BRIEF FILED
WITH MOTION

No. 13-0764

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,

Respondents.

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

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In November of 2012, this Honorable Court affirmed the circuit court's conclusion that Quicken Loans, Inc. ["Quicken"] committed common law fraud and employed unconscionable conduct to induce Respondents to accept an unconscionable loan. This Court specifically found that Quicken's conduct was "designed to mislead" the Respondents into a loan with "exorbitant" costs; that Quicken engaged in "opportunistic" and "distasteful" conduct; and when it comes to unconscionability, this Court concluded that "this is not a close case."

Nevertheless, on remand Quicken maintained that it did little to nothing wrong, that Ms. Jefferson received "precisely what [she] wanted", and that it deserved "no punishment" at all.[1] In doing so, Quicken asked that the "status quo" be restored by rescinding the loan, that no additional compensation be awarded, that it should not have to pay any of Respondents' attorney fees and costs, and, notwithstanding the fact that Quicken would not have to pay a single dime in compensation or attorney fees to the Respondents under its theories, that no punitive damages should be awarded. In fact, had the circuit court adopted Quicken's position it is Ms. Jefferson who would need to cut Quicken a check for more than three times her home's value.

This extreme strategy failed and reminded the circuit court of a Japanese soldier who continued to fight World War II for 28 years after it ended. This analogy is not only creative, but on point. In addition to committing common law fraud, the circuit court determined in early 2010 that Quicken violated four consumer protection statutes. Three of these violations were not appealed and are, therefore, final. The statutory unconscionability claims, along with the common law fraud claim, were finally and conclusively established in this Court's 2012 Opinion. What is more, Quicken has never appealed the circuit court's conclusion in 2010 under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) that its conduct constitutes "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil

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[1] See, Quicken's Opening Brief on Remand at 1 (A614), 16 (A629), 28 (A641) & 35 (A648).

obligations affecting the rights of others," such that punitive damages are warranted. Despite the multiple findings of unlawful, fraudulent, and unconscionable conduct, Quicken presses on with its arguments here.

Accordingly, this Court's main task appears limited and clear: it should perform its own due process review primarily by applying its own prior findings to the various *Garnes* factors. In addition, the Court should reject Quicken's attempt to hoist up an ill-suited, generic civil penalty that it masquerades as a guidepost under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and look to more meaningful measures of punishment existing under state law. This required review should lead to the affirmance of the circuit court's award, once and for all.

In addition, this Court should, consistent with its 2012 Opinion, affirm the circuit court's refusal to enforce the unconscionable loan agreements while preserving Quicken's security interest. This Court should further affirm the circuit court's conclusion that the offset of compensatory damages mandated by this Court excludes attorney fees and costs, particularly where Quicken affirmatively represented in its prior appeal that it would pay Respondents' attorney fees. Finally, the Court should determine that the circuit court did not abuse its discretion in awarding additional fees and costs on remand.

STATEMENT OF THE CASE

A. Background

At the time of the loan, Lourie Brown (now Lourie Jefferson) was a 42-year old single parent, who worked as a licensed practical nurse and earned $14.36 per hour. *See*, PL Ex. 1-EE (A2085). Lourie Jefferson has three children, two of whom are minors and another, Plaintiff Monique Brown, who is a disabled adult who suffered a traumatic brain injury in 2001. *See*, Findings of Fact and Conclusions of Law entered on Feb. 25, 2010 ("2/25/10 Op.") at ¶¶ 1-2

(A129). Ms. Jefferson was unable to work for an extended period of time due to her daughter's accident, which together with the subsequent death of Ms. Jefferson's mother, Lena Brown, triggered financial hardship for the Plaintiffs. *See, id.* at ¶7 (A130); Vol. II at 180-181 (A1468-1469) (Jefferson). These difficult circumstances led Plaintiffs to obtain a mortgage with CitiFinancial, as well as another unsecured loan, also with CitiFinancial. These loans were refinanced multiple times. *See*, 2/25/10 Op. at ¶¶ 8-12 (A130).

B. The Loan Origination and Fraudulent Promise of Refinancing

While using an internet browser, Ms. Jefferson saw a pop-up ad offering an attractive refinance opportunity, which led to a telephone solicitation call from Quicken's loan agent, or "mortgage banker", Heidi Johnson ["Johnson"]. *See, id.* at ¶ 15-17 (A131). Quicken is a large national mortgage lender, headquartered near Detroit, Michigan. The loan process began on May 16, 2006. Later, an appraisal was ordered from former Defendant Dewey Guida and his company Appraisals Unlimited [collectively, "Guida"]. For no bona fide reason, the appraisal order form included an estimated value. 2/25/10 Op. at ¶ 50 (A136).

Quicken quoted Ms. Jefferson a higher monthly payment than she expected based on the pop-up advertisement. As a result, she became hesitant to complete the loan. 2/25/10 Op. at ¶24 (A132). Beginning on May 24, 2006, Ms. Jefferson ceased returning Quicken's calls. *See*, PL Ex. 1-QQ, Q410, 414-19 (A2110, 2124-29). "On May 26, 2006, Guida concluded that the Property had a value of $181,700, using an analysis of comparables of distinctly different properties located in neighborhoods vastly superior to the Property's neighborhood." 2/25/10 Op. at ¶ 23 (A132). On May 30, 2006, Ms. Jefferson called Quicken and stated "that she no longer want[ed] to go through with the loan." *Id.* at ¶ 25 (A132); PL Ex. 1-QQ, Q420 (A2130).

The appraisal was approved by Quicken on May 31, 2006. PL Ex. 1-QQ, Q421 (A2131). On June 1, 2006, Quicken left Ms. Jefferson a message stating that the appraisal came in where needed. *See*, PL Ex. 1-QQ, Q423 (A2133) (noting "we have appraisal done now though so maybe I can save"). Quicken representatives left several other messages for Ms. Jefferson, but she did not respond to any of them. *See*, PL Ex. 1-QQ, Q426-429 (A2136-2139). Ms. Jefferson finally spoke to Ms. Johnson on June 6, 2006. The note to the file describes lengthy persuasion employed by Quicken to get this loan "closed:"

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

PL Ex. 1-QQ, Q431 (A2141). *See also*, PL Ex. 4, Q2623 (A2329) (in referring to this conversation, Johnson states in an e-mail, I was "*trying to save her from going to the bank.*").

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

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

Vol. II at 195 (A1483) (Jefferson). "Lourie Jefferson understood Quicken's position to be that once her loan was in place, Quicken would be able to refinance the loan in three to four months and then she could get a cheaper rate." 2/25/10 Op. at ¶ 29 (A133). Quicken's written training materials, among other aggressive practices, encourage "forward looking statements" that push the boundaries of false promises. *See e.g.*, PL Ex. 8 at 878-80 (A2583-2585), Q916 (A2621), Q940-941 (A2645-2646), and Q971 (A2676). Specifically, Quicken suggests telling borrowers that "[y]our transaction with Quicken Loans/Rock Financial will assist you in your quest to reestablish a solid credit rating and the ability to transition into a conventional loan in a short period of time without a prepayment penalty." *Id.* at Q879 (A2584) ("Overcoming Objections"). In addition, Quicken touted the inflated appraisal to coax Ms. Jefferson into borrowing more money than she had originally sought. *See*, Vol. II at 196 (A1484) (Jefferson).

Instead of sending someone to the closing who could explain what had become very complex terms, Quicken sent an unaffiliated notary to Plaintiffs' home to close the loan. The notary opened the large closing packet and instructed Ms. Jefferson to sign various documents, which were marked with "sign here" stickers. The closing took roughly 15 minutes. Ms. Jefferson felt rushed and the notary was unable to answer her questions about the loan documents, which included an unspecified balloon payment. *See*, *id.* at 200-202 (A1488-1490). Prior to closing, Ms. Jefferson was unaware of *any* balloon payment on the loan. At the closing, she did not understand the meaning of a balloon payment, but was not overly concerned in light of Quicken's promise to refinance within a few months. *See*, *id.* at 203-204 (A1491-1492).

Johnson made a commission on this loan of $834. Nuckolls Deposition at 43-44 (A920) (Corporate Representative for Quicken). Commissions for Quicken employees were based on the loan amount, loan type and number of loans closed per month. *See*, *id.* at 22 (A916). The more loans and the higher the loan amounts or loan volume, the higher the commission. *Id.* at 23-24 (A916). High revenue, subprime loans, like this loan, paid higher commissions than prime loans. *Id.* at 25 (A917). In addition to base commissions, loan agents earn additional sums on loans priced at a "*premium*" through discretionary "*discount*" points, which Johnson added to this loan. *See*, *infra* at 7-8. Finally, the threat of termination motivates loan agents to aggressively pursue loans. *See*, *id.* at 185-186 (A1655) ("Her responsibility was to close mortgages.").

C. A Broken Promise

In October 2006, Ms. Jefferson contacted Ms. Johnson numerous times to start the promised refinancing. However, Ms. Johnson was not responsive to Ms. Jefferson's repeated calls. 2/25/10 Op. at ¶ 37-38 (A134). "Ultimately, Quicken Loans refused to refinance the . . . loan, [which] . . . constitutes a breach by Quicken of a pivotal ingredient of the loan transaction." *Id.* at ¶ 39 (A134). At trial, Quicken admitted it never intended to keep its promise to Ms. Jefferson. *See*, Vol. IV at 29 (A1616) (Opening St.) ("Quicken . . . cannot and does not refinance in under four months.").

D. The Outrageous Terms of the Loan

1. Underwater Loan with an Adjustable Rate

On July 7, 2006, Quicken closed the loan in the amount of $144,800. Quicken made this loan despite the true market value of Plaintiffs' property being only $46,000. 2/25/10 Op. at ¶ 56 (A137). The initial annual interest rate of 9.25% was fixed for 3 years and then adjusted every six months thereafter, based on the market in London. *See*, PL Ex. 1-P (A2011-2012). The interest rate could increase to as high as 16.25%, but only decrease to 7.75%. *Id.* (A2012). The initial monthly payment was $1,144, exclusive of taxes and insurance. PL Ex. 1-P (A2012). Ms. Jefferson's previous mortgage had a 30-year fixed rate of 9.75% and a monthly payment of $578. *See*, PL Ex. 18 (A2823). None of Ms. Jefferson's other debt was secured by her home.[2]

2. The Shocking Balloon Feature

The loan contained an exotic feature known as a 40/30 balloon payment. There was no pre-closing disclosure of the balloon payment. *See*, Vol. V at 22 (A1699) (Lyon - Corporate

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[2] While this loan conceivably included an *initial* monthly saving to Ms. Jefferson compared to the combined cost of her prior debts, this Court noted in its Opinion at fn. 17 that "according to Quicken's own financial expert, beginning two years and five months into the loan, Plaintiff no longer saved money . . . Furthermore, after five years . . ., Plaintiff's monthly payment would be $1,582, as compared to the combined monthly payment for her previous mortgage and other debt, which would have been $578."

Representative for Quicken); 2/25/10 Op. at ¶ 46 (A135). In fact, the loan as disclosed prior to closing *did not* have a balloon feature of any kind. The loan as disclosed fully amortized with a variable rate of 8.5% and an initial monthly payment of $799. *See*, PL Ex. 1-OO (A2110); PL Ex. 1-PP (A2111). Even at closing, the balloon feature was not fairly or lawfully disclosed.

West Virginia law requires conspicuous disclosure of balloon payments. The amount of the balloon payment and its due date must be stated specifically on the promissory note. *See*, W.Va. Code § 46A-2-105(2). It is undisputed that the promissory note that Quicken prepared contains no such disclosure. *See*, PL Ex. 1-P (A2011-2015). As a result, Ms. Jefferson was unaware of the amount of the balloon payment and its due date when the loan closed.

Importantly, this was no ordinary balloon note. Because this loan product amortizes over 40 years, it leaves the borrower with a very large balloon payment when it becomes due in 30 years. A balloon payment of $107,000 would be due *after* 360 monthly payments totaling an estimated $550,084. 2/25/10 Op. at ¶ 45 (A135). Plaintiff's expert witness, Margot Saunders, explained the 40/30 product was short-lived, rare, and considered dangerous. She further opined that it was an outrageous product with a huge finance charge. *See*, Vol. II at 113 (A1401). Here, Ms. Jefferson's fate and the fate of her disabled daughter were sealed at the loan closing. *After paying more than half of a million dollars on the loan, Ms. Jefferson, then a 72 year-old woman, and Ms. Brown, then a disabled 57 year-old, would have to come up with another $107,000 or face foreclosure.* Most egregiously, because the loan exceeded the fair market value of their home by nearly $100,000, Plaintiffs could not escape the balloon payment by refinancing.

3. <u>Excessive Points and Closing Costs</u>

Quicken charged Ms. Jefferson four points, or 4% of the loan, for what it termed a "loan discount." *See*, PL Ex. 1-L (A1994). Discount points are intended to be in exchange for a reduction of the interest rate. Vol. I at 96 (A1081) (Saunders). The maximum number of loan discount points available for this loan was 2.5. Nevertheless, Quicken represented to Ms. Jefferson that she was buying her interest rate down with the purchase of four discount points. Unbeknownst to Ms. Jefferson, 1.5 of those points, or $2,100, resulted in *no benefit* to her. *See*, 2/25/10 Op. at ¶¶ 41-43 (A135); Banfield Deposition at 51-52 (A973).

Quicken's written policies expressly gave its loan agents discretion to overcharge borrowers in this fashion, and termed such an overcharge a "premium."

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

PL Ex. 9, Q1010 (A2691). This is all by design. Mrs. Jefferson paid $2,100 for nothing. *See*, Vol. V at 139-140 (A1728) (Banfield). For these reasons and others, the circuit court determined the total closing costs of $8,889 to be excessive. 2/25/10 Op. at 17 (A143).

E. Quicken's Business Model and Its Feverish Attempts to Sell This Loan

Quicken's goal is to sell 100% of its loans and to avoid "get[ting] stuck with loans." *See*, Banfield Deposition at 16-17 (A969-970) "Quicken has the ability to do what's called interim servicing . . . But we do not have a strategy of holding services for the long term." *Id.* at 19 (A970). Quicken creates a pool of loans and sells the pool on the secondary market. *See*, *id.* at 20-21 (A970-971). The larger the loan - the more Quicken makes in both points and sales. *See*, Vol. I at 105-07 (1090-92), 187-89 (A1172-74) (Saunders). Beginning in August 2006, Quicken attempted but failed to sell this loan numerous times. *See*, 2/25/10 Op. at ¶¶ 60-61 (A141).

On or about February 21, 2007, Quicken obtained a second appraisal from a different licensed appraiser, Michael Doyle, in anticipation of foreclosure. Therein, Doyle opined that the Property had a value of only \$56,000 – over \$125,000 less than Guida's value. *See*, Vol. I at 149-150 (A1134-1135) (Saunders); PL Ex. 22 (A2859); PL Ex. 23, Q643 (A2883). Nevertheless, Quicken's efforts to sell the loan continued into April of 2007. *See*, Vol. V at 111 (A1721) (Banfield). Thus, despite knowing its appraisal was inflated, Quicken still attempted to sell the \$144,800 loan on the secondary market. *See*, Vol. V at 202 (A1744) (Borelli).

F. Foreclosure and Procedural History through Trial

Within months of closing the loan, in January 2007, Ms. Jefferson underwent surgery. Because of a hemorrhage, she had to undergo a second surgery on an emergency basis. Ms. Jefferson was required to be off work for at least a few months. She advised Quicken of the same and asked for assistance with her payments. Several of her pleas for help over the next six months were in writing. *See*, PL Exs. 27 (A2896), 29 (A2899) & 32 (A2904). Although Ms. Jefferson was able to make payments in January and February, Quicken was unwilling to work with Ms. Jefferson in any manner. *See*, Vol. II at 210-214 (A1498-1502) (Jefferson); Vol. IV at 129-130 (A1641) (Nuckolls) (Quicken categorically did not make discretionary loan modifications); PL Ex. 28 (A2897). On July 27, 2007, Quicken issued a notice of acceleration of the balance through the Trustee named in the Deed of Trust. PL Ex. 33 (A2905).

In August 2007, Plaintiffs provided statutory notice of a claim and afforded Quicken a right to cure under W.Va. Code § 46A-6-106(b). *See*, PL Exs. 34 (A2907) & 35 (2909). No cure offer was made; instead, a Notice of Foreclosure Sale was issued. *See*, PL Ex. 38 (A2914). Plaintiffs were forced to obtain injunctive relief from the circuit court to avoid the immediate loss of their home. *See*, PL Application for Preliminary Injunction (Feb 1. 2008) (A32). Prior to judgment, Plaintiffs paid without delay $578 per month to Quicken. *See*, Vol. IV at 84-85 (A1629-1630) (Winfree); PL Exs. 39 (A2915-2933) & 53 (A2989). During litigation, Quicken declined to make a single offer of settlement before being found liable. *See*, Phase II at 171-172 (A2982) (Nuckolls); PL Post Trial Brief Regarding Punitive Damages at 6 (A171).

On February 25, 2010, the circuit court entered its 26 page Memorandum of Opinion. It found against Quicken on multiple counts, including: common law fraud, unconscionability (both unconscionable inducement and unconscionable contract under W.Va. Code § 46A-2-121), unfair methods of competition and unfair or deceptive acts or practices under § 46A-6-104, illegal mortgage in excess of fair market value under § 31-17-8(m)(8), and illegal balloon payment under § 46A-2-105(2). As damages, the court ordered $17,476.72 in restitution of payments, cancelled the loan, and awarded attorney fees and costs under both § 46A-5-104 and § 31-17-17(c). Finally, the court concluded that the cumulative effect of Quicken's misconduct warranted "a" punitive damage award under *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (affirming *Mayer*, 40 W.Va. 246, 22 S.E. 58).

On September 1, 2010, the circuit court held the punitive phase, or Phase II of the trial, under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Thereafter, the parties submitted briefs arguing the *Garnes* factors. On February 17, 2011, the circuit court issued its award for punitive damages in the amount of $2,168,868.75 and attorney fees and costs in the amount of $596,199.89. Judgment was entered accordingly.

G. Quicken Loans' First Appeal

In its appeal, Quicken asserted five assignments of error. Addressing the first assignment, this Court held that "there is no merit to Quicken's contention" that the loan was not induced by unconscionable conduct and, moreover, found that "[t]his is not a close case" in upholding the circuit court's conclusions that the entire loan agreement was unconscionable. *Quicken Loans v. Brown*, 230 W.Va. 306, 737 S.E.2d 640, 658-59 (2012).

Quicken also appealed each of the circuit court's three findings that Quicken engaged in common law fraud. This Court affirmed the circuit court's findings of clear and convincing evidence of fraud with respect to the concealment of the enormous balloon payment and the false promise of refinancing. However, this Court found insufficient evidence of reliance on Quicken's misrepresentation of the "discounted" interest rate and reversed on that point. Nonetheless, it characterized Quicken's conduct as "distasteful and opportunistic." *Id.* at 656.

For its third assignment of error, Quicken contested the circuit court's authority to cancel the loan. This Court agreed with Quicken in part and reversed the remedy of cancellation, but specifically preserved the circuit court's "authority to refuse to enforce the Note and Deed of Trust . . . pursuant to . . . West Virginia Code § 46A-2-121" on remand. *Id.* at 661.

As regards to punitive damages, Quicken first argued that the circuit court erred by failing to apply the required factors under *Garnes*. This Court remanded for additional findings. Quicken further argued that the cancelation of the loan and the award of attorney fees could not be considered compensatory and therefore could not be included in the ratio analysis under *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 187 W.Va. 457 (1992). The Court declined to address the cancelation remedy in light of its partial reversal. However, with respect to attorney fees and costs, the Court adopted a new syllabus point. "Attorneys fees and costs awarded under West Virginia Code § 46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio in cases where punitive damages are available." *Quicken Loans*, at *syl. pt.* 11.

In its last assignment of error, Quicken contended that it "is entitled as a matter of law to an offset of compensatory damages and the loan cancellation." Brief of Petitioner Quicken Loans, 09/06/11, at 39 (A402). Importantly, Quicken did not seek an offset of the attorney fee award. This Court found only that Quicken was entitled to offset compensatory damages.

H. Proceedings on Remand

On remand, the Honorable David Sims, who succeeded retired Circuit Judge Arthur Recht, entered a briefing schedule at the request of the parties. *See*, 1/28/2013 Stipulation and Agreed Order (A551). On April 9, 2013, Judge Sims heard argument on the pending issues, at which time the parties, through counsel, agreed that under this Court's mandate Judge Sims should enter his own punitive damage award, as opposed to merely providing support for Judge Recht's award. 4/9/2013 Status Hearing at 16-18 (A731-733).

Judge Sims, after having studied the record, entered his 24-page memorandum opinion and order on June 18, 2013 ["Remand Op."] (A891), which included a punitive damage award of $3,500,000 and the required findings of fact and conclusions of law under *Garnes*. The matter is therefore ripe for this Court to conduct its own due process review of the punitive damage award. Unfortunately, Quicken attempts to divert this Court's attention from genuine issues by focusing on some of the strong and, perhaps, unconventional language utilized by the circuit court. While Judge Sims took the liberty of airing his discontent with the positions Quicken had taken on remand, his Order remains well-reasoned and well-supported by the record.

With respect to the remedy under W.Va. Code § 46A-2-121, the circuit court exercised its authority to refuse to enforce the loan. The circuit court, however, did not cancel the loan outright as Quicken protests. Instead, the deed of trust remains a valid lien requiring the Plaintiffs to satisfy up to the principal balance before they transfer *any* interest in the secured property. Thus, in keeping with this Court's Opinion, Quicken still has its security interest intact; however, because Quicken cannot enforce the note or deed of trust, payment against the principal balance will occur on Ms. Jefferson's timetable, not Quicken's.

Turning to the issue of offset, the circuit court allowed an offset against compensatory damages. The issue in this appeal is whether Quicken is further entitled to offset the attorney fee award. On public policy grounds, the circuit court rejected Quicken's newly devised request to fully offset the attorney fee and cost award.

Finally, the circuit court properly allowed a supplemental award of attorney fees and costs to account for the time and expense incurred by Plaintiffs' counsel in defending post-trial motions, defending the first appeal, and litigating the remaining issues on remand.

SUMMARY OF THE ARGUMENT

Quicken seeks a due process review of the punitive damages award under the three guideposts of *Gore*, 517 U.S. 559: reprehensibility, disparity between award and harm, and disparity between award and civil or criminal penalties. With regard to reprehensibility, the circuit circumstances here warrant a substantial award of punitive damages. Quicken, through its ultra-aggressive policies, facilitated and encouraged the rank and file to engage in intentional malice, trickery and deceit. The circuit court correctly found that "[t]here is a recklessness and inherent greed in Quicken Loans' conduct. Quicken Loans has shown no concern for any of the consequences of its conduct. Quicken Loans' only motive in procuring Plaintiffs' mortgage loan was to turn an immediate profit and then quickly unload . . . it." Remand Op. at 9-10 (A899-900). As for the disparity between the award and harm or potential harm, there is practically none, as the circuit court appropriately found the potential harm attributable to Quicken to be both "enormous" and "incalculable." And, finally, the anchor of Quicken's argument proves to be an inapplicable, meaningless civil penalty that is overcome by the wealth of serious civil and criminal penalties applicable under West Virginia law to the exact type of fraud at issue here.

Whether due process is framed around *Gore* or *Garnes*, the circuit court correctly applied all of the applicable factors. What is left is Quicken's thinly spread attempt at manufacturing constitutional issues that do not exist. Accordingly, the circuit court committed no error and the punitive damages award should be affirmed.

Relying on little more than out-of-place buzz-words, such as "forfeiture" and "status quo", Quicken criticizes the circuit court for refusing to enforce the unconscionable loan agreement. However, the circuit court was acting under the express authority of this Court's Opinion and W.Va. Code § 46A-2-121. The circuit court did not cancel the loan outright, but instead properly preserved Quicken's security interest. The circuit court's remedy fairly balances the intent of the Consumer Credit and Protection Act ["CCPA"], not to enforce unconscionable consumer agreements, with the preference the CCPA gives to secured loans.

In its 2012 Opinion, this Court did not address whether Quicken could offset the attorney fee and cost award against the prior settlement. Naturally, there was no reason to address the issue in light of the fact that when this case was first appealed "Quicken Loans [was] already paying Plaintiffs' attorney's fees." Brief of Petitioner Quicken Loans Inc., 09/06/11, at 32 (A395). On remand, Quicken's "forward-looking statement" proved false. Now, Plaintiffs are subject to yet another appeal having sought only a single recovery of their divisible fees that remain unpaid.

Finally, the circuit court did not abuse its discretion in making a supplemental award of attorney fees and costs on remand.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully submit that oral argument is unnecessary in this matter. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decision process would not be significantly aided by oral argument. The Court has heard oral argument previously and has already decided the facts that it will undoubtedly apply to the *Garnes* factors. There is no substantial question of law remaining and no prejudicial error was made by the circuit court.

ARGUMENT

I. The Punitive Damages Award Was Well-Supported And Satisfied Due Process

This Court's primary duty in this appeal is to conduct a *de novo* review of the circuit court's punitive damages award to assure that Quicken was afforded due process. *See*, *syl. pt.* 16, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009).[3] In conducting a *Garnes* analysis, it is important to keep in mind "[t]he *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards." *TXO*, 187 W.Va. at 474, 419 S.E.2d at 887. The mere fact that a mitigating factor is present does not necessitate a reduction in the amount of punitive damages. *Perrine*, 225 W.Va. at 557, 694 S.E. 2d. at 890. On appeal, "[p]etitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not

[3] The general standard for bench trials is also applicable to the extent that Quicken's alleged errors require consideration of the sufficiency of the evidence. *Cf.*, *Perrine v. E.I. Dupont De Nemours & Co.*, 225 W.Va. 482, 549, 694 S.E. 2d. 815, 882 (2010). "In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard . . ." *Syl. pt.* 1, *Public Citizen, Inc. v. First National Bank*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

specifically addressed in the petition will be deemed waived as a matter of state law." *Syl. pt.* 5, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897.[4]

Curiously, Quicken largely chooses to bypass *Garnes* and instead arranges its argument around the guideposts of *Gore*, 517 U.S. 559. The factors in determining reprehensibility, the first and most crucial guidepost under *Gore*, include

> 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 v. Campbell, 538 U.S. 408, 419 (2003). The remaining two guideposts address the disparity between the punitive damages award and the actual or potential harm inflicted by the defendant and a comparison of the award to civil or criminal penalties that could be imposed for comparable misconduct.

A. Quicken's conduct is reprehensible.[5]

This Court has essentially already concluded that this loan was no "mere accident" and instead was the product of fraud, which is akin to "malice, trickery, or deceit." Here, Quicken

[4] Here, Quicken waived any error in regards to, at a minimum, the circuit court's use of profit, the parties' litigation costs, any criminal sanction, any other civil actions, and the catch all, additional relevant evidence. In the pre-argument sections of its brief, Quicken briefly mentions the factors regarding profit and Plaintiffs' litigation costs but never addresses these factors with "particularity." Even if not waived, the circuit court's analysis on these factors was appropriate. The circuit court did not attempt to quantify Quicken's profit or apply any such figure. The circuit court first noted the potential profit from the loan had all the payments been made; second, it noted that only $17,000 in payments were actually made, which Judge Recht ordered to be returned; and, finally, it concluded that punitive damages should be in excess of any profit. With respect to Plaintiffs' litigation costs, the circuit noted that the case was unattractive, complex, aggressively defended and very expensive for the Plaintiffs. Quicken argues here that it has been ordered to pay Plaintiffs' litigation costs. But to this point, Quicken has paid nothing. Plaintiffs have received only a fraction of their litigation costs from a separate defendant, Guida, and the amount received was largely attributable to work for which Quicken was not ordered to pay.

[5] Respondents here have responded to Quicken's arguments in the order Quicken has raised them. In doing so, both federal and state standards are addressed as necessary. A comprehensive, step by step review of the *Garnes* factors may be found at Plaintiffs' Brief in Support of Their Position Following Remand at 21-33 (A577-589).

intentionally induced the Plaintiffs into accepting an unconscionable loan that featured unfathomable terms by making fraudulent representations and engaging in other fraudulent conduct. In reality, Quicken's sales tactics were nothing short of a con, featuring a game of bait-and-switch of loan terms that culminated in the introduction of an enormous balloon payment into the loan at closing.

In its Opinion, this Court stated that "[c]oncealing such an enormous balloon payment from Plaintiff was ***designed to mislead her and to induce her*** into entering into the loan and, in fact, that is precisely what occurred." *Quicken Loans*, 737 S.E.2d at 654 (emphasis supplied). This loan was no accident. Quicken's actions were *designed* to mislead and intended to *induce* the Plaintiffs to enter into an absurd loan that would cost them $349,000 more than their prior loans combined, including a final payment of $107,015 – none of which they could afford.

Certainly, this Court did not use the word "designed" loosely, as the opinion included pages of detail that demonstrated the intentional nature by which the enormous balloon payment was concealed. The facts noted by this Court include: (1) the only loan that *was* disclosed to the Plaintiffs prior to closing did not include a balloon, (2) Quicken did not send out revised disclosures per industry standards in advance of closing, (3) the balloon payment was not conspicuously disclosed on the Note as required by West Virginia law at closing, (4) "nowhere in the closing documents signed by Plaintiff at the July 7, 2006 closing does the balloon payment amount of $107,015.71 appear", (5) Jefferson would have had to sort through legal jargon before performing an actuarial calculation to arrive at the amount of the balloon at closing, and (6) Quicken appointed an uninformed notary who could not answer any questions while conducting a 15 minute closing. *See, id.* at 653-654.[6]

[6] Ignoring all of the above facts, in footnote 4 of its brief, Quicken grabs onto footnote 27 of this Court's Opinion and argues that the Court "relied heavily" on the absence of the Truth-in-Lending

When affirming liability for common law fraud, this Court further found that "Quicken's fraudulent misrepresentation to Plaintiff that it would refinance the loan in three to four months was clearly material because, absent that promise, Plaintiff would not have otherwise entered into the loan." *Id.* at 655.[7] Of course, when Ms. Jefferson called to obtain the promised refinancing, Quicken turned its back on her. Likewise, this Court found that Quicken harmed the Plaintiff through its program to sell discount points that in fact do not reduce interest rates. Here, the Court characterized Quicken's actions as "distasteful" and "opportunistic." *Id.* at 656. Because Quicken's many tactics, including its phony discount points, were motivating or facilitating factors behind one common fraudulent scheme, it is appropriate to consider them collectively, as opposed to engaging in the unsupported, illogical and vacuum-based analysis that Quicken urges. Even "lawful out-of-state conduct" may be used to show reprehensibility where there is a "nexus" between the conduct and the harm suffered by the plaintiff. *State Farm*, 538 U.S. at 422. Certainly then, transaction-specific, related conduct can be considered for purposes of determining reprehensibility.

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disclosure (which non-conspicuously contains the final payment in small print) when finding fraudulent concealment. However, Quicken leaves out the following language from footnote 27, "Quicken does not argue on appeal that this document disclosed to Plaintiff prior to or at the July 7, 2006, closing that the amount of the balloon payment was $107,015.71." Nor did Quicken ever make this argument at trial or at any point in the record before remand. Not surprisingly, there is no testimony addressing Plaintiffs' Exhibit 5 in this regard. For these reasons, no weight can be given to this argument. But even now, Quicken is not coming clean. Consistent with Quicken's argument at trial, the circuit court found Quicken delivered "two" packages of loan documents to Ms. Jefferson. 2/25/10 Op. at ¶¶ 34-35 (A134). What Quicken really means (but is unwilling to say) is that the two packages were not exactly identical: the execution copy was missing the Truth-in-Lending disclosure but the unsigned copy that the borrower retains after closing (Pl. Ex. 5) (A2437-2519), included the disclosure. Excluding this disclosure from the execution copy is entirely consistent with Quicken's fraudulent scheme. Note also that Plaintiffs' Exhibit 5 is Bate stamped *out of order*. The first page of the loan package can be found at B5076 (A2512).

[7] Judge Copenhaver recently found similar evidence of fraud against Quicken. *See*, *Bishop v. Quicken Loans*, 2011 WL 1321360, *9 (S.D. W.Va.) (Denying summary judgment, the court found "[P]laintiffs have presented sufficient evidence that Quicken Loans materially misrepresented that it would refinance the December 2006 note to a fixed-rate loan before the adjustable interest rate could increase.").

In its brief at pages 3 and 13, Quicken again casts its behavior as the "isolated conduct" of "a single low level employee." This is simply not the case. Quicken was both aware of and encouraged its employees' deceitful behavior, behavior that was causing or was likely to cause harm to its customers, through its own policies.[8] For example, Quicken openly encouraged its employees to make "forward looking statements" or "hypotheticals" (perhaps better characterized as "lies") regarding refinancing. *See*, Phase II Transcript at 97-105 (A2964-66) (Saunders discussing Quicken's training materials). Quicken's "sales-isms" include the recommendation to "press the bruise" and, thereby, present the loan Quicken is pushing as the prospective borrower's only option given a past financial blemish or other bruising event that has followed the borrower around. *See*, Vol. IV at 162-163 (A1649) (Nuckolls). These training materials further include scripts on how to "overcome a prospective borrower's objections to a loan." *Quicken Loans*, at fn. 6.

During discovery and at Phase I of the trial, Quicken approved of its loan agents making "forward looking statements." *See*, Lyon Deposition at 102-03, 109 (A947, 949). It was not until the punitive damage phase that Quicken finally condemned these policies, thereby conceding their impact.

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

[8] Respondents' discussion of Quicken's policies and procedures is included to rebut Quicken's argument that its actions were not as deliberate, culpable or reprehensible as the circuit court found, because its misconduct was purportedly isolated to a single, low level employee. Likewise, these facts bear on the issue of whether Quicken was aware its actions were causing or were likely to cause harm under *Garnes*. However, Respondents are not advocating that the Court should directly *punish* Quicken for harm that its policies and procedures may have caused others, or consider for any purpose the application of those policies outside of West Virginia.

Phase II at 148 (A2976) (Nuckolls) (emphasis supplied). The purported decision to rein in Quicken's training tactics was not made until 2010, after the underlying verdict.[9]

Similarly, it is Quicken's policy to engage in "opportunistic" pricing. Quicken encourages its loan agents to charge surplus "discount points" to borrowers without providing a corresponding reduction in the interest rate. As this Court noted, Quicken is not only aware that its employees engage in this "distasteful" conduct, but it also incentivizes such conduct through direct profit sharing. *Quicken Loans*, 737 S.E.2d at 651. In fact, as the circuit court noted, Quicken's Vice President of Mortgage Operations *signed* the settlement statement that misrepresents the loan discount points as 4 instead of 2.5, thereby indicating his knowledge of and consent to the practice. Remand Op. at fn. 5 (A900); PL Ex. 1-L (A1994).

Additionally, Quicken's policies with respect to disclosure of loan terms were inept. *See*, *id.* at 650, fn.18 & 653. The failure to assure accurate pre-closing disclosures is compounded by the fact that Quicken's policy is to send non-affiliated notaries who know nothing about the loans, rather than knowledgeable employees or lawyers to conduct loan closings. *See*, *id.* at 650, 654. This, together with the "sign here" stickers that Quicken provides, is intended to result in a quick, uninformative closing, which is unexpected and simply unfair to West Virginia consumers.

Likewise, it was Quicken's management that implemented the rare and dangerous "40/30" balloon loan product that was in and of itself unconscionable. *See*, *id.* at 650, 659. The individual loan agents were directly incentivized to sell these deceptive products, as their

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[9] The fact that Quicken purportedly changed this offensive policy post trial should do little to mitigate the punitive damage award. *See*, *Vandevender v. Sheetz*, 200 W.Va. 591, 604, 490 S.E.2d 678, 691 (1997) (in upholding a multi-million dollar award with a 15-1 punitive to compensatory ratio in an employment case, this Court stated "an appropriately sized punitive damages award may be necessary to ensure against repetition of both the conduct and the policies employed by Sheetz").

compensation was tied to the number, types and amounts of loans that they closed. Subprime loans resulted in the biggest reward for Quicken's loan agents. *Id.* at fn. 13.

Furthermore, Quicken's attempt to put this case squarely on Heidi Johnson is contradicted by its own testimony at Phase 1 of the trial, where it attempted to *minimize* her role in the loan process, as well as an incriminating note that she had written indicating that Quicken may have intentionally discarded a prior appraisal that was insufficient to make this loan in favor of the subsequent Guida appraisal.

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

PL Ex. 1-QQ, Q438 (A2148) (emphasis supplied). Now with the issues surrounding this note behind it, Quicken has come full circle: instead of minimizing Johnson's capabilities, it attempts to cast her as the czar of fraud. In reality, Johnson was only doing what was she was trained to do by making the critical false promise and failing to mention the enormous balloon payment.[10] Moreover, she was doing what she was *encouraged* to do by saying what was necessary to "close the mortgage" and collect her share of the take. However, she was by no means calling the shots. Johnson did not author Quicken's training manuals, nor did she devise Quicken's compensation program. Instead, she simply did what was expected of her to keep her job.

Johnson was far from the only employee involved in this fraud. Quicken's Vice President of Mortgage Operations confirmed at trial that there were *over 20 other team members* involved in the transaction, including those responsible for preparing pre-closing disclosures;

[10] This is certainly not the first time that Quicken's sales practices have been criticized in a judicial proceeding. *Cf.*, *Henry v. Quicken Loans*, 2009 WL 3270768, *7 (E.D. Mich.)(Loan agents, such as Johnson, are told to control the release of information given to prospective clients, "giving only small nuggets of information if the client is PUSHING for answers" and to create a sense of "urgency" in their customers); *id.* at **3-9 (discussing generally Quicken's practices with respect to loan agents, including: extensive training, close supervision, sales call quotas, high-pressure work environment, the "sales process" and hard sale tactics).

reviewing the final terms of the loan with Ms. Jefferson before closing; underwriting the loan; preparing the closing packet, including the Note without the required balloon disclosure; exorbitantly pricing the loan; and selling the loan despite its obvious deficiencies. *See*, Vol. IV at 215 (A1662) & 244 (A1669) (Lyon); Vol. V at 35-36 (A1702), 73-74 (A1712) (Lyon). In sum, Quicken's reprehensible conduct was by no means isolated to Ms. Johnson's cubicle.

Another *Gore* factor, "financial vulnerability" is addressed in this Court's prior Opinion.

> As set forth above, in determining unconscionability, this Court "must focus on the relative positions of the parties, the adequacy of the bargaining positions, the meaningful alternatives available to the Plaintiff, and the 'existence of unfair terms in the contract.'" *Arnold*, at syl. pt. 4. *This is not a close case. Plaintiff was a single mother to three children who earned $14.36 an hour and who had a well-documented poor credit history. She was not a sophisticated borrower. Quicken's own records describe her as "timid," "fragile" and needing to be handled with "kid gloves."* When Plaintiff declined the original $112,000 loan because the payments were too high, Quicken continued to pursue her. It tried to contact her numerous times especially after Mr. Guida's appraisal came in at almost four times the actual fair market value of the property.

Quicken Loans, 737 S.E.2d at 658-59 (emphasis supplied). Notwithstanding Ms. Jefferson's substantial efforts to walk away from this deal, Quicken's sophisticated and deceptive sales tactics and lending practices were more than enough to trap the "fragile" and "timid" Ms. Jefferson. Furthermore, Plaintiff Monique Brown is disabled from a traumatic brain injury and, thus, even more vulnerable.

A *Garnes* factor not expressly covered by *Gore*, the attempt to conceal or cover up actions, is similarly evident. Quicken not only concealed the actual loan terms from Ms. Jefferson, as discussed above, but also focused its efforts following the uninformative closing on selling the loan on the secondary market to an unsuspecting investor. Although Quicken failed to sell this loan, its intent to "pass the buck" was made evident by its later, continuing attempts to dump the loan on the secondary market even *after* it obtained a legitimate appraisal.

Finally, as more fully discussed below, the harm or potential harm here, while not physical, was personal and beyond pure economic harm. Since the tortious conduct of Quicken jeopardized the Plaintiffs' family home, their "health or safety" was also implicated.

B. The punitive damages award bears a reasonable relationship to the harm or potential harm resulting from Quicken's conduct.

Due to Quicken's fraudulent conduct, the Plaintiffs were saddled with a mortgage that required 360 monthly payments ranging from $1,144 to $1,582 and totaling $550,084, payments which unimaginably amounted to only a marginal decrease in loan principal. "Plaintiff, who, at all times relevant, earned $14.36 per hour as a licensed practical nurse, was [then] required to make a single balloon payment of $107,015.71 to avoid foreclosure." *Quicken Loans,* at fn. 19. Thus, the total cost of the loan was a whopping $657,099, all in order to repay a loan of $144,800. The total finance charge was $520,065.61. The circuit court on remand viewed the terms of this loan as "egregious", "despicable" and "borderline criminal." It found "the nature of the likely financial harm here [to be] enormous." Remand Op. at 8 (A898).

This Court has, in essence, already answered the question of whether this loan was financially harmful to the Plaintiffs in its analysis of substantive unconscionability:

> Furthermore, as previously established, the loan contained a $107,015.71 balloon payment (of which Plaintiff was not aware prior to closing). The *total cost of the loan was exorbitant,* costing *Plaintiff an additional $349,000 in monthly payments as compared to her prior mortgage and debts.* From this and all of the evidence presented at trial, we conclude that the circuit court correctly found that, given the particular facts involved in this case, *the terms of the loan described above and the loan product, in and of itself, were unconscionable.*

Quicken Loans, 737 S.E.2d at 659 (emphasis supplied). The finance charge for an illegitimate, illegal and unconscionable loan is a reasonable measure of the financial harm. *See*, *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 958 (Or. 2007) ("the appropriate figure for potential damages is $326,751.57, the amount of interest [the lender] would have earned over the life of the loan."). Quicken argues that the finance charge should not be considered harm or potential harm, because it "represents the legitimate price of borrowing money." However, it overlooks a number of conclusive findings from this Court, as well as the circuit court, including that "the total cost of the loan was exorbitant"; "the terms of the loan . . . and the loan product, in and of itself [particularly its cost structure], were unconscionable"; and, indeed, the interest rate was unfair, deceptive and *unconscionably high*, inasmuch as the interest rate was not reduced consistent with Ms. Jefferson's payment for discount points. *See*, 2/25/10 Op. at 17 (A143), 20 (A146). Alternatively, the $349,000 increase in total monthly payments as found by this Court is a fair measure of financial harm.

On remand, Judge Sims repeated Judge Recht's early finding that Quicken unnecessarily put "Plaintiffs' home at risk" by increasing Ms. Jefferson's "secured monthly debt obligation from $578 to $1,114." Remand Op. at 9 (A899). Indeed, Ms. Jefferson could not possibly keep up the monthly payments for long given her meager income, but she went forward with the loan because Quicken promised her refinancing at better terms in three to four months. *See*, *Quicken Loans*, 737 S.E.2d at 649. After Quicken reneged on its promise, foreclosure became inevitable. Had the circuit court not intervened, foreclosure is exactly what would have happened, causing irreparable harm to the Plaintiffs.[11] *See e.g.*, *Gonzalez v. Wells Fargo Bank, No.*, 2009 WL 3572118, *3 (N.D. Cal.) ("The possible irreparable harm that [plaintiff] would suffer if his home

[11] Because Quicken views the harm it caused solely in terms of equity, it is worth noting that yes (unbeknownst to them) Plaintiffs were underwater prior to this loan, but Quicken took them from treading water with negative $21,000 in equity to drowning at sea with negative $98,800 in equity. Furthermore, Quicken's prediction that Ms. Jefferson may have defaulted on her preexisting loans in footnote 5 of its brief ignores the fundamental distinction between secured and unsecured debt. Ms. Jefferson may have had to deal with her unsecured debts through bankruptcy or otherwise, but any such default would not have impacted her home ownership. The family home was safe with the manageable $578 fixed mortgage payment.

is sold at foreclosure is obviously high."); *Brown v. Artery Organization, Inc.*, 691 F.Supp. 1459, 1461 (D.D.C., 1987) ("Wrongful eviction, as a matter of law, constitutes irreparable injury.").[12]

Accordingly, the circuit court correctly found that the "likely and actual harm in this case goes beyond financial harm. The fear and stress of being unable to manage a mortgage loan and the looming threat of losing one's home, can only cause incalculable psychological harm and mental distress." Remand Op. at 9 (A899). Finally, as discussed *infra* at 34-35, the attorney fees and costs incurred fending off foreclosure and pursuing consumer rights should be considered in the reasonable relationship analysis.

C. The civil penalty Quicken references is meaningless.

As part of both its first and sixth assignments of error, Quicken makes an argument based on the third guidepost of *Gore*, 517 US 559, which guidepost was not mentioned in this Court's mandate because it was raised for the first time on remand. According to Quicken, the Court should approve only a meager award of punitive damages, despite the intentional, reprehensible nature of its conduct, because the civil penalty provided for under W.Va. Code §46A-5-101 is only $1,000 before adjusting for inflation.[13]

In an effort to deflect attention from the damning effects of the first and most important *Gore* factor, 517 U.S. at 575, Quicken throws a spotlight on the third. In doing so, Quicken ignores the fact that the third guidepost is rarely helpful and, indeed, is often omitted from the

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[12] The harm here was not solely potential. *See*, Vol. II at 210-215 (A1498-1503) & 239-241 (A1527-1529) (Jefferson) (describing actual emotional harm from threat of foreclosure). To this end, there is overwhelming precedent for considering uncompensated or potential harm in awarding punitive damages. *See, e.g.*, *TXO Production Corp. v. Alliance Resources Corp.* 509 U.S. 443 (U.S. W.Va., 1993) ("It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded . . .).

[13] Certainly, it is worth noting that the circuit court has already determined that this civil penalty provision does not even apply to this case. 2/25/10 Op. at 18, fn. 5 (A144), which determination is the *law of the case* having not been previously appealed by either party.

due process analysis.[14] Here, the penalty under § 46A-5-101 is not tailored by the legislature to address common law fraud, but applies broadly for most any violation of the Consumer Credit and Protection Act ("the CCPA"), however minor or technical that violation may be.[15] In *Perrine,* this Court found that the civil penalties cited by the defendant did not "set the proper measuring tool." 225 W.Va. at 562, 694 S.E.2d at 895. The same is true here.

This Court recently examined this same civil penalty provision in *Vanderbilt Mortgage & Finance, Inc., v. Cole,* 230 W.Va. 505, 740 S.E.2d 562 (2013). In *Cole*, Vanderbilt properly foreclosed on the homeowner, Cole, and filed a wrongful detainer action against her to recover the property. Cole counterclaimed, alleging violations of the unfair debt collection provisions of the CCPA. The circuit court directed a verdict in favor of Vanderbilt on the unlawful detainer action. However, the jury found 13 violations of the CCPA, including violations for insulting language in a debt collection call, excessive calls, unnecessarily publicizing the debt to a relative and failing to timely provide an account statement. The jury awarded no actual damages; however, the circuit court awarded various civil penalties for each violation.

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[14] For instance, in *BMW of North America v. Gore*, 701 So.2d 507, 514 (Ala. 1997), the Alabama Supreme Court concluded upon remand that "[b]ecause the legislature has set the statutory penalty for deceitful conduct at such a low level [i.e., "a meager $2,000"], there is little basis for comparing it with any meaningful punitive damages award." Similarly, the Utah Supreme Court upon remand in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah), *cert. denied*, 543 U.S. 874 (2004) approved a $9,000,000 punitive award where the civil fine was only $10,000 (900-1 ratio).

There is no clear guidance from the Supreme Court on how to apply this guidepost, which itself blessed a 100-1 ratio in *State Farm*, and as a result federal circuit courts of appeal often give the third guidepost little to no weight. *See e.g.*, *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004) (following its trend not to quantify legislative penalties and/or discuss them at all); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3rd Cir. 1999)("We agree with the Tenth Circuit's observation that 'a violation of common law tort duties [may] not lend [itself] to a comparison with statutory penalties.'").

[15] The CCPA has no express statutory fraud provision. However, this Court has said fraud is akin to inducement by unconscionable conduct under § 46A-2-121(1)(a). *See e.g., One Valley Bank v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) (§ 46A-2-121 "expressly deals with conduct that is 'unconscionable' which we have equated with 'fraudulent conduct.'"). While unconscionable conduct in the CCPA is similar to common law fraud in many respects, said violation does not necessarily require all of the elements of common law fraud (*i.e.*, materiality, justifiable reliance and damages) and certainly need not be proved by clear and convincing evidence.

In affirming the circuit court, this Court stated that it

> believes that the Legislature, in creating W. Va. Code § 46A-5-101(1), has created a mechanism by which those who have suffered no quantifiable harm may yet recover civil penalties for being subject to undesirable treatment described in Article 2 of the Act. We find that by including the option for consumers to pursue civil penalties, the Legislature intended that § 46A-5-101(1) function, in part, as a disincentive for creditors to engage in certain undesirable behaviors that might not result in actual damages. . . .
>
> [C]ivil penalties are not punitive damages. . . . Civil penalties are their own separate class of damages, taking on both compensatory and punitive characteristics.

Id. at 568-69. Accordingly, the Legislature could not have intended this generic penalty (that, in part, was intended not to punish but to compensate for minor, technical or even trivial violations, where damages cannot be quantified) to apply as its primary deterrent for the type of serious common law fraud at issue here.

In considering this guidepost, the Court should look elsewhere and be mindful of the full gamut of civil and criminal penalties which might be invoked under analogous facts or circumstances. *See e.g., Myers v. Central Florida Investments, Inc.*, 592 F.3d 1201, 1222-23 (11th Cir. 2010)("When considering criminal penalties, a reviewing court considers *both* fines and imprisonment."); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed Cir 2003)(same). In *Myers*, the Court of Appeals for the Eleventh Circuit reasoned that a one year jail sentence under Florida law for battery was sufficient notice to the defendant of the seriousness of similar actions in upholding a $500,000 punitive damage award. Here, it is certainly no surprise that West Virginia has criminalized fraud. Under W.Va. Code § 61-3-24, fraud involving money, goods, or property in excess of $1,000 is a felony punishable by up to 10 years incarceration. The 10-year sentence under West Virginia law provides similar notice to Quicken of how our Legislature views fraud.

Moreover, under W.Va. Code § 46A-7-108, 109 & 111, the Attorney General has the power to issue a statewide injunction prohibiting Quicken from engaging in any conduct in violation of the CCPA and to recover a penalty in a civil action on behalf of a consumer, who, like the Plaintiffs, was assessed charges in violation of the CCPA. The penalty is significant: up to the greater of the loan finance charge or ten times the amount of any excess charge by the lender. Here, the loan finance charge alone was $520,065.61.

Even more drastic, a lender's license to do business in this state may be revoked under W.Va. Code § 31-17-12(a)(6) if it "has committed any fraud or engaged in any dishonest activities with respect to any mortgage loan business in this state or failed to disclose any of the material particulars of any mortgage loan transaction in this state to anyone entitled to the information." Any one of these three criteria would be sufficient to invoke this *death penalty* upon a lender, but *all three* have been established against Quicken in this case. Numerous federal circuit courts of appeals and state supreme courts have given considerable weight to a defendant's notice of similar license-stripping statutes under *Gore*.[16] Certainly, these civil and criminal penalties, taken together, are sufficient to give Quicken "fair notice" that a substantial

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[16] *See e.g., Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir.2003) (upholding a punitive award nearly seventy-five times larger than the potential civil fine where the defendant was "subject to revocation of its license, without which it [could not] operate"); *Greenberg v. Paul Revere Life Ins. Co.*, 91 Fed. Appx. 539, 542 (9th Cir.2003), *cert. denied*, 542 U.S. 939, (2004) (upholding a $2.4 million punitive award without discussing potential civil fines but "[c]onsidering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses"); *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 906-07 (Ky. 2008)(considering loss of license to sell motor vehicles without discussing civil fines); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 992 (Idaho 2004) (upholding a $300,000 punitive award without discussing the size of potential civil fines but noting that "[e]ven the threat of losing licensure in the State did not have an immediate [deterrent] effect upon" the defendant); *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143 (Ohio 2002) (upholding a $2.5 million punitive award where the potential civil fine was $3,500 per violation and the defendant could "lose its license to engage in the business of insurance in Ohio"); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 489 (Or. 2001) (upholding a $1 million punitive award where the potential civil fine was $25,000 per violation and "administrative sanctions" included "the loss of a business license").

punitive award could be made if it engaged in the kind of fraudulent, opportunistic conduct which formed the basis of this predatory lending case. Nothing more is required.

II. The Circuit Court Did Not Punish Quicken For Taking An Appeal

For its second assignment of error, Quicken states that "[t]he 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." However, Quicken fails to inform this Court that all parties agreed in light of this Court's general mandate that Judge Sims would not be constrained by Judge Recht's previous award and was free to make the award that he felt most appropriate.

> THE COURT: So, you believe I ought to do an independent analysis based upon my review of the evidence and exhibits, determine whether there's an appropriate punitive damage award or not, and, then, *I'm free to set whatever punitive damage award I believe is appropriate?*
>
> MR. GOODWIN (Petitioner's Attorney): *Absolutely.*
>
> THE COURT: *And I'm not bound by anything Judge Recht did?*
>
> MR. GOODWIN: *Absolutely not.*
>
> . . .
> THE COURT: So, in essence what we're doing is *we're taking the same evidence that has previously been presented, and we're presenting it to a new jury, which is me.* That's, in essence, what we're doing.
>
> MR. GOODWIN: *Exactly.*

4/9/2013 Status Hearing at 16-18 (A731-733). Accordingly, the circuit court did nothing more than follow this Court's directive with Quicken's full blessing. Failed litigation strategy and adverse results are not subject to rescue by some ill-defined notion of due process. The Ninth Circuit Court of Appeals case from 1986 that Quicken relies on bears no resemblance to the unique procedural history we have here. Accordingly, this assignment of error, which is at best unfair to the circuit court, should be summarily rejected.

III. The Circuit Court Performed A Proper *Garnes* Analysis And In No Way Punished Quicken For Any Lawful Conduct

In its third assignment, Quicken relying on *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) stretches even further in arguing that the circuit court unconstitutionally punished it for perfectly legal conduct. In *Bordenkircher*, the United States Supreme Court ruled that a prosecutor did *not* violate a defendant's due process rights by threatening the defendant with more serious felony charges if he did not accept a plea bargain. Quicken argues that the circuit court focused "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." Quicken Brief, at 18.

Whether it is *Bordenkircher* or *Gore*, Quicken is grasping at straws. In fact, Quicken completely ignores the law on point, as *Garnes* requires a circuit court to consider as part of its reprehensibility analysis "whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him." *Syl. pt.* 3, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897.[17] After finding Quicken's obstinate belief that it did no wrong here to be irrational to the point of losing touch with reality and, therefore, demonstrating no accountability, the circuit court concluded consistently with *Garnes*:

> [I]t is apparent that Quicken Loans did not accurately evaluate the egregiousness of its conduct, its potential liability, and the potential for a large damages award against it.
>
> Quicken Loans has had, and continues to have, an opportunity to resolve this matter by way of settlement. There is no evidence before this Court that it has ever shown any interest in settling this matter with the Plaintiffs. Quicken Loans instead, as it is clearly entitled to do, chooses to do battle, to hold fast to its' position that it has done little or no wrong in this action, and has caused minimal damage. Quicken Loans chose to fully litigate this matter at trial and on appeal, and now chooses to fight on, post-appeal, as is its right. However, it

[17] Liability was painfully obvious from the beginning. As this Court expressly made clear – "[t]his [was] not a close case," yet Quicken offered nothing.

> cannot now complain that it was somehow "vindicated". . . Quicken Loans proceeded in this matter, at its own peril, when others reached compromises, with full knowledge of the consequences should it not prevail. Quicken Loans did not prevail and must now face the music.

Remand Op. at 18 (A908). Accordingly, the circuit court followed *Garnes* as required.

Under the same heading, as part of a single paragraph, Quicken further argues that the circuit court's reliance on Quicken's "use of discount points" also violates the general principle that it may not be punished for *lawful* conduct. Quicken's use of discount points is in *no way* lawful. While this Court determined Quicken to have made an intentional misrepresentation, it found Ms. Jefferson failed to establish reliance by clear and convincing evidence. Nevertheless, Quicken's *misuse* of discount points remains unconscionable, as well as unfair and deceptive, and, therefore, unlawful under West Virginia law. 2/25/10 Op. at 17 (A143), 20 (A146). Furthermore, the phony discount points from which both Quicken and its employee Johnson received a cut at closing were indeed a motivating factor in the false promise of refinancing and the concealment of the balloon payment. As referenced *supra* at 18, sufficiently related conduct, whether it be lawful or unlawful or in or out-of state, can be properly considered in the reprehensibility analysis. *See*, *State Farm*, 538 U.S. at 422.

Similarly, Quicken complains that the circuit court "relied on a supposed violation of W.Va. Code § 33-11A-11(c) ..., yet the trial court never found any violation of this statute ...." It bears repeating that Quicken encouraged the circuit court to take a fresh look at the evidence and confirmed for Judge Sims that he was not bound by what Judge Recht had found. The fact that Judge Sims noticed on his own a fairly obscure statutory violation that the parties had not identified only demonstrates the detail upon which he reviewed the record. Judge Sims discussed this violation, which is reviewed under the abuse of discretion standard, in the related context of the (unlawful) role that the non-lawyer, notary-closing agent played in facilitating the fraud at issue here. Since Quicken did not employ a lawyer, but charged the Plaintiffs for these legal services, the circuit court took the opportunity to elaborate on its prior finding of excessive closing costs. In any event, the conduct at issue was not lawful conduct and the circuit court's discussion on this fine point amounts to surplusage.

IV. The Circuit Court Did Not Enhance Its Award On Account Of Wealth

In its fourth assignment of error, Quicken argues *Perrine*, 694 S.E.2d at 888 ("[T]o accomplish punishment and deterrence for ... a wealthy company, a punitive damage award must necessarily be large.") is in conflict with Supreme Court precedent by classifying wealth as an "aggravating" factor and that this Court should take the opportunity to revisit *Perrine*. Strangely, Quicken makes this argument despite the fact that Judge Sims adopted Quicken's approach and expressly did not "enhance" the punitive damage award on account of Quicken's wealth. Remand Op. at 16 (A906). Accordingly, the error Quicken complains of does not exist.

Nonetheless, Respondents respectfully submit that *Perrine* was rightly decided consistently with settled law. "DuPont asserts its wealth has no bearing on the question of whether the punitive damages award in this case was excessive. We reject this argument on the simple ground that the United States Supreme Court approved of the *Garnes* factors in its review of those factors in *TXO*..." *Perrine*, 694 S.E.2d 815, 888. Plaintiffs summarized Quicken's financial statements in a chart admitted into evidence as Pls. Ex. 57 (A2991) and later sealed.

V. There Was No Punishment For Dissimilar Acts Or Harm To Others

Under the fifth assignment of error, Quicken ignores *Garnes* entirely and misapplies Judge Sims' analysis. Syllabus point 3 of *Garnes* provides, in part: "Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." Judge Sims devoted nearly two pages to this

Garnes factor, detailing how Quicken's misconduct harmed the Plaintiffs. Noting that the loan terms "boggle the mind," he found the nature of the likely financial harm to the Plaintiffs to be "enormous." More than that, Plaintiffs were harmed emotionally: "[T]he looming threat of losing one's home can only cause incalculable psychological harm and mental distress. The plaintiffs described in detail the toll this took on them emotionally." Remand Op. at 9 (A899).

Toward the end of his analysis, Judge Sims referred vaguely to the 2008 financial crisis. Quicken complains this was "flatly unconstitutional" because it punished Quicken for harming others. Quicken Brief, at 21. However, this was merely an incidental reference. Judge Sims was not blaming Quicken for our country's economic woes or punishing Quicken for the 2008 financial crisis. At most, he was recognizing this kind of harm is not theoretical but, in fact, very real. The balance of his analysis makes this abundantly clear.

Furthermore, under *Perrine*, the disparity between the punitive award and harm is a *mitigating* factor, not an *aggravating* factor. Given the circuit court's findings of "enormous" financial harm and "incalculable psychological harm and mental distress", which are reviewed under a clearly erroneous standard, there is little to no disparity between the punitive award and harm or potential harm to Plaintiffs. As such, the short comment Quicken wildly attempts to magnify had no impact on the analysis.[18] Accordingly, Judge Sims properly applied this *Garnes* factor and committed no error.

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[18] Furthermore, while the Court did not expressly adopt its position, Philip Morris contended before the Court and submitted a jury instruction below that would *permit* a trial court to use harm to others as part of the "reasonable relationship [between the punitive award and harm to plaintiffs'] equation" but not directly as punishment. *Philip Morris USA v. Williams*, 549 U.S. 346, 356 (2007). Here, the general, passing reference to the harm brought about by "subprime" and "high risk" loans was located under the heading dedicated to the reasonable relationship analysis. Remand Op. at 9 (A899). Additionally, the *Philip Morris* court, while prohibiting direct punishment, would surprisingly allow a plaintiff to show harm, even potential harm, to others to demonstrate reprehensibility. *Id.* at 355. Here, Judge Sims *did not* use the 2008 financial crisis in his reprehensibility analysis at all and certainly went nowhere near direct punishment in any part of his opinion.

VI. None Of Quicken's Five Arguments Contained In Its "Catch All" Assignment Amount To Error

For its sixth assignment of error, Quicken first repeats its argument regarding the third guidepost of *Gore*. Respondents have thoroughly addressed this argument *supra* at 25-29.

Next, Quicken accuses the circuit court of misusing one of the *Garnes* factors: the appropriateness of punitive damages "to encourage fair and reasonable settlements when a clear wrong has been committed." The circuit court correctly applied this factor, which is similar to the earlier discussed *Garnes* factor addressing the willingness of a defendant to make amends for its wrong. The focus of this factor as explained by *Perrine* relates primarily to *future* litigants: "[W]as the award large enough so that a future defendant who has committed a clear wrong will be encouraged to accept a fair and reasonable settlement rather than force the wronged plaintiff into litigation and risk incurring a similarly large punitive damages award?" 225 W.Va. at 556, 694 W.Va. at 889. There is no doubt that a large punitive damage award is necessary to prevent Quicken and other large, well-funded lenders from dragging consumers through litigation instead of reaching a fair, reasonable settlement where the lender has committed a clear wrong. Thus, this factor supports the circuit court's punitive award.

Third, Quicken, citing nothing new, rehashes its argument that attorney fees and costs awarded in this case should not be included in *TXO's* compensatory-to-punitive damages ratio. This argument was expressly rejected in the syllabus of this Court's prior Opinion, in line with the clear majority of courts deciding the issue in the context of a fee shifting statute. *See, e.g.*, *Blount v. Stroud*, 915 N.E.2d 925, 943-44 (Ill. Ct. App. 2009)(canvassing cases from across the country). Here, Quicken attempts to make a constitutional issue out of the fact that Plaintiffs' attorney fees and costs incurred fending off its foreclosure and pursuing consumer rights greatly exceed the compensatory damages. While this issue has been conclusively decided against

Quicken, Plaintiffs would point out that the same was true for two cases this Court relied on in its 2012 Opinion. *See*, *Quickens Loans*, at fn. 41 (Punitive award upheld where plaintiff in *Blount* received \$282,000 for compensatory damages; \$1,000,000 for attorney fees; and \$2.8 million in punitive damages); *Willow Inn, Inc. v. Public Service Mut. Ins. Co.,* 399 F.3d 224 (3rd Cir. 2005)(Punitive award upheld where plaintiff received \$135,000 in attorney fees; no compensatory damages; and \$150,000 in punitive damages); *see also*, *In re USA Commercial Mortg. Co*, 2013 WL 3944184 (D. Nev.) (Punitive award upheld where plaintiffs received \$2,464,052 in attorney fees; \$22,321 in compensatory damages and interest; and \$800,000 in punitive damages).

Fourth, Quicken, in its single-paragraph fashion and again by citing only the general principle of fair notice under *Gore*, attempts to convince this Court that it should *not* apply its new syllabus point to this case but apply it only prospectively. Of course, the *Gore* Court itself applied its newly announced three guideposts to the case at hand. Moreover, it is the guideposts *themselves* that set the standards for fair notice – see discussion *supra*.

Moreover, Quicken did have fair notice that punitive damages could be awarded in consumer cases where the elements of common law fraud are satisfied. *See*, *Quicken Loans*, at fn. 39(2 of 2)(quoting, *Muzelak v. King Chevrolet Inc.*, 179 W.Va. 340, 344, 368 S.E.2d 710, 715 (1988)). Furthermore, as discussed *supra*, Quicken had notice of the severe civil and criminal penalties that it would be subject to for engaging in this fraudulent conduct. Finally, Quicken had fair notice that attorney fees awarded to consumers would be considered compensatory for ratio purposes when it designed a plan to defraud Plaintiffs and when it employed a litigation strategy that caused the Plaintiffs to incur hundreds of thousands of dollars in legal costs to save their home. Announcing its ruling, this Court stated:

> In light of the foregoing, and considering this Court's ***past recognition*** that, in general, fee-shifting statutes are compensatory and not punitive in nature, we

> find persuasive the argument that the attorneys fees and costs awarded under West Virginia Code § 46A-5-104 shall be included in the compensatory to punitive damages ratio where, as here, punitive damages are available to Plaintiff because there was a finding of common law fraud.

230 W.Va. 306, 737 S.E.2d at 666 (emphasis supplied). *See also*, *id.* at fn. 42 ("Indeed, this is wholly consistent with *Garnes*, which directs that review of a punitive damages award should, at a minimum, consider, among other factors, '[t]he costs of the litigation.'"). Out of fifteen cases cited by this Court under the heading, "Attorney Fees as Compensatory Damages", twelve had been decided before Quicken defrauded Ms. Jefferson. Furthermore, a clear majority rule to include attorney fees obtained pursuant to a fee shifting statute existed across the country. *See e.g.*, *Willow Inn, Inc.*, 399 F.3d 224; *Diviney v. Nationsbank of Texas, N.A.*, 225 B.R. 762, 777 (10th Cir. 1998); *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (2004 PA Super).

Fifth, Quicken states that the $98,800 award was for the "negligent violation of the appraisal statute" and its inclusion "grossly inflated" the compensatory/punitive multiplier. Regardless of what claim(s) these damages flow from, they may be included in the multiplier provided the claim(s) are *related* to the supporting fraud claim.

> If a court is not limited to compensatory damages that actually occurred in calculating the ratio, it follows that a court is not confined only to the compensatory damages under particular claims and instead can look at damages found by a jury on related claims. *Cf. Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 668 (6th Cir.2005) (combining compensatory damages from separate claims when calculating ratio even though the punitive damage award was only for one claim). Accordingly, *State Farm*, *BMW*, and *TXO* all suggest that a court can aggregate compensatory damages from multiple related causes of action when comparing compensatory damages to punitive damages.

Fastenal Co. v. Crawford, 609 F.Supp.2d 650, 661 (E.D. Kentucky 2009).

In its 2012 Opinion, this Court already determined that attorney fees awarded under the CCPA, which Act *may not* itself allow for punitive damages, could be included in the ratio analysis. *Quicken Loans*, at syl. pt. 11 & fn. 43 (rejecting Quicken's proposed claim by claim analysis for lack of support).[19] Of course, the common law fraud claim and the consumer protection claims are undoubtedly related. Indeed, the fraud claim and the freestanding unconscionable inducement claim under § 46A-2-121(1)(a) are based on identical facts. *Id.* at 657-58. Thus, aggregating compensatory damages for related causes of action would appear to be *the law of the case*. Similarly, as discussed *supra* at 4-5, the inflated appraisal facilitated this fraudulent loan and was joined with the false promise of refinancing to persuade Ms. Jefferson to accept this loan. Even if the Court were to distinguish and subtract the $98,800 damage award, the ratio remains well within constitutional limits at 3.9 to 1.[20]

VII. The Circuit Court Properly Exercised Its Authority To Refuse To Enforce The Loan, While Preserving Quicken's Security Interest

VIII. The Single Reference To "Status Quo" In This Court's Opinion Is Not Applicable To The Claims Addressed By The Circuit Court

In assignments of error seven and eight, Quicken accuses the circuit court of outright betrayal of this Court's mandate in regards to the remedies the circuit court awarded as alternatives to loan cancellation. However, Quicken's protests of clear error are fueled only by misdirection. Quicken seizes upon a single phrase from this Court's lengthy Opinion for the impractical proposition that Plaintiffs must return the loan principal to Quicken as a condition precedent to any remedy against the loan obligation regardless of the legal theory upon which the Plaintiffs prevailed.

[19] Whether a violation of Article 6 of the CCPA prohibiting unfair and deceptive acts can serve as a predicate for a punitive damages remains an open question. *See*, *Quicken Loans* at fn. 39(2 of 2).

[20] While the circuit court apparently did not include any sum for the unenforceable loan on the compensatory side of the ratio, Respondents submit that it should have included the total unenforceable finance charge of $520,065.61 as compensatory damages in light of the potential harm to the Respondents or, at a minimum, the $83,313.91 in accrued finance charges that Ms. Jefferson has been relieved of paying as compensatory damages in the ratio analysis. Pls. Brief on Remand at 33-37 (A589-593). While Respondents are satisfied with the punitive damage award, they do object to the circuit court's use of the 5 to 1 ratio as the "outer limit" in this case. *See*, *id.*

> Plaintiff has failed to offer any authority tending to support forfeiture of the loan principal as an equitable remedy under the unfair and deceptive acts provisions of the Act, as set forth above. To the contrary, 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. The first problem with Quicken's argument is that this statement is limited to the general equitable powers of the court that are expressly invoked in Article 6 of the CCPA, prohibiting unfair and deceptive acts or practices. In footnote 38, this Court extended its instruction to Plaintiffs' common law fraud claim *but no further.*

This Court separately addressed the legal remedy provided by statute for unconscionable conduct and unconscionable loan agreements.

> Applying these rules of statutory construction, therefore, we must conclude that although *the circuit court had the authority to refuse to enforce the Note and Deed of Trust in this case* pursuant to the provisions of West Virginia Code § 46A-2-121, the clear language of the statute simply does not allow the court to cancel Plaintiff's debt obligation. Therefore, this Court finds that the court committed error in canceling Plaintiff's debt obligation under West Virginia Code 46A-2-121.

Id. at 661 (emphasis supplied). § 46A-2-121 (emphasis supplied) provides:

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

Thus, circuit courts have the legal authority to refuse to enforce a loan agreement in whole or in part as a matter of *law*, not *equity*. In fact, the very intent of the CCPA was to eliminate the practice of including unconscionable terms in consumer agreements, *Syl. pt.* 3, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), and to provide an avenue of relief for consumers that did not exist at common law. *See e.g.*, *Cole*, 230 W.Va. 505, 740 S.E.2d at 568. As a remedial act, this Court has consistently held that the CCPA should be construed liberally in favor of the consumers whom it was intended to protect. *E.g.*, *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577, 583 (2011). Given the purposes of the CCPA and the plain language of the statute, the remedy available to the circuit court is clear: it may void an unconscionable loan. *See e.g.*, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556, 571-72 (2013) ("the [CCPA] says that . . . a contract may be voided if it was either 'induced by unconscionable conduct' or if the terms of the contract were unconscionable at the time it was made.) (Justice Ketchum, concurring).

The argument advanced by Quicken and accepted by this Court was that the circuit court's authority under § 46A-2-121 is constrained by and must be read in *pari materia* with § 46A-5-105, which does not permit the cancellation or voiding of secured loans, such as this. Subject to this constraint, the circuit court was charged with providing a remedy to the prevailing Plaintiffs. But the circuit court was not free to read something into the statute that it does not say – a prohibition that includes something as drastic as a tender obligation on the part of the consumer. "Furthermore, as we have made clear in prior cases, '[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.'" *Quicken Loans*, 737 S.E.2d at 661.

Therefore, the circuit court stuck to the letter of the statute and this Court's Opinion and continued to hold the Note and Deed of Trust unenforceable as a matter of law. However, the circuit court recognized that it must now preserve the security interest under § 46A-5-105. Accordingly, the Deed of Trust remains a valid lien against the subject property. The lien operates just as any other lien, and should the Plaintiffs wish to transfer any interest in the property, they will necessarily have to satisfy the lien as outlined by the circuit court. To be clear, the reference to "heirs, successors or assigns" is simply intended to bind those acquiring an interest involuntarily or otherwise charged with acting on behalf of the Plaintiffs. Plaintiffs cannot voluntarily transfer their interests without addressing Quicken's lien.

The circuit court's remedy properly balances the intent of the CCPA not to enforce unconscionable consumer agreements with the preference given to secured loans. Finally, as a practical matter, few, if any, consumers who are victimized by predatory lending transactions will be able to tender the full loan principal as a condition to accessing this remedy. If this Court adopts Quicken's position, this remedial statute will become entirely illusory.[21]

With respect to the cash award of $98,800, Quicken has never appealed the circuit court's general liability findings under W.Va. Code § 31-17-8(m)(8). 2/25/10 Op. at 22-24 (A148-150). Quicken did, however, appeal the remedy of loan cancellation. This Court found that the statute does indeed permit loan cancellation for willful violations, but concluded that the circuit court found only a negligent violation of this particular statute and committed error by cancelling the loan. *Quicken Loans*, 737 S.E.2d at 660. As a lesser but included alternative, the circuit court had the authority on remand to award damages for "negligent" violations under § 31-17-17(c) in lieu of loan cancellation under § 31-17-17(a). Based on evidence already in the record and consistent with prior rulings, the circuit court awarded the Plaintiffs $98,800, which represents

[21] *See*, Amici Brief of National Association of Consumer Advocates, Mountain State Justice, West Virginia Attorney General, and West Virginia Association for Justice in Support of Plaintiffs and Respondents Lourie Brown and Monique Brown, 10/21/11, at 15-16 (discussing the importance of a real remedy)(A483-484); *see also*, *id.* at 3-6 (discussing the rise of predatory lending)(A471-474).

the amount that the loan of $144,800 exceeds the statutorily proscribed legal limit of $46,000 (*i.e.*, the subject property's true market value as found by the circuit court). It further represents the amount that this illegal, unfair, deceptive and fraudulent loan left the Plaintiffs underwater. In any event, the award was entirely offset by the proceeds from Plaintiffs' settlement with Guida.

IX. Quicken Will Stop At Nothing To Deny Plaintiffs A Single Recovery Of Attorney Fees And Costs

Contrary to Quicken's argument, this Court did not even address—let alone decide—the issue of whether Guida's settlement proceeds could be offset against attorney fees and costs.

Quicken did not raise this issue in its first appeal. Why? Because Quicken *affirmatively represented to this Court that it was paying the fee award.* It did so in an effort to mitigate its punitive damage exposure. In analyzing the aggravating factors under *Garnes*, Quicken argued that the cost-of-litigation factor should not weigh against it because Quicken, in fact, "[was] already paying plaintiff's attorney fees." Brief of Petitioner Quicken Loans Inc., 09/06/11, at 32 (A395). Accordingly, as it was framed and briefed by the parties, the offset issue *only* involved the $17,000 restitution award and, potentially, the loan cancellation remedy. *Id.* at 39 (A402).[22]

Now Quicken insists that it is entitled to a dollar-for-dollar offset against the attorney fees and costs it must pay. That is, Quicken says that all of the Plaintiff's compensatory damages, including attorney fees, must be offset by the full amount of Guida's settlement. This represents the *third* distinct and most extreme position Quicken has taken on this issue, which, if adopted, would eviscerate the award.[23] The circuit court properly rejected this argument.

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[22] While Quicken considered *both* attorney fees and loan cancellation as punitive damages on appeal, Quicken expressly preserved the issue of offset with respect to loan cancellation. However, Quicken made no such reservation for attorney fees. *Id.* at 40 (A403).

[23] Quicken has changed its position multiple times during the course of litigation. In the post trial briefing, Quicken argued that it should be entitled to a $280,000 offset—representing the amount of the fee paid to Bordas & Bordas out of Guida's settlement. *See*, Defendant's Response Brief Regarding Attorney Fees at p. 4, filed 9/1/10 (A164). In briefing the first appeal, Quicken did not seek any offset

To begin with, the circuit court's ruling was correct under principles of judicial estoppel. West Virginia law is well settled:

> Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken . . taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process."

Syl. Pt. 2, *West Virginia Dept. of Transp., Div. of Highways v. Robertson,* 217 W.Va. 497, 618 S.E.2d 506 (2005). Quicken unequivocally informed this Court it was paying the Plaintiffs' attorney's fees. Having done so and having obtained a review of the punitive damage award on that basis, which review resulted in a favorable remand, Quicken should not be allowed to adopt a new, inconsistent position. Furthermore, Plaintiffs were prejudiced by this misstatement, as they could not possibly comprehend the need to oppose something that Quicken did not seek. As such, Plaintiffs made no argument specific to the fee award that Quicken touted it was paying and allocated only a single sentence overall to the substantive argument on the issue of offset – because there was scarcely anything to argue over. See, Brief of Respondents, 10/21/2011, at 48-49 (A459-60).

Had Quicken fairly presented the issue, this Court could have resolved it more than a year ago by simply reviewing two critical and undisputed facts from the record below.

First, the attorney fee award does not represent a "joint obligation" under *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990), because the award was made pursuant to W.Va. Code 46A-5-104 and 31-17-17(c)—neither of which applies to appraisers. These statutory provisions govern the conduct of creditors, lenders, and

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because it contended attorney fees were punitive in nature, not compensatory, and because it strategically represented that it was paying the fees in its *Garnes* analysis. Now, however, Quicken argues that it should receive an offset of the fee award against the entire amount of Guida's settlement.

mortgage brokers, and exclude appraisers, who are governed by W.Va. Code § 30-38-1, *et seq.*, which, importantly, does not provide for fee shifting.

Second, the Plaintiffs' fees here were not only capable of being divided but were, in fact, divided. The only fees awarded against Quicken were those attributable to the claims against Quicken. Notably, 71% of the initial fee bill submitted by the Plaintiffs covered time occurring *after* the defendant, Guida, had settled and, therefore, solely related to Quicken. And, of course, 100% of the supplemental fee bill reflects time occurring *after* Guida settled. The remaining time was carefully reviewed by the Plaintiffs, and all time relating solely to Guida's claim was eliminated (attending Guida's mediation, preparing a lengthy DVD settlement presentation for Guida's insurer, responding to Guida's discovery and summary judgment motion, etc.). Affidavit of Jason Causey, 8/30/2010, at 3 (A2938). *Zando,* of course, requires "a single, indivisible loss" before an offset can be applied. Here, attorney fees represent a *divisible* loss for which Quicken alone is liable.

Because Plaintiffs in reality seek only *one* recovery of fees, the circuit court was able to conclude that public policy prevented an offset of the statutory attorney fee award. Quicken first contends that this Court has foreclosed the issue in its favor. However, the circuit court correctly found that this Court did not address attorney fees, directly or indirectly, for purposes of applying the offset it granted. *See*, Remand Op. at 20 (A910). Judge Sims then rightly concluded that applying an offset under the circumstances would frustrate the public policy behind the fee statute:

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

Id., at 21(A911) (emphasis in original).

Awards of attorney fees are an integral and essential part of our consumer law. Permitting attorney fees to be offset, particularly where Plaintiffs seek only a single recovery, would prevent consumers from fully accessing the courts to enforce their legal rights, thereby defeating those rights in the process. *Cf.*, *Auwood v. Harry Brandt Booking Office*, 850 F.2d 884 (2d Cir. 1988).

Still, Quicken attempts to counter with *Corder v. Brown*, 25 F.3d 833 (9th Cir. 1994) for the proposition that "offset is applicable to attorney fees." Quicken Brief, at 28. But even *Corder* does not adopt the view Quicken is advocating here. *Corder* says that attorney fees may only be offset against attorney fees—not, as Quicken argues, against all compensatory damages. Ironically, *Corder* reflects Quicken's first position on this issue. *See*, *supra* at fn. 23.

X. The Mandate Of This Court Leaves The Issue Of A Supplemental Fee Award To The Discretion Of The Circuit Court

Quicken suggests that the issue of whether the Plaintiffs are entitled to additional attorney fees was resolved by this Court's mandate. Quicken makes two arguments, but neither of them withstands even the slightest scrutiny. First, Quicken points to language in the mandate stating that "the parties shall each bear their own costs." According to Quicken, by refusing to award costs this Court has effectively disposed of the Plaintiffs' request for attorney fees. However, W. Va. R. App. P. 24 makes it abundantly clear that "costs" include only the costs of preparing, assembling and filing the appendix, none of which the Plaintiffs even incurred, and *do not* include attorney fees. Thus, the directive regarding costs is not relevant.

Second, Quicken argues that a circuit court is powerless to award fees relating to an appeal where the mandate has not included a directive to do so. For this proposition, Quicken cites *Powell v. Paine,* 226 W.Va. 125, 697 S.E.2d 161 (2010). But *Powell* says nothing of the sort. This Court in *Powell* issued a *limited* mandate specifically authorizing the circuit court to merely "reinstate[ ]...the appellant's teaching license." *Id.* at 129, 165. Here, however, this Court issued a *general* mandate; therefore, the circuit court had authority to award attorney fees for a successful appeal. *See*, *Orndorff v. West Virginia Dep't of Health,* 165 W.Va. 1, 267 S.E.2d 430 (1980) (construing a similar remedial statute to permit recovery of attorney fees for services on appeal).

The final question is: Was the Plaintiffs' defense of the appeal successful? The test for determining whether a party is entitled to a recovery of statutory attorney fees is whether he "achieved [an] appreciable advantage in the litigation." Put another way, did the plaintiff achieve a "material alteration of the legal relationship of the parties"? *State ex rel. West Virginia Highlands Conservancy, Inc. vs. W.Va. Div. of Environmental Protection,* 193 W.Va. 650, 655, 458 S.E.2d 88, 93 (1995). In light of this modest test, the circuit court was undoubtedly correct in finding "that the plaintiffs have substantially prevailed on appeal, particularly on the issues of fraud and unconscionability" and in concluding that "an award of additional attorney fees and costs is wholly fair and justified." Remand Op. at 21 (A911). As *West Virginia Highlands* indicates, success is measured from the standpoint of the litigation as a whole, not, as Quicken suggests, from the Plaintiffs' individual claims. In any event, the Plaintiffs on remand substantially prevailed on each of Quicken's remaining appellate issues.

XI. Plaintiffs' Attorneys' Billing Records Are Reasonable

Under the eleventh assignment of error, Quicken complains that the circuit court erred in its calculation of the attorney fees to be awarded to the Plaintiffs.

We begin with two legal principles. First, the amount of any award of statutory attorney fees is to be judged under an abuse of discretion standard: "The reasonableness of the award [of attorney fees] is to be judged by the abuse of discretion standard of review" and, in the absence of an abuse of discretion, "the trial court's decision is final." *Brown v. Thompson,* 192 W.Va. 412, 415, 452 S.E.2d 728, 731 (1994). Using a deferential standard of review "is appropriate in view of the [lower] court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).

Second, where there are some claims that would support an award of fees, and some that would not, the issue of whether to apportion a fee award is left to the trial court's sound discretion. *C.f., West Virginia Highlands,* 193 W.Va. at 655, 458 S.E.2d at 94 ("court may ... apportion the attorney fees"); *Daily Gazette v. West Virginia Development Office,* 206 W.Va. 51, 65, 521 S.E.2d 543, 557 (1999) ("not compelled" to apportion). In determining whether apportionment is proper in a given case, the trial court should only reduce a fee award where there are "discrete" issues for which fees are unavailable. *See, e.g., Hensley,* 461 U.S. at 436 ("Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."); *see also, Heldreth v. Rahimian,* 219 W.Va. 462, 467, 637 S.E.2d 359, 364 (2006) (the critical issue "is determining whether a separate and distinct factual development was required to support to those alternate theories of recovery ...").

Quicken's arguments fall into broad categories. The first argument relates to apportionment. According to Quicken, the circuit court erred when it awarded the Plaintiffs all of the attorney fees they requested because the claim for punitive damages would not, in and of itself, support a fee award. In advancing this argument, however, Quicken completely ignores *Heldreth* and its teaching. Here, the appellate issue involving punitive damages arose out of the same core of underlying facts as the Plaintiff's unconscionability claims. That is, the facts supporting relief for unconscionability (for which an attorney fee is recoverable) were the same facts supporting an award of punitive damages. Even post appeal, it is difficult to parse out the time dealing exclusively with punitive damages. For example, the hearing attended by Plaintiffs' counsel involved all issues, as did the briefing with some sections of the briefs serving dual purposes or spilling over to others. In light of these facts, the circuit court did not abuse his discretion in awarding a fee that covered *all* of the Plaintiffs' related claims and theories.

The second argument is a more general attack on the circuit court's ruling. Quicken complains that the court did not adequately scrutinize the Plaintiffs' fee request and that the hourly rates it approved were higher than those previously approved.

The Plaintiffs' fee petition was fully documented, including affidavits from all of the attorneys who participated in the post trial motions, appeal and remand stages of the case together with their billing entries. *See*, Plaintiffs' supplemental fee petition and affidavits in support (A759-873). From its review of the petition, the circuit court concluded that both the work performed and the time expended were reasonable.

Next, Quicken complains that some of the Plaintiffs' billing records were reconstructed. However, Quicken overlooks the fact that reconstructed records were approved by this Court in the seminal attorney fee case, *Aetna Casualty & Surety Co. v. Pitrolo,* 176 W.Va. 190, 192, 342 S.E.2d 156 (1996)(Mr. Amos had not kept contemporaneous time sheets, so he attempted to reconstruct time sheets by going through his file"); *see also*, *Thompson,* 192 W.Va. 412, 452 S.E.2d 728. Quicken also claims that some of the billing entries are too "vague." Even if true, however, this is a technical deficiency because Quicken never claims that the total amount of time billed was excessive or unreasonable. Nor does it offer the billings from any of the four law firms that it employed in this case for comparison purposes.

Finally, Quicken complains that the hourly rates approved by Judge Sims were higher than those previously approved by Judge Recht. But Judge Sims was not bound by his predecessor's rulings on the prior fee petition. The hourly rates Judge Sims approved were supported by affidavits, which reflected additional experience and expertise since Judge Recht's award, and, moreover, were commensurate with the rates charged by attorneys with similar experience and skill.

CONCLUSION

The circuit court entered a judgment that was tailored to accomplish the societal goals of punishment and deterrence upon which the very precedent of punitive damages is based. This Court, like the circuit court, should reject Quicken's invitation to turn a blind eye to all that has gone on before. The nominal punitive damages award that Quicken seeks is not only antithetical to the very purpose of punitive damages, but would also bless the type of fraudulent and unconscionable behavior at issue here. West Virginia should not be open to the infamous business of predatory lending. This state's homeowners deserve real protection against mortgage fraud and, furthermore, the many law-abiding banks and mortgage lenders in this state's market deserve protection against unfair competition. Only by affirming the circuit court can the societal goals of West Virginia be accomplished.

Because Quicken cannot meet its burden of showing factual or legal error by the circuit court, the judgment in favor of Lourie Jefferson and Monique Brown should be AFFIRMED.

By: ______________________

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CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL was had upon the Petitioner herein via e-mail and by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 5th day of December, 2013, to the following:

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