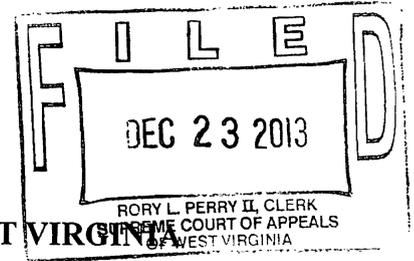


No. 13-0764



**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)**

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

Thomas R. Goodwin (W.Va. Bar # 1435)  
*Counsel of Record*  
Johnny M. Knisely II (W.Va. Bar # 4968)  
GOODWIN & GOODWIN, LLP  
300 Summers Street, Suite 1500  
Charleston, WV 25301  
(304) 346-7000  
[trg@goodwingoodwin.com](mailto:trg@goodwingoodwin.com)

*Of counsel:*

Meir Feder  
David M. Cooper  
JONES DAY  
222 East 41<sup>st</sup> Street  
New York, NY 10017  
(212) 326-3939

*Attorneys for Petitioner  
Quicken Loans Inc.*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT IN REPLY ..... 1

I. Introduction and Summary ..... 1

II. Argument ..... 6

    A. The Award of Punitive Damages is Wildly Excessive and  
    Violates Quicken Loans’ Right to Due Process of Law ..... 6

    B. The “Remedies” Imposed on Remand Violate the Law and  
    this Court’s Mandates ..... 14

    C. The Circuit Court Erroneously Refused to Offset Its Award of  
    Fees and Costs With the Proceeds of the Guida Settlement ..... 15

    D. The Award of Additional Fees and Costs on Appeal was Error and  
    Yet Another Violation of the Mandate ..... 17

CONCLUSION .....18

## TABLE OF AUTHORITIES

### Cases

<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996) .....	3, 6, 11
<i>Clark v. Chrysler Corp.</i> , 436 F.3d 594 (6 <sup>th</sup> Cir. 2006) .....	11
<i>Dep't of Transp., Div. of Highways v. Robertson</i> , 217 W. Va. 497, 504, 618 S.E.2d 506 (2005) .....	16
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W.Va. 656, 413 S.E.2d 897 (1991) .....	4, 11
<i>One Valley Bank of Oak Hill, Inc. v. Bolen</i> , 188 W.Va. 687, 425 S.E.2d 829 (1992) .....	8, 12
<i>Pacific Mutual Life Insurance Co. v. Haslip</i> , 499 U.S. 1 (1991) .....	4
<i>Perrine v. E.I. du Pont de Nemours</i> , 225 W.Va. 482, 694 S.E.2d 815 (2010) .....	11, 14
<i>Philip Morris USA v. Williams</i> , 549 U.S. 346 (2007) .....	3, 8
<i>Sizemore v. State Farm General Insurance Co.</i> , 202 W.Va. 591, 505 S.E.2d 654 (1998) .....	9
<i>State Farm Mutual Automobile Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003) .....	<i>passim</i>
<i>Thomas v. iStar Financial, Inc.</i> , 652 F.3d 141, 149 (2 <sup>nd</sup> Cir. 2010) .....	11
<i>Vasquez-Lopez v. Beneficial Oregon, Inc.</i> , 152 P.3d 940 (Or. App. 2007) .....	10

### Statutes and Constitutional Provisions

U.S. Const. Am. XIV, § 1 cl. 3 .....	<i>passim</i>
W.Va. Code § 33-11A-11(c) .....	9
W.Va. Code § 46A-2-121 .....	14-15
W.Va. Code § 46A-5-101 .....	11,13
W.Va. Code § 46A-5-104 .....	5, 17
W.Va. Code § 46A-5-105 .....	14-15
W.Va. Code § 46A-7-111 .....	13
W.Va. Code § 61-3-24 .....	12

## ARGUMENT IN REPLY

### I. Introduction and Summary

Petitioner Quicken Loans Inc. respectfully submits this reply memorandum in support of its petition. In the four-dozen pages of their brief, Respondents Lourie (now Jefferson) and Monique Brown urge this Court to approve forfeitures, the shift of a vast sum of attorneys' fees, and a punitive damages award that was *increased* by well over a million dollars on a remand that occurred *only* because of serious errors that the Circuit Court committed in its initial consideration of the case.

On remand, because the lawfulness of an award of punitive damages demands the *de novo* review of any and every court, Quicken Loans again defended its actions as best it could. This approach greatly displeased the Circuit Court, which castigated Quicken Loans repeatedly for defending itself, for successfully appealing, and even for failing to settle the case.<sup>1</sup> However irked the Circuit Court may have been by these actions, all were perfectly lawful and in no conceivable fashion subject to an additional punitive damages award.

Respondents are sensitive to this point, and they even momentarily concede that the Circuit Court's intemperate rhetoric was "strong and, perhaps, unconventional." Brief of Respondents ("Resp. Br.") at 12. Indeed it was. But it is not at all true that, by citing that "unconventional" rhetoric, Quicken Loans seeks to "divert this Court's attention" (*id.*) from the merits of any point on appeal. The Circuit Court wrote its own opinion, and it chose its own

---

<sup>1</sup> The Circuit Court declared that Quicken Loans "has had, and continues to have, an opportunity to resolve this matter by way of settlement." Remand Op. at 18 (A0000908). If this observation be true, Quicken Loans knows nothing about it. Have Respondents made settlement demands? They have, but a settlement is a mutual agreement, and no settlement on terms remotely acceptable to Quicken Loans has ever been possible. *Capitulation* is, of course, always an available "opportunity" for any defendant in any case, but a refusal to capitulate is lawful and hence cannot be the basis for punishment.

attention-grabbing language. Moreover, Quicken Loans very much wishes this Court to closely examine the important issues presented by its appeal.

Quicken Loans should first remind the Court, as briefly as possible, of the reasons why this appeal was necessary to begin with.

The most obvious reason is a jaw-dropping award of \$3.5 *million* in punitive damages. The Respondents have not been physically harmed in any respect. They have not even been *economically* harmed in any way that they have ever been able to articulate, much less prove. Very much to the contrary, they took Quicken Loans' money, spent it as they wished, and then defaulted after *two* payments. Yet Quicken Loans stands before this Court ordered to pay, among other things, \$875,233 in attorneys' fees and costs, and those \$3.5 million in punitive damages. As it asked in its opening brief ("QL Br."), Quicken Loans asks again: *is* "the State of West Virginia commit[ed] to rational, fair remedies, and to proportional, fair punishments?" QL Br. at 3. For if it is, the judgment of the Circuit Court cannot withstand even casual scrutiny.

The massive punitive damages award teeters precariously atop a base of punishment and forfeitures. As for *damages at law* proximately caused by common-law fraud, the record simply does not disclose *any*.

However daunting may have been a balloon payment of remaining principal looming thirty years in the future, the simple fact is that Respondents did not make 360 timely monthly payments only to face that balloon. They made *two*. They also did not make payments on their adjustable-rate mortgage for three years only to see those payments suddenly and dramatically increase (and, as it turned out, they would not have). There was absolutely no evidence from which they could quantify damages from the lack of a quick refinancing, inasmuch as Heidi Johnson's supposed promise contained no substantive terms whatsoever, and

Respondents' ability to pay even a modestly lower monthly payment was never tested. In short, Respondents showed no damages for the claimed common-law fraud. Indeed, on remand, Respondents conceded that their actual economic damages were "minimal." Plaintiffs' Opening Memorandum on Remand, at 35 (A0000591). And before this Court, they concede that, even before the loan, they had no equity in the subject real estate. Brief of Respondents ("Resp. Br.") at 24 n.11.

Instead, while urging the Circuit Court (and now this Court) to impose forfeitures and seven-figure punitive damages on Quicken Loans, Respondents have conjured and exaggerated *hypothetical* harms that have not and *need not* ever befall them. The bizarre irony of their approach is that *if this Court's mandate had been obeyed on remand* – the equities balanced, the transaction unwound in a rational fashion, and the status quo restored as nearly as possible, then Respondents could *never* suffer any of the imaginary future harms about which they so prodigally speculate.<sup>2</sup>

Moreover, the Circuit Court's immense award of punitive damages cannot conceivably withstand review under the substantive due process guideposts established by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and then further explained and developed in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Respondents' feign "curi[osity]" (Resp. Br. at 16) at Quicken Loans' reliance on this substantive due process law, and in so doing simply reveal their discomfort at its correct application. In any event, Quicken Loans cites and relies upon the *Gore* guideposts because they state the *mandatory* test

---

<sup>2</sup> Indeed, a borrower can – without the aid of any court – avoid such "harms" as a thirty-year stream of interest payments simply by defaulting, as Respondents did. Acceleration of the loan entitles the lender only to principal and interest accrued at the time of foreclosure, and not to theoretical post-foreclosure interest payments that the lender will never earn.

for constitutional excessiveness in each and every appellate court in the land, and they must be applied “exacting[ly]” by this Court. *State Farm*, 538 U.S. at 418.<sup>3</sup>

The \$3.5 million award fares very poorly under the *Gore* guideposts. Quicken Loans’ alleged misconduct involved a low-level employee, and Respondents presented *no evidence* that the employee’s misconduct had been replicated on even one other occasion. The supposed harm that might have been (but was not) inflicted on Respondents would have been purely economic, and the law and Constitution quite rationally deem physical harm to be much more deserving of punishment. The punitive damages award vastly exceeds the modest restitution awarded to Respondents. Finally, the award even more vastly exceeds the specific, legislatively prescribed civil penalty made available to a private plaintiff for a single-transaction incident of consumer fraud.

The Circuit Court avoided the conclusion compelled by the guideposts by, at Respondents’ eager urging, either ignoring them altogether (*e.g.*, the third guidepost) or contaminating its reprehensibility and harm analyses with improper considerations. As Quicken Loans showed in its opening brief – and Respondents have utterly failed to refute – the Circuit Court punished it for lawful conduct, including such innocuous, everyday characteristics as being a for-profit business. Further, and perhaps even more inappropriately, it punished Quicken Loans (to the tune of over a quarter-million in additional fees and costs, and over \$1.3 million in punitive damages) for successfully appealing the Circuit Court’s own prior errors.

---

<sup>3</sup> *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), by comparison, is a procedural due process mechanism mandated by this Court in the wake of the Supreme Court’s approval of a similar Alabama test in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). As a procedural due process protection, proper *Garnes* analysis should, in principle, prevent *substantive* due process violations regarding the size of punitive damages awards. Nonetheless, the *Gore* guideposts remain the ultimate, mandatory yardstick to determine whether such a substantive violation has occurred.

The Circuit Court did not stop there. In its zeal to vilify Quicken Loans, the Circuit Court also punished it for speculated harm to others not before the Court, including not only to those Wall Street mortgage investors who demurred to buy Respondents' specific loan, but to the nationwide pain caused by the entire "Great Recession" of the late '00s. Respondents attempt to assure us that the Circuit Court did not really *mean* what it so forcefully said, but courts speak through their orders, and this Court is bound to take the Circuit Court at its word.

The Circuit Court's punitive damages errors rest on underlying errors regarding "remedies." In this respect, the Court not only disregarded the law, but also this Court's plain mandates.

The most striking of these was the Circuit's Court's reinstatement of an unsustainable forfeiture – debt cancellation. And for good measure, the Circuit Court fashioned a brand-new forfeiture as well: an inexplicable \$98,800 in purported "damages," which the court awarded just so that the damages-less Respondents can recover something "meaningful" from Quicken Loans.

Second, the Circuit Court rubber-stamped an *additional* \$279,000 award of attorneys' fees and costs, most of them for Quicken Loans' appeal, and notwithstanding that this Court had refused to award those very fees and costs.

Third, the Circuit Court refused to apply this Court's dual holdings that (i) an award of attorneys' fees and costs under W.Va. Code § 46A-5-104 is compensatory in nature; and (ii) Quicken Loans is entitled to an offset of all compensatory damages by the amount of Respondents' pretrial settlement with former codefendants Dewey Guida and Appraisals Unlimited, Inc.

Hence, the Circuit Court's ruling leaves Respondents with

- the remaining principal of the loan with no personal obligation to repay a cent of it;
- restitution of all payments that they made to Quicken Loans;
- a \$98,800 gift of something “meaningful”;
- over \$875,000 in fees and costs;
- \$3.5 million in punitive damages; and
- nearly \$600,000 of the \$700,000 value of their pretrial settlement with Guida and Appraisals Unlimited.

Justice cannot tolerate such a result.

## II. Argument

Quicken Loans offers one last *caveat* before it moves to its arguments in reply. Respondents’ lengthy brief contains numerous mini-arguments that often consume merely a sentence or two. Quicken Loans will address a number of these in this reply brief, but makes no claim that it has addressed them all, or that any or all merits addressing. No point not specifically and expressly conceded by Quicken Loans in the record or in its briefs on this appeal is conceded.

### A. The Award of Punitive Damages is Wildly Excessive and Violates Quicken Loans’ Right to Due Process of Law

Quicken Loans’ opening brief shows why the vast \$3.5 million punitive damages award – which is based and heaped upon “relief” consisting solely of forfeitures and attorneys’ fees – is constitutionally unsustainable. In this reply, we again discuss this question within the framework of the federal due process guideposts mandated by *Gore* and *State Farm*.

**Reprehensibility.** Aside from Respondents’ utter lack of actual damages, the alleged fraud – which is, after all, the sole ground upon which the punitive award can rest – was

perpetrated by a single employee who worked at the lower levels of Quicken Loans' organization. There was no evidence that it was ever replicated, not even once.

Respondents know this, and so scramble to pretend that committing fraud was a corporate policy. But the policies about which they so vehemently complain are all perfectly lawful. Most notably, none instructs an employee to make a fraudulent refinancing promise.<sup>4</sup> Were Quicken Loans employees formerly permitted to make "forward-looking" statements? They were. And even if the future is hazier than the past, there is nothing inherently *fraudulent* about statements concerning events yet to come, even if those events do not wind up occurring. *Nothing* in the record suggests, much less proves, that Quicken Loans authorized a single employee on a single occasion to make an intentionally false "forward-looking" statement.

And again, there was *no* evidence that the alleged wrongdoing was ever *replicated*, which is the strict constitutional test for conduct relevant to the reprehensibility inquiry. *State Farm*, 538 U.S. at 423 ("Although 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.") (quotation and citation omitted). Accordingly, the fraudulent conduct must be considered isolated and hence less reprehensible than the acts of a recidivist.

---

<sup>4</sup> Respondents do not even try to show that "fraudulently" concealing the amount of a balloon payment by neglecting to have a routine Truth-in-Lending document signed at closing could be connected to some corporate policy. At any rate, they have no proof that such an error occurred at even one other closing, much less that the error was deliberate. The fantastic theory that they posit at 17-18 n.6 is simply bizarre. *No*, Quicken Loans does *not* "mean ... to say" that it sent Lourie Jefferson two distinct settlement packets, which differed only in the inclusion or exclusion of a Truth-in-Lending statement. Quicken Loans meant to say exactly what it said – the "evidence" of deliberate concealment of the amount of the balloon payment is extremely thin, especially to support a claim of fraud. And as for the order in which the documents are Bates-stamped, we note that the cited exhibit is Respondents', not Quicken Loans'.

Aware of Heidi Johnson's modest status within the Quicken Loans organization, Respondents can do no more than point out that other Quicken Loan employees were involved in processing Lourie Jefferson's loan application. Respondents' Br. at 21-22. But of course Heidi Johnson could not *make the loan* all on her own. Moreover, what matters is that she is the *only* person who allegedly participated in the refinancing-promise "fraud."<sup>5</sup>

And keeping this focus on the actual alleged fraud is essential here. Punitive damages can be awarded, if at all, only for common-law fraud. Violations of the Consumer Credit and Protection Act can result in statutory penalties, but not in punitive damages. *One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W.Va. 687, 425 S.E.2d 829, 833-834 (1992). Yet over and over, Respondents point to facts underlying their unconscionability claim, to conduct that was held to be merely negligent, and, most egregiously, to conduct that has absolutely nothing to do with their claims at all.

The law is very clear that the only constitutionally proper purpose of punitive damages is to punish for the conduct that harmed the plaintiff. *Philip Morris*, 549 U.S. at 354; *State Farm*, 538 U.S. at 424. Accordingly, it is utterly irrelevant to a proper reprehensibility inquiry to consider *any* conduct except, as Quicken Loans noted above, that which "*replicates*" the conduct that harmed the plaintiff.

Given this clear law, the Court should find it telling that Respondents continue to mention such things as Quicken Loans' unsuccessful attempts to sell Respondents' loan to

---

<sup>5</sup> Who – if anyone employed by Quicken Loans at all – was responsible for Respondents' failure to sign the Truth-in-Lending disclosure of the amount of the balloon payment at closing is not revealed in the record. Indeed, inasmuch as Quicken Loans believes that the record demonstrates that the loan packet that it provided to Ms. Jefferson before closing *contained* this disclosure, *see supra* n.4, any fault in failing to obtain Respondents' signatures on the document would likely lie with the unaffiliated notary who conducted the closing.

investors. Any transfer of an uncollectible note could have harmed only the transferee, and not Respondents.

In this regard, Respondents do shrink (ever so slightly) from fully endorsing the Circuit Court's remarks blaming Quicken Loans' actions for the effects of the recent nationwide recession. Remand Op. at 9 (A0000899); Resp. Br. at 33. Yet even here, Respondents' attempt to downplay these remarks is incongruous. While they describe the Circuit Court's remark as merely "incidental," and asseverate that the court was not blaming Quicken Loans, they then immediately posit that its remark somehow demonstrates that the (imaginary) harm in this case was "very real." *Id.* It of course does nothing of the kind, and it had no place in a proper analysis.

Finally, as a part of its deeply misguided reprehensibility analysis, the Circuit Court essentially abandoned its judicial role in order to make up a brand-new claim on behalf of the Respondents – an alleged violation of W.Va. Code § 33-11A-11(c). Respondents posit that somehow the Circuit Court's *de novo* review of the record entitled it to do so, Resp. Br. at 31, but this unsupported assertion ignores a judge's role in our system – as arbiter rather than inquisitor – as well as the bedrock due process violation that is inherent in the court's action. To be perfectly blunt, the Circuit Court invented a claim that Respondents did not make, about which Quicken Loans had no prior notice and hence no opportunity to defend, and *then* punished Quicken Loans on account of it. This course of action is a violation of due process of the most basic order. Plaintiffs are the masters of their claims, and they must plead them in their complaint. *See, e.g., Sizemore v. State Farm General Insurance Co.*, 202 W.Va. 591, 505 S.E.2d 654, 661 (1998).

**Disparity Between Award and Actual or Potential Harm.** Quicken Loans can largely rely on its opening brief as regards the second guidepost. *See* QL Brief at 15-16. Respondents simply have not demonstrated actual damages. Merely adding up a stream of interest payments over three decades is not a meaningful measure of “harm,” even “potential” harm. In support of this incongruous proposition, Respondents continue to rely, as they did below, solely on *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. App. 2007). The intermediate Oregon court did not endorse Respondents’ proposition; instead, because the defendant failed to properly raise any contrary argument, the *Vasquez-Lopez* court simply “accept[ed] plaintiffs’ figure.” 152 P.3d at 958. The court did not make a holding of any kind; at most, it made an explanatory remark or observation. Moreover, Respondents have never contended that they were promised a refinancing at *no interest*, which their theory of potential harm from the supposed fraud necessarily presupposes. That Respondents put on no evidence of the “better rate” that Quicken Loans might have provided or of the present value of any difference between that rate and the contract rate simply underscores the paucity of support for their claim.

More importantly, well over eighty percent of the “compensatory” damages under the Circuit Court’s math consists of its award of fees and costs. This award is entirely divorced from any real underlying harm to the Respondents, but rather is simply the cost of litigation. And where, as here, that cost is proposed to be *shifted* from to the defendant, any conceivable rationale to *punish* the defendant for the cost of litigation evaporates.

To make matters worse, a third of the Circuit Court’s fee and cost award (and hence of its grossly enlarged punitive damages award) represents litigation costs occasioned by Quicken Loans’ appeal. As Quicken Loans argued in its opening brief and reiterates herein, it

was lawfully entitled to appeal, did so in good faith, and prevailed on several important points. The Circuit Court cannot lawfully punish Quicken Loans for asking this Court to correct the Circuit Court's errors.

**Civil Penalty.** The Circuit Court ignored the essential guidepost comparing the punitive damages award to the legislatively prescribed civil penalty for similar misconduct altogether. Hence, its analysis was incomplete and *per se* erroneous under both the federal substantive due process guideposts and under *Perrine's* reformulation of the *Garnes* factors.

This Court is not at liberty to disregard or disparage this guidepost as Respondents urge. It is a fundamental feature of the Supreme Court's mandatory test, and it is there because due process commands that a state give potential tortfeasors fair *advance* notice of the punishment that may attend certain misconduct.

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of *the severity of the penalty* that a State may impose.

*Gore*, 517 U.S. at 574 (emphasis added). Existing legislative pronouncements are particularly informative in this regard. *Id.* at 583.

If there are cases in which the third guidepost is less informative for reasons peculiar to the case, then there are others in which it warrants significant weight. *See, e.g., Thomas v. iStar Financial, Inc.*, 652 F.3d 141, 149 (2<sup>nd</sup> Cir. 2010); *Clark v. Chrysler Corp.*, 436 F.3d 594, 607 (6<sup>th</sup> Cir. 2006). This case involves a single, allegedly fraudulent consumer transaction, and there is a civil penalty that is specifically prescribed for these circumstances.

That civil penalty is plainly the one previously identified by Quicken Loans: W.Va. Code § 46A-5-101. Not only is this penalty tailored for a private civil action involving a consumer fraud or frauds, it is the very civil penalty that persuaded this Court that the

Legislature did not intend that the additional deterrent of common-law punitive damages should be available for violations of Article 2 of the Consumer Credit and Protection Act. *See Bolen*, 425 S.E.2d at 833-834. To be sure, the Act does not displace otherwise-available remedies, and a plaintiff who can prove common-law fraud retains that cause of action, but § 46A-5-101 nonetheless stands as the clearest expression of legislative judgment regarding the appropriate punishment for fraud in the consumer credit setting like this one.

Respondents' proposed alternatives are clearly inapt. To begin with, of course fraud is occasionally prosecuted as a criminal offense, and W.Va. Code § 61-3-24 does authorize a lengthy prison sentence for one convicted of that crime. But the United States Supreme Court has cautioned very strongly against loose comparisons with criminal penalties. Quicken Loans had none of the procedural protections here that a criminal defendant would enjoy, most notably a presumption of innocence and requirement of proof of guilt beyond a reasonable doubt. And it respectfully submits that convicting it of fraud with such a presumption and burden of proof would have been utterly impossible. Hence, as the *State Farm* Court explained:

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." We note that, *in the past*, we have also looked to criminal penalties that could be imposed. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. *Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process*, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

*State Farm*, 538 U.S. at 428 (emphasis added; citations omitted).

A similar analysis should apply to unprecedented applications of "death penalty" civil sanctions that would require exercise of governmental discretion, generally proof of systemic misconduct, and finally exercise of judicial discretion as well. Respondents can cite no

example of such a draconian remedy being imposed in West Virginia for an isolated incident like this one, and the infrequency or paucity of such events should bear heavily on whether such sanctions truly provide the fair notice demanded by due process. If anything, one statute relied upon by Respondents, Code § 46A-7-111, strongly supports Quicken Loans' position. The per-violation *civil penalty* that the Attorney General can recover under that section is **\$5,000** – a figure just a few hundred dollars more than the inflation-adjusted maximum private civil penalty under § 46A-5-101. Quicken Loans submits that this congruence is no accident: the Legislature has provided real guidance as to appropriate punishment for this species of consumer fraud.<sup>6</sup>

**Other Constitutional Defects – Increasing Award After Successful Appeal.**

In response to Quicken Loans' argument that the Circuit Court's seven-figure increase in the punitive damages award was itself a violation of due process, Respondents merely cite a brief excerpt of discussion from the April 9 status conference,<sup>7</sup> in which Quicken Loans' counsel agreed with the Circuit Court that it was not bound by Judge Recht's earlier computation of punitive damages. Respondents' Br. at 29. Respondents apparently believe that this statement – which is of course accurate as a general principle of the law – is sufficient to refute Quicken Loans' argument on this point. It is not.

Quicken Loans' argument was plainly stated in its opening brief: a court cannot, consistently with due process, increase a punitive damages award on remand *where the only intervening event is a lawful, good-faith, and partially successful appeal*. Moreover, the Circuit Court aggravated its error by increasing the award based on its award of attorneys' fees and costs

---

<sup>6</sup> And to reiterate – the Circuit Court disregarded this factor entirely, which necessarily renders its analysis incomplete and erroneous.

<sup>7</sup> The Circuit Court did not hear "argument" on April 9. The hearing was scheduled and held as a status conference, and the court was unprepared to hear argument on the merits at that time. Tr. (4/9/2013) at 1, 11 (A0000716, 726). Instead, the court suggested that a later hearing would be held after the court had reviewed the record. *Id.* at 34 (A0000749). None was.

to the Respondents on remand, where the remand was necessitated *solely* by the Circuit Court’s own errors and addressed *solely* matters upon which Quicken Loans’ appeal had been successful.

**Consideration of Wealth.** Quicken Loans fully acknowledges that the Circuit Court *stated* that it would not enhance the award because of Quicken Loan’s wealth, but that statement then begs the question why the Court considered wealth *at all*. To the extent that Respondents rely on *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010), Quicken Loans reiterates that classifying wealth as an “aggravating” factor cannot be squared with the plain holding of *State Farm*.

B. The “Remedies” Imposed on Remand Violate the Law  
and this Court’s Mandates

In its Opinion, this Court forbade the cancellation of Respondents’ debt, finding no support in the applicable statutes or otherwise in law or equity for such a “remedy.” Instead, invoking equity’s time-honored abhorrence of forfeitures, this Court 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.*” 737 S.E.2d at 662 (emphasis added; footnote omitted). Yet on remand, the Circuit Court again relieved Respondents of liability for their debt. The Circuit Court thereby ran afoul of both the law and this Court’s mandate.

Respondents attempt to defend the Circuit Court’s actions by seeking to limit the breadth of this Court’s direction, positing that, for some reason, it ought not apply to the finding of unconscionability under Code § 46A-2-121. Resp. Br. at 38-39. They are wrong. This Court has already decided that 46A-2-121 must be read *in pari materia* with 46A-5-105, and the latter statute simply does not permit the cancellation of debts secured by a security interest.

Contrary to Respondents' assumption, there is nothing whatever inconsistent between this holding and other language in the Court's opinion that recognizes a circuit court's power to "refuse to enforce" an *agreement* under § 46A-2-121. Section 46A-5-105 refers to a *debt* – and a debt is merely one half of a credit *agreement*. To refuse to enforce an "agreement" is tantamount to a rescission, relieving *both* parties of their obligations. Thus, the Court's observation that the Circuit Court could refuse to enforce the agreement is perfectly consistent with its directive that the *status quo* be restored as nearly as possible.

As for the Circuit Court's novel "lien," it is illusory and all but worthless for the reasons Quicken Loans has already explained. QL Brief at 26. Moreover, nothing in the order suggests that it is even limited in the manner suggested by Respondents in their Brief at 40. In sum, § 46A-5-105 forbids cancellation of Respondents' "debt," and by rendering the Note unenforceable while permitting Respondents to retain the benefits of Quicken Loans' completed performance under that Note, the Circuit Court did precisely that.

In addition, the Circuit Court heaped another \$98,800 award on top of the debt cancellation – yet another forfeiture, and one that placed the parties that much *further* away from the *status quo*. This Court must correct the Circuit Court's errors and redirect it to adhere to both the letter and spirit of this Court's mandate.

C. The Circuit Court Erroneously Refused to Offset its Award of Fees and Costs  
With the Proceeds of the Guida Settlement

Citing *dicta* in a single case, the Circuit Court decided that it was facing a question of first impression, and it refused to offset its massive award of fees and costs with *any* of Respondents' \$700,000 recovery from their pretrial settlement with former defendants Guida and Appraisals Unlimited. Remand Op. at 18-21 (A0000908-911). The Circuit Court did so notwithstanding this Court's holdings that (i) fees and costs awarded under the Consumer

Protection Act are compensatory in character; (ii) Respondents suffered a single, indivisible injury; and (iii) Quicken Loans is entitled to an offset of all compensatory damages.

Respondents do not so much defend the Circuit Court's "reasoning" as attempt to substitute some other justification for the court's error. Their primary assertion is that Quicken Loans has somehow agreed to pay the fees, or should be estopped from asking for the offset. But this argument fundamentally misunderstands the way an offset functions. Guida's payment to Respondents is a *credit* to Quicken Loans for the liability that they share for Respondents' indivisible injury. When Quicken Loans applies its credit to its liability for fees, it *is* "paying" those fees by consuming, dollar-for-dollar, an asset that is essentially a cash equivalent.

Next, Respondents argue that Quicken Loans has somehow lost its opportunity to use its offset because it took the position on the prior appeal that an award of fees should be considered punitive rather than compensatory. Indeed it did, but nowhere in any paper did Quicken Loans ever cede its right to an offset of whatever compensatory damages were eventually awarded against it.

And in that regard, it is more than ironic that Respondents would ask the Court to apply judicial estoppel to bar the offset. Proper application of that doctrine requires precisely the opposite ruling. Respondents argued on appeal that fees and costs are compensatory, and they prevailed. They must not now be heard to argue otherwise. *See Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 504, 618 S.E.2d 506, 513 (2005) ("Under the doctrine, a party is generally prevented from *prevailing* in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (emphasis added; quotation omitted). Their further suggestion that they were "prejudiced" because Quicken Loans argued as it did is nonsense – Respondents deliberately and successfully argued that fees were

compensatory for their own reasons (*i.e.* to jack up the punitive damages), and had Quicken Loans agreed with their position, Respondents would surely have welcomed the agreement.

Finally, this Court has already held that Respondents suffered a single, indivisible loss, which is the correct test under the law, and *not* whether Quicken Loans and Guida had a “joint obligation.” Resp. Br. at 42.<sup>8</sup> Their attempts to now divide up their single injury are too late and erroneous in any event. Guida’s appraisal was a *sine qua non* for this ill-fated transaction, and Guida’s settlement and exit from the litigation simply left Quicken Loans in the lurch, facing liability for which the Guida appraisal was, is, and always will be a proximate and *essential* cause.

D. The Award of Additional Fees and Costs on Appeal was Error  
and Yet Another Violation of the Mandate

In attempting to defend the Circuit Court’s award of over a quarter-million dollars in additional fees and costs (which then served as a basis for the colossal increase in punitive damages), Respondents studiously ignore Quicken Loans’ primary argument, and they mischaracterize the other.

First and foremost, they ignore their *own* express request *to this Court* for an award of fees on appeal, which this Court implicitly rejected. The Circuit Court was without power to second-guess this Court’s decision.

Second, Respondents point out unhelpfully that fees are not ordinary court “costs,” as if Quicken Loans had so argued (and it had not). Quicken Loans’ actual observation regarding court costs was that the *legal standard* for an award of costs and for an award of fees is

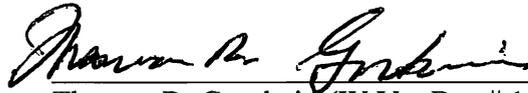
---

<sup>8</sup> For completeness’ sake, Quicken Loans does note that Respondents are incorrect in asserting that Guida was not subject to an award of attorneys’ fees under 46A-5-104. Although he was not a creditor, he was a seller of services and could have been guilty of unfair and deceptive practices under Article 6 of the Act. Indeed, the entire point of Article 6 is to provide consumer protections in non-credit situations.

precisely the same – *i.e.* whether the party substantially prevailed. Hence, the Court’s direction that each party bear its own costs reflects this Court’s view that *neither* party substantially prevailed.

### **III. Conclusion**

The judgment of the Circuit Court of Ohio County must be reversed and remanded. This Court should (i) eliminate or vastly reduce the multi-million-dollar punitive damages award, (ii) permit Quicken Loans to have the full benefit of the \$700,000 offset to which it is entitled, (iii) eliminate or sharply reduce the additional award of attorneys’ fees on remand, (iv) require the Circuit Court to craft remedies that reflect Respondents’ lack of actual damages and that restore the *status quo* as nearly as possible; and (v) otherwise direct the Circuit Court to strictly adhere to all mandates of this Court.



Thomas R. Goodwin (W.Va. Bar # 1435)

*Counsel of Record*

Johnny M. Knisely II (W.Va. Bar # 4968)

GOODWIN & GOODWIN, LLP

300 Summers Street, Suite 1500

Charleston, WV 25301

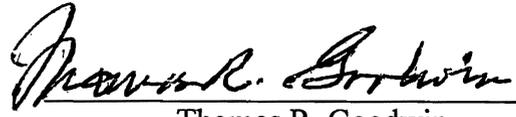
(304) 346-7000

trg@goodwingoodwin.com

**CERTIFICATE OF SERVICE**

I, Thomas R. Goodwin, counsel of record for Petitioner Quicken Loans Inc., hereby certify that the foregoing "Reply Brief of Petitioner Quicken Loans Inc." was served this 23rd day of December 2013, by placing a true and accurate copy thereof in the United States Mail, postage prepaid and addressed as follows:

James G. Bordas, Jr., Esq.  
Jason E. Causey, Esq.  
Bordas & Bordas, PLLC  
1358 National Road  
Wheeling, WV 26003

  
\_\_\_\_\_  
Thomas R. Goodwin