an “aggravating” factor and restate the governing law of punitive damages: under the United States Constitution, wealth may never be an “aggravating factor.”

**5. The Circuit Court deprived Quicken Loans of due process by basing its reprehensibility finding on conduct dissimilar from that upon which liability for punitive damages was premised, as well as on harm or potential harm to persons other than Plaintiffs.**

The Supreme Court has repeatedly emphasized that a defendant may be punished only for harm to the plaintiff before the court, and only for the conduct at issue in the case. The reprehensibility inquiry is *not* a license for a comprehensive moral audit of the defendant: “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *State Farm*, 538 U.S. at

422-423. Accordingly, “[a]lthough our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, in the context of civil actions courts must ensure the conduct in question *replicates* the prior transgressions.” *Id.* at 423 (emphasis added; citation and quotation omitted).

Similarly, harm or potential harm to persons not before the Court may not be a basis for punitive damages: “the Constitution’s Due Process Clause forbids a State to use a punitive damages award for injury that it inflicts upon nonparties[.]” *Philip Morris*, 549 U.S. at 353; *see Perrine*, 694 S.E.2d at 877 (recognizing and applying *Philip Morris*). Moreover, considering merely *potential* harm to others diverges even further from what the Constitution permits. “We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant’s conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.” *Philip Morris*, 549 U.S. at 354 (emphasis in original; citing *State Farm*, 538 U.S. at 424).

Yet, in this case, the Circuit Court expressly justified its punitive award based in part on a connection it drew between the loan in this case and the 2008 financial crisis – including harm to the entire “global economy.” Remand Op. at 9 (A0000899). This punishment of Quicken Loans for its purported role in harm to others is flatly unconstitutional.

**6. The Circuit Court's *Garnes* review was flawed in numerous respects, including failure to address the third *Gore* “guidepost” at all, and misconstruction of one factor so as to punish Quicken Loans for lawfully litigating the case.**

Several of the errors committed by the Circuit Court in its review under *Garnes* are addressed in the assignments of error above, including its gross exaggeration of the reprehensibility of Quicken Loans’ conduct, as well as consideration of its lawful conduct, of

dissimilar conduct, of its wealth, and of potential harm to persons or entities other than the Plaintiffs.

This assignment of error focuses on five specific deficiencies in the Circuit Court's analysis. First, the Circuit Court misapplied the "aggravating" factor concerning the "appropriateness of punitive damages to encourage settlement" from syllabus point 4 of *Garnes*. As the Court made clear in *Perrine*, 694 S.E.2d at 888-889, this factor is *not* intended to permit a court to punish the defendant for failing to settle the case before it. Yet the Circuit Court used it in precisely that way, remarking that because Quicken Loans had stood on its rights rather than settle the case, it must now "face the music." Remand Op. at 18 (A0000908).

Second, the Circuit Court utterly failed to address the federal substantive due process guideposts as this Court required in *Perrine*, 694 S.E.2d at 895. In particular, the third "guidepost" is both missing from and has no proxy factor in a *Garnes*-only analysis, and that factor – comparison with civil penalties authorized or imposed in similar cases – should carry great weight in this case. *Gore*, 517 U.S. at 583.

Third, the Circuit Court grossly inflated the compensatory/punitive multiplier by improperly including in the "compensatory" figure nearly \$100,000 in forfeitures awarded for merely *negligent* conduct, which cannot support punitive damages. Although its holding on this point is not entirely clear, the Circuit Court appears to have awarded Plaintiffs \$98,800 on account of Quicken Loans' *negligent* violation of the appraisal statute. Remand Op. at 19, 24 (A0000909, 914). Of course, the law requires "more than a showing of simple negligence to recover punitive damages." *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 671, 379 S.E.2d 388, 394 (1989). Harm from negligent conduct cannot support punitive damages.

Fourth, and notwithstanding this Court's prior holding as regards the "compensatory" nature of an award of attorneys' fees and costs under the Consumer Protection Act, use of such an award – whatever its label under state law – as a supposed justification to *enhance* punitive damages is illogical and unconstitutional. Indeed, the United States Supreme Court has not counted such fees as compensatory damages in calculating the permissible ratio, even when it has been urged to do so. *State Farm*, 538 U.S. at 425-426. Here, the attorneys' fees make up such a large portion of the purportedly compensatory damages that the punitive-to-compensatory ratio analysis has lost all relation to the minimal actual harm in the case, and become little more than an exercise in comparing the punitive award to the cost of litigation – a function far removed from the purposes of the ratio as set forth in cases like *State Farm*.

And fifth, the fee award in this case was pursuant to a statute – the Consumer Credit and Protection Act – that does not authorize punitive damages awards for violations, and the syllabus point announcing this Court's holding as regards their inclusion in punitive damages ratios was the only new one announced in the Opinion. It was, therefore, a new point of law, and as regards punitive damages, such pronouncements should apply only prospectively. Again, due process entitles a defendant to fair *advance* notice of the conduct for which a state may impose a punishment and the size of the penalty that the state may impose for that particular misconduct. *Gore*, 517 U.S. at 574. Quicken Loans did not have, and could not have had, fair advance notice that the Court might authorize punitive damages in addition to and on the basis of an attorneys' fee award, let alone a fee award under the Consumer Protection Act.

**7. The Circuit Court failed to obey the mandate of this Court forbidding cancellation of Plaintiffs' debt; moreover, such cancellation of a secured debt is impermissible in any event for the reasons explained by this Court in its Opinion.**

**and**

**8. The Circuit Court failed to obey the mandate of this Court that the law does not favor forfeitures, and that a balancing of the equities “requires” the restoration of the status quo as nearly as possible; moreover, the law disfavors forfeitures and requires restoration of the status quo for the reasons stated in the Opinion.**

The Circuit Court’s order effectively cancelling Plaintiffs’ obligation to repay the principal of the loan blatantly violates both this Court’s mandate and its binding interpretation of West Virginia law. Needless to say, “[a] trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.” Syl. pt. 3 (in part), *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003).

This Court’s mandate, as well as its instructions for remand, could not have been clearer – cancellation of the debt in this case is not a permissible remedy, and the equities require returning the parties as nearly as possible to the *status quo*. To begin with, the Court considered the two provisions of the Consumer Credit and Protection Act that authorize outright debt cancellation (W.Va. Code §§ 46A-5-101(2) and -105), and held that neither applied to a secured debt that is not a “regulated consumer loan.” 737 S.E.2d at 659. Second, the Court held that a merely negligent violation of W.Va. Code § 31-17-8(m)(8) cannot justify cancellation of a debt. *Id.* at 660 (citing W.Va. Code § 31-17-17(a)). Third, the Court held that the authorization in W.Va. Code § 46A-2-121, to “refuse to enforce” an unconscionable contract, must be read *in pari materia* with the specific language in the Consumer Credit and Protection Act limiting a court’s power to cancel a debt; hence, debt cancellation was limited to the specific circumstances described in W.Va. Code §§ 46A-5-101(2) and -105, which are not present here. *Id.* at 660-661.

Finally, this Court held that cancellation is an improper remedy for unfair and deceptive acts because, while that statute allows for equitable relief, equity strongly disfavors forfeitures. *Id.* at 662. This Court then made perfectly clear what equitable remedy, rather than cancellation, was permissible: “*This Court finds that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible.*” *Id.* at 662 (emphasis added; footnote omitted). This Court also made clear what constituted a return to the status quo: unwinding the transaction entirely, with the Plaintiffs returning the monies lent them. Specifically, this Court approvingly cited a case for the proposition that where the “seller who entered into contract to sell real estate was found to have been incompetent, [the] Circuit Court properly directed her to return full purchase price, thereby balancing the equities in terms of returning the parties to the status quo ... ‘as far as possible.’” *Id.* at 662 (emphasis added; quoting *Go Mart, Inc. v. Olson*, 198 W.Va. 559, 563, 482 S.E.2d 176, 180 (1996)); see also Restatement (Second) of Contracts § 384 (party seeking restitution must “return[] or offer[] to return, conditional on restitution, any interest in property that he has received”).

The Circuit Court’s decision on remand blatantly disregarded this Court’s crystal-clear holding that the parties should be returned to the status quo. In direct opposition to this Court’s instructions, the Circuit Court held that “Plaintiffs are entitled to some form of meaningful relief *other than the status quo.*” Remand Op. at 5 (A0000895) (emphases added). The “relief other than the status quo” that the Circuit Court imposed was precisely the inequitable windfall remedy – cancellation of Plaintiffs’ debt – of which this Court so forcefully disapproved. The Circuit Court ordered that “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.” Remand Op. at 6, 23

(A0000896, 913). Moreover, the purported legal rationale for the Circuit Court's action is one that the Court expressly rejected. The Circuit Court held that it "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 6 (A0000896). But this Court specifically addressed the "refuse to enforce" provision of § 46A-2-121(1)(a), and held that it did not allow for cancellation of a secured debt. 737 S.E.2d at 661. The Circuit Court ignored this holding.

To be sure, notwithstanding that it declared that Quicken Loans had no right to enforce the Deed of Trust, the Circuit Court's opinion did state that "[t]he Deed of Trust executed by the Plaintiffs shall remain a valid lien on the Plaintiffs' real property," whereby "[i]n the event of the sale of Plaintiffs' real property by Plaintiffs, or their heirs, successors or assigns, . . . Quicken Loans will be entitled to receive all of the net proceeds from the sale up to the principal amount of the loan made to Plaintiffs (\$144,800.00)." Remand Op. at 6, 23 (A0000896, 913) (footnote omitted). This unique "lien" can be rendered worthless at the whim of Plaintiffs, who need never sell the property and may apparently freely pass it to "heirs" or "assigns" without satisfying the phantom lien. In any event, Quicken Loans submits that this remotely contingent "lien" cannot hide the Circuit Court's effective cancellation of the debt, and surely does not constitute an attempt to return *both* parties to the "status quo as nearly as is possible." The Circuit Court defied the mandate, defied equity, and plainly erred.

And the Circuit Court did not stop there. In addition to cancelling the Plaintiffs' debt, the Circuit Court fashioned a brand new award of \$98,800 under Code 31-17-17(c) for the negligent violation of the appraisal statute. After trial, the Circuit Court made no such award, and potential damages under the appraisal statute were beyond the scope of the remand. But even if the Circuit Court could have addressed the issue on remand, the \$98,800 amount was not

a *harm* to Plaintiffs, and was therefore not a proper basis for compensatory damages. A plaintiff who has not suffered damages is not entitled to damages. *Absure, Inc. v. Huffman*, 213 W.Va. 651, 584 S.E.2d 507, 511 (2003). The Circuit Court made no attempt to explain how the receipt of another \$98,800 would remedy the “harm” of having already received it (and had the obligation to repay it forgiven to boot). Hence, the \$98,800 award is yet another inequitable forfeiture and represents a pure windfall to Plaintiffs.

**9. The Circuit Court erred by refusing to offset attorneys’ fees with the settlement amount paid to Plaintiffs by co-defendants, given that this Court previously found those attorneys’ fees to be compensatory.**

The Circuit Court further defied this Court’s mandates by refusing to offset the Plaintiffs’ Guida settlement against the award of attorneys’ fees. This Court’s decision as to offset was perfectly clear: “Plaintiff suffered a single indivisible loss arising from the actions of Quicken and the settling co-defendants. Quicken is therefore entitled to a credit for the settlement between Plaintiff and the appraisal defendants . . . .” *Quicken I*, 737 S.E.2d at 668. Moreover, this Court recognized that Quicken is “entitled to a reduction of the compensatory damage award, but not the punitive damage award.” *Id.* (quoting Syl. Pt. 1, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)). Thus, Quicken Loans is entitled to offset of compensatory damages.

This Court was equally clear in deeming attorneys’ fees to constitute compensatory damages. This Court rejected “Quicken’s contention that attorneys fees are punitive in nature and not compensatory,” instead concluding that “fee-shifting statutes,” including the one at issue here (West Virginia Code § 46A-5-104) “are compensatory and not punitive in nature.” *Id.* at 666. For this reason, the Court held 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.” *Id.* at 666-

67. This should end the matter: Compensatory damages are subject to offset, and if attorneys' fees are compensatory,<sup>10</sup> they too are subject to offset.

There is no legal or logical basis for treating attorneys' fees as compensatory for purposes of calculating punitive damages but not for purposes of offset. Simply put, if attorneys' fees are compensatory, then they should be treated like all other kinds of compensatory damages, which are subject to offset.

The only case the Circuit Court cited in support of its contrary holding is one in which the court did not decide the issue, but rather expressed doubt about the propriety of an offset before providing offset on other grounds. *See Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 894 (2d Cir. 1988). In a case where the court actually decided the issue, it held that offset is applicable to attorneys' fees. *See, e.g., Corder v. Brown*, 25 F.3d 833, 840 (9th Cir. 1994) ("We hold here that a non-settling defendant is entitled to offset attorneys' fees owed by the amount already paid by settling defendants. Defendant-appellant has presented a persuasive argument, highlighting the unfairness and unreasonableness of denying an offset."). In any event, the Circuit Court was bound to follow *this* Court's commands, and it did not. Quicken Loans is entitled to full use of the \$700,000 offset against all "compensatory" damages.

**10. The Circuit Court failed to obey the mandate of this Court that implicitly rejected Plaintiffs' request for an award of fees and costs on appeal and explicitly directed that each party would bear its own costs; moreover, as the Court's express mandate reflects, neither party substantially prevailed over the other in the prior appeal.**

In the first appeal, Plaintiffs expressly requested that this Court award them their fees on appeal. Brief of Respondents at 49 (A0000460) ("Respondents should be awarded

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<sup>10</sup> As set out above, *see supra* Argument Part 6, Quicken Loans preserves its argument that attorneys' fees and costs should not be considered compensatory damages, for purposes of punitive damages or otherwise. But if they are so considered, then Quicken Loans must be entitled to its offset.

attorney fees for defending this appeal under [W.Va. Code] § 46A-5-104 and § 31-17-17.”). The Court ignored Plaintiffs’ request and awarded them nothing.

The law concerning adherence to this Court’s mandate bears repeating here: “a trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.” Syl. pt. 3 (in part), *State ex rel. Frazier & Oxley*. Among the “circumstances” necessarily “embrace[d]” by this Court’s prior opinion was Plaintiffs’ fee request and its rejection by this Court. *Id.*, 591 S.E.2d at 735 (noting that the mandate of the Court includes matters decided “implicitly” on appeal); *Hatfield v. Painter*, 222 W.Va. 622, 671 S.E.2d 453, 463 (2008) (same). Nevertheless, the Circuit Court awarded *another* \$279,000 in fees and costs to Plaintiffs, most of which reflected the very time spent on appeal for which they had unsuccessfully sought an award by this Court.

A Circuit Court may not award fees on remand for a prior appeal where the mandate had not included a directive to do so. *See Powell v. Paine*, 226 W.Va. 125, 697 S.E.2d 161, 165 (2010) (where mandate of this Court had directed simply the reinstatement of the appellant’s teaching license, circuit court was not empowered to award attorneys’ fees or other relief). Here, not only did this Court’s opinion and mandate decline to award fees to Plaintiffs, it refused to even award them the modest “costs” available to a prevailing party on appeal. *See* W.Va. R. App. P. 24(a). Instead, the mandate of the Court provided, in relevant part: “[t]he decision of the circuit court is hereby affirmed, in part; reversed, in part, and remanded with directions, and *it is hereby ordered that the parties shall each bear their own costs.*” Mandate, *Quicken Loans Inc. v. Brown*, No. 11-0910 (Dec. 24, 2012) (emphasis added).

This direction as to costs also precludes the Circuit Court’s supplemental fee award because the test for deciding whether to award a party costs is the same applicable to

statutorily authorized fee-shifting: whether that party “substantially prevailed” on appeal. *See, e.g.,* W.Va. Code § 59-2-11 (“[I]n every case in an appellate court costs shall be recovered in such court by the party substantially prevailing.”); *e.g., Chesapeake & Potomac Telephone Co. v. City of Morgantown*, 143 W.Va. 800, 105 S.E.2d 260, 276 (1958). Accordingly, this Court’s decision that Plaintiffs not recover their costs necessarily means that Plaintiffs failed the test for attorneys’ fees. The Circuit Court therefore plainly erred in shifting yet another quarter-million dollars of fees onto Quicken Loans.

The Circuit Court’s further award of fees and costs accrued on remand is, if anything, even more clearly improper than the award of fees and costs on appeal. *All* of the litigation on remand concerned issues on which Quicken Loans was successful on appeal: punitive damages, cancellation of the Loan, and offset. It would make no sense for Quicken Loans to pay Plaintiffs’ fees and costs for a remand necessitated by the Circuit Court’s errors in Plaintiffs’ favor (and Plaintiffs’ defense of those errors). In any event, as explained throughout this brief, the Circuit Court’s rulings on remand in Plaintiffs’ favor directly conflict with this Court’s decision. And if Quicken Loans is ultimately successful on the remand issues in this Court, then Plaintiffs cannot be entitled to attorneys’ fees and costs as a prevailing party.

11. **The Circuit Court’s award of attorneys’ fees was an abuse of discretion because it accepted without question or scrutiny time records that were vague, reconstructed, and in some instances inscrutable; much of the time claimed was in pursuit of punitive damages for common-law fraud, rather than a claim for which statutory fee-shifting is permitted; and it approved, without explanation, hourly rates considerably in excess of those previously found reasonable by Judge Recht.**

Even if it were permissible to award additional attorneys’ fees, the Circuit Court’s unquestioning acceptance of *all* of Plaintiffs’ supposed fees and costs constitutes an abuse of discretion.

*First*, the award was erroneous because the time devoted to the punitive damages issue is not compensable. Punitive damages, if any, can be awarded solely on account of Plaintiffs' common-law fraud claim. *See Quicken I*, 737 S.E.2d at 666 (“[P]unitive damages are available to Plaintiff because there was a finding of common law fraud.”). And the fee award was expressly made pursuant to W.Va. Code § 46A-5-104, not for the common-law fraud claim (for which no statutory fees are available). *See 2/25/10 Op.* at 20 (A145). Thus, the time spent on punitive damages concerned a claim for which fees are unavailable, and therefore that time cannot be included in the calculation of fees. *See Syl. pt. 5, State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Env't'l Protection*, 193 W.Va. 650, 458 S.E.2d 88 (1995) (“Apportionment of attorneys’ fees is appropriate where some of the claims and efforts of the claimant were unsuccessful.”). Being easily distinguished from time spent on other claims, Plaintiffs must present time records that permit that time to be segregated. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“applicant [for fees] ... should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims”).

The failure to apportion fees is particularly egregious here because the majority of the fees on remand were incurred in litigating punitive damages. Although the parties briefed the Circuit Court on remand regarding cancellation and offset, the lion’s share of the briefing concerned punitive damages because on that issue the Circuit Court was essentially starting from scratch. *See Defendant Quicken Loans Inc.’s Opening Brief on Remand* (Mar. 6, 2013) (A0000608-659) (19 of 21 pages of argument devoted to punitive damages); *Plaintiffs’ Brief in Support of Their Position Following Remand* (Mar. 6, 2013) (A0000544-607, 2992) (17 of 26 pages of argument devoted to punitive damages).

*Second*, the Circuit Court erred in accepting without scrutiny Plaintiffs' supposed fees. A court's exercise of such discretion should be a thoughtful decision based on everything before it, as the dozen potentially relevant factors should confirm:

Where attorneys' 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 attorneys' 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.

Syl. pt. 4, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Here, however, the court accepted essentially all of the supposed fees, without any analysis. *See* Remand Op. at 22 (A0000912) ("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 . . .").

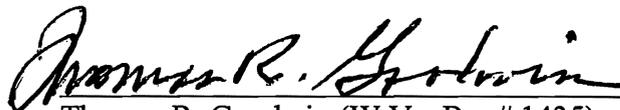
Furthermore, if the Circuit Court had examined the supposed fees, it would have found that the documentation of hours was clearly deficient. "Where documentation of hours is inadequate, the [trial] court may reduce the award accordingly." *Hensley*, 461 U.S. at 433. In their application for fees on remand, Plaintiffs' documentation of hours has two primary flaws. First, it is admittedly based in some unspecified (but substantial) part on "reconstructed" time. In other words, records were not kept contemporaneously, but have been created from hindsight.

Second, many entries are simply far too vague to charge to anyone, be it a client or an adversary.<sup>11</sup>

In addition, the hourly rates approved by the Circuit Court exceeded those found reasonable by Judge Recht for similar work in the same case. Neither Plaintiffs nor the court provided any reason why counsel's time should be compensated at significantly higher rates now than in 2011. In sum, the Circuit Court conducted no review, let alone an adequate review, of attorneys' fees.

### CONCLUSION

The judgment should be vacated, and the case should again be remanded for further proceedings consistent with the law, the federal and state constitutions, and this Court's original mandate.



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<sup>11</sup> Descriptions of inter-office conferences (for which at least a quarter-hour is always charged) often consist of no more than "Discuss with JEC" (Bordas, Jr., 01/08/13), "Meeting with JBS" (Causey, 3/14/11, 3/24/11, 4/01/11), "Meeting with JEC" (Stoneking, 3/14/11, 5/03/11, 6/07/11, 09/29/11, 10/04-06/11), and the like. Other inscrutable entries include "8 internal e-mails" (Causey, 4/21/11) and "Prepare letter" (Causey, 5/02/11). (A0000776, 780-781, 794a-795).

**CERTIFICATE OF SERVICE**

I, Thomas R. Goodwin, counsel of record for Petitioner Quicken Loans Inc., hereby certify that the foregoing "Brief of Petitioner Quicken Loans Inc." and the accompanying Appendix Record were served this 21st day of October 2013, by placing true and accurate copies thereof in the United States Mail, postage prepaid and addressed as follows:

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