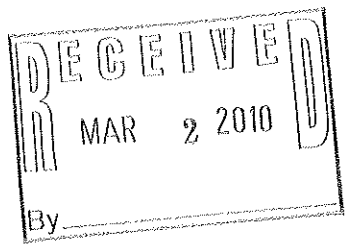
IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA



LOURIE BROWN and
MONIQUE BROWN,

Plaintiffs,

vs. **Civil Action No. 08-C-36**

QUICKEN LOANS INC.,
APPRAISALS UNLIMITED,
INCORPORATED, DEWEY V. GUIDA and
JOHN DOE NOTE HOLDER,

Defendants.

MEMORANDUM OF OPINION AND ORDER
(FINDINGS OF FACT AND CONCLUSION OF LAW)

INTRODUCTION

On Monday, October 5, 2009, the above-entitled case matured for a bench trial on issues of liability and damages. The plaintiffs, Lourie Brown Jefferson and Monique Brown, appeared in person and by their counsel, James G. Bordas, Jr. and Jason E. Causey. The defendant, Quicken Loans, Inc., appeared through its corporate representatives and by counsel, James Feeney, Stephen King and Richard Gallagher.

This litigation relates to a parcel of property located at 118 Twelfth Street, Wheeling, West Virginia, 26003 (hereinafter the "Property"). Plaintiff Lourie Brown Jefferson alleges that she was a victim of a predatory lending scheme related to the Quicken Loan of July 7, 2006, in the amount of $144,800. The Plaintiff's Complaint asserts various theories of recovery against

Quicken including: (1) Unconscionability (W. Va. Code § 46A-2-121); (2) Breach of Covenant of Good Faith & Fair Dealing; (3) Unfair and Deceptive Acts (W. Va. Code § 46A-6-104); (4) Fraud; (5) Illegal Appraisal; and (6) Illegal Balloon Note (W. Va. Code § 46A-2-105). (Note: Plaintiffs recently dropped their Intentional Infliction of Emotional Distress and Negligent Misrepresentation claims.) The Plaintiff's are also seeking punitive damages within the boundaries of Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895).

Each of these counts requires that Plaintiffs prove their case by a preponderance of the evidence except for fraud, which requires proof by clear and convincing evidence.

The plaintiffs called the following witnesses who were sworn and offered oral testimony: Margot Saunders, Lourie Jefferson, Troy Sneddon and Monique Brown. Ms. Saunders and Mr. Sneddon were qualified as experts in their respective fields.

After giving its opening statement, the defendant called the following witnesses: Morgan Winfree, Anthony Nuckolls, Michael Lyon, William Banfield and Laura Borrelli. Mr. Winfree and Ms. Borrelli were qualified as expert witnesses in their respective fields.

The deposition testimony of the following witnesses was also introduced in its entirety: Carol Antuna, Anthony Nuckolls, Michael Lyon, Danette Fica, William Banfield and Kristin Broadley. The plaintiffs' objection to the introduction of Ms. Broadley's testimony is preserved. All other objections are waived.

Upon consideration of the exhibits, the testimony of the witnesses and other evidence appearing in the record, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACTS

I. The Subject Loan

A. The Parties and Prior Financial Transactions

(1) Lourie Jefferson is a 45-year old licensed practical nurse (LPN). She was unable to finish her schooling to become a registered nurse. Mrs. Jefferson has three children, two of which were minors at the time of this loan and the other, Monique, is disabled.[1]

(2) Monique Brown is 30 years old. She suffers from a traumatic brain injury sustained in an automobile wreck in 2001. She has been disabled and unable to work due to the accident in 2001. Her short term memory is impaired.

(3) Lourie Jefferson and her mother, Lena Brown, purchased the Property in 1988. Lourie's mother took care of all the documentation and attended the closing. They paid $35,000 for the Property.

(4) Lourie Jefferson and her mother purchased the Property together because it was a duplex and they could reside in separate sections of the home. There are separate utilities, separate kitchens and separate entryways. Lourie's mother was living downstairs and Lourie upstairs.

(5) On or about December 3, 1993, Lourie Jefferson, as Guardian for Monique Brown, disbursed in excess of $528,000 of settlement funds – related to a prior lawsuit involving the wrongful death of Ms. Brown's father – as follows:

- $264,469.83 to the attorneys for fees[2];
- $14,930,83 to the attorneys for costs;

[1] When this civil action was filed, Lourie Jefferson was known as Lourie Brown. During the litigation, Lourie Brown married Bryant Jefferson. Accordingly, throughout these Findings and Conclusions, Lourie Brown will be referred to as Lourie Jefferson.

[2] In December 1993, the law firm handling this wrongful death lawsuit was Bordas, Bordas, & Jividen.

- $20,000.00 to Mrs. Jefferson for the needs of Ms. Brown;
- $34,132.89 to discharge the note on Mrs. Jefferson and Lena Brown's house;
- $195,406.10 to be placed in a custodial fund held by Mrs. Jefferson in her role as Guardian for the benefit of Ms. Brown; and
- Interest on the $195,406.10 to be spent as Mrs. Jefferson deemed necessary and in the best interest of Ms. Brown.

(6) Also on December 3, 1993, Lourie Jefferson and Lena Brown transfered the Property to Monique Brown in exchange for Monique Brown discharging the existing loan of $34,132.89. From December 1993 until June 2006, Monique Brown was the sole owner of the Property. Accordingly, the Property was debt free as of December 3, 1993.

(7) Lena Brown passed away in 2002. Accordingly, Lourie Jefferson became solely responsible for all of the household expenses, including utilities on both floors of a very large, older home, maintenance for the home, taxes and insurance for the home.

(8) On August 2, 2003, Lourie Jefferson refinanced the Property with CitiFinancial for the first time in the amount of $40,518.[3]

(9) On November 7, 2003, Lourie Jefferson borrowed $5,785 with AmeriFirst Loan.

(10) On January 8, 2004, Lourie Jefferson refinanced the Property with CitiFinancial for $63,961.

(11) On May 31, 2005, Lourie Jefferson refinanced the Property with CitiFinancial for $67,348. The interest rate on this transaction was 9.75%.

(12) On November 23, 2005, December 1, 2005, January 12, 2006, and April 10, 2006, Lourie Jefferson took four (4) separate loans with CitiFinancial for $1,500, $3,060, $5,000, $7,650 respectively. The interest rate on these loans ranged from 24.99% to 31.00%.

[3] The Property was debt free until this transaction.

(13) On February 1, 2006, Mrs. Jefferson also took a Refund Anticipation Loan ("RAL") with Jackson Hewitt in the amount of $3,418. The interest rate on this loan was 94.862%.

(14) The Defendant, Quicken Loans, is a large national mortgage lender making loans in all 50 states; it is headquartered near Detroit, Michigan. Quicken is part of a financial network and wholly owned by Rock Holdings, which is the same parent company that owns Title Source, Inc. (hereinafter "TSI"), an appraisal management company servicing Quicken.

B. The Loan Origination and Promise to Refinance

(15) While on her computer, Lourie Jefferson saw a "pop-up" advertisement offering an attractive loan opportunity that would allow her to consolidate her debt and lower her monthly payment.

(16) Lourie Jefferson filled out a basic application and began receiving telephone solicitations from various mortgage lenders. The purpose of filling out this inquiry was to locate a lender who would be able to lower her existing monthly payment and provide her with cash at closing. Quicken Loans was the prospective lender satisfying the borrowing goals of Lourie Jefferson.

(17) Lourie Jefferson decided to work with Quicken Loans because of the personality of its loan agent, Heidi Johnson and her expressed willingness to help Lourie. The loan process began on May 16, 2006.

(18) On May 16, 2006, Lourie Jefferson, with the assistance of Quicken Loans, completed the Client Information Summary as part of the loan origination process. On this form is listed the "Anticipated Property Value" of $250,000 for the Property. It is unclear as to who provided the "Anticipated Property Value."

(19) On May 17, 2006, Quicken Loans sent Lourie Jefferson a document entitled "Things We Need From You." The purpose of this document was to obtain certain documents that would allow Quicken Loans to make an informed decision regarding this potential loan.

(20) On or about Monday, May 22, 2006, Quicken Loans received the documents requested from Lourie Jefferson. The very next day, Quicken Loans requested that TSI arrange for a full appraisal on the Property. TSI is a vendor that handles the ordering of appraisals for numerous lenders across the country, including Quicken Loans.

(21) On May 23, 2006, TSI uploaded this information, including a request for a full appraisal, onto its computerized appraisal port. Included on this order form was the "Applicant's Estimated Value."

(22) TSI's order was shared on the internet by way of its appraisal port with independent-contractor appraisers who were licensed to perform appraisals in West Virginia. This order was ultimately accepted by former co-defendants Appraisals Unlimited, Incorporated ("Appraisals Unlimited") and Dewey Guida ("Guida").

(23) 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.

(24) The monthly payment that Lourie Jefferson was quoted was higher than what she had expected based on the "pop-up" advertisement. As a result, she became hesitant to consummate the loan.

(25) On May 30, 2006, Lourie called Quicken and stated "that she no longer wants to go through with the loan."

(26) The appraisal of $181,700 calculated by Guida was approved on May 31, 2006.

(27) On June 1, 2006, Quicken informed Lourie Jefferson that a satisfactory appraisal of the Property was secured and Quicken was ready to move forward. Lourie Jefferson did not respond to this or any subsequent message regarding the consummation of the loan.

(28) On June 6, 2006, a Quicken loan note states as follows: "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 ("Loan to Value") and will have closure today."

(29) 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.

(30) Heidi Johnson inquired of Lourie Jefferson whether there would be anything else she needed because the money ($181,700) could be made available.[4] Lourie Jefferson informed Heidi Johnson that she intended to purchase a new automobile and pay off other existing debt with some of the loan proceeds.

(31) The *quid pro quo* of the loan transaction between Quicken Loans and Lourie Jefferson, and which Lourie relied upon, was that in accepting the loan offer by Quicken, she would be able to refinance the loan within three (3) to four (4) months from the date of closing, July 7, 2006.

(32) The loan closing occurred on July 7, 2006 at Lourie Jefferson's home.

(33) The only professional in attendance at the closing was a "notary public" on behalf of Quicken Loans.

[4] The predicate for this statement was that the Guida appraisal of the Property ($181,700) was high enough to permit Quicken to increase its loan offer to Lourie Jefferson because the original Quicken loan offer was $112,000.

(34) On or about July 5, 2006, two (2) days prior to closing, Quicken Loans delivered two identical packages of loan documents to Lourie Jefferson – one for review and the other for execution.

(35) Plaintiff received the loan package a day or two prior to her appointment with defendant's closing agent, but did not have an opportunity to review the documents prior to the closing meeting due to her work schedule and family obligations. When the closing agent arrived to witness plaintiff's execution of the documents, they were marked with "sign here" stickers, and the closing directed plaintiff to sign each of the places indicated. The closing took only approximately 15 minutes. Plaintiff felt rushed and the closing agent was not able to answer plaintiff's questions regarding the loan and the loan documents. Plaintiff did not closely read the closing documents in any detail.

(36) Lourie Jefferson's reliance on the promise of refinancing and the representation regarding the value of her home, as conveyed by Quicken Loans, was justified.

(37) In October 2006, Lourie Jefferson contacted Heidi Johnson to start the promised refinancing process. However, Heidi Johnson was not responsive to Lourie Jefferson's repeated requests.

(38) Quicken's telephone records confirm that in October 2006, Lourie Jefferson made numerous calls to Quicken and, specifically, Heidi Johnson without any success. The single returned call from Heidi Johnson to Lourie Jefferson occurred on October 11, 2006 and lasted 37 minutes. Nothing in the record reveals the substance of this conversation.

(39) Ultimately, Quicken Loans refused to refinance the Lourie Jefferson loan. The refusal to refinance constitutes a breach by Quicken of a pivotal ingredient of the loan transaction.

C. **Points and Closing Costs**

(40) On July 7, 2006, Lourie Jefferson closed on the $144,800 loan with Quicken Loans.

(41) Prior to the closing, Quicken informed Lourie Jefferson that if she paid more money toward the closing costs that the interest rate on the loan would be reduced.

(42) Lourie Jefferson, did in fact, pay more money toward the closing costs calculated as a 1.5 percent premium in what Quicken Loans labels as "discount points." Notwithstanding the increased payment, the interest rate on the loan was not reduced. The only party to benefit from the increased payment was Quicken in the amount of $2,100.

(43) The manipulation of the increase of 1.5 percent "discount points" misrepresented to Lourie Jefferson that her interest rate would be reduced.

D. **The Balloon Feature**

(44) This loan contained a feature known as a 40/30 balloon payment.

(45) This loan amortizes over 40 years but becomes due after 30 years leaving a large balloon payment. Here, according to the Truth in Lending Disclosure, Lourie Jefferson was required to make 360 monthly payments ranging from $1,144 to $1,582 and totaling $550,084. Thereafter, she would still owe a $107,015 lump-sum balloon payment to repay a $144,800 loan. The total finance charge for this loan was estimated at $520,065.61, which is nearly four times the amount financed.

(46) Lourie Jefferson did not know about the balloon feature of this loan until the time of the closing.

(47) In West Virginia, there is a statutory requirement to conspicuously disclose any balloon payment, including, specifically stating on the Note itself the amount of the balloon payment and its due date.

(48) In the case *sub judice*, the Note does not state the amount of the balloon payment or its due date.

II. The Appraisal and the Appraisal Review

A. The Appraisal

(49) The Property was appraised by Dewey Guida (Guida), a non-resident of Ohio County, West Virginia, where the Property is located. Guida was selected by Quicken through TSI, a wholly-owned subsidiary of Rock Holdings which is also the parent company of Quicken.

(50) At the time the assignment was made to Guida, TSI provided Guida with an estimated value of the Property. No legitimate purpose is served by providing an appraiser with an estimated value of a property. The only purpose could be to inflate the true value of the property. The estimated value that was provided to Guida was $262,500, representing nearly $200,000 more than the highest sale in East Wheeling, the neighborhood where the property was located.

(51) The Plaintiffs' expert, Troy Sneddon (Sneddon), a qualified licensed appraiser, performed a retrospective appraisal of the subject property at an effective date of May 26, 2006, the same effective date used by Guida. The result of Sneddon's appraisal was $46,000 as a duplex and $42,000 as a single family home.

(52) In doing so, Sneddon properly concluded that the subject property was a duplex as opposed to a single family home.

(53) Sneddon used the comparable sales approach in a neighborhood similar to the one in which the Property was located. Comparable sales should be the most similar to the Property, primarily in a similar location, because location is of the utmost importance in real estate appraising.

(54) Sneddon defined the neighborhood in which the Property was located as Route 2 to the East, the Marshall County line to the South, Wheeling Island to the West, and North River Rd. to the North, because these areas are considered to be substitutes by the typical buyer in the market for East Wheeling. Within his defined neighborhood, Sneddon located a number of sales and chose those most similar to the subject property.

(55) Sneddon valued the property using both the comparable sales approach and income approach. For the comparables sales approach, his comparables came from Main Street in Wheeling, 14th Street in Wheeling, and North Huron Street in Wheeling. For the income approach, his comparables came from Eoff Street, 24th Street, and Indiana Street, all in Wheeling.

(56) The proper fair market value for the Property was $46,000 as opposed to Guida's appraisal of $181,700

B. <u>The Appraisal Review</u>

(57) At the time this loan was made, Quicken Loans employed eighteen (18) appraisal analysts for the entire country who devote approximately 20 to 25 minutes for each appraisal review.

(58) During the review process, Quicken Loans ignored obvious flaws in the inflated Guida appraisal. Furthermore, Quicken violated its own appraisal review standards and the

Uniform Standards of Professional Appraisal Practice (hereinafter "USPAP"). The flaws and ignored standards are:

(a) A simple review of the pictures comparing the "comparable properties" to the subject property should have revealed red flags. The comparables appeared to be architecturally more sophisticated, in better condition and had more expensive landscaping, all of which indicated that the comparables were in a very different neighborhood. Likewise, Quicken through Mr. Lyon conceded that Comparable 2, the Forest Hills property, was a different structure and newer property compared to the subject property. Notably, Comparable 2 was the property that Guida represented to be the most comparable to the subject.

(b) The appraisal violated both Quicken's and USPAP by not including a sketch of the home with exterior dimensions.

(c) The map plainly shows the three comparable properties on one side of a major highway and the subject Property on the other.

(d) Guida notes the neighborhood to be downtown. However, the comparables are not selected from the downtown area.

(e) Guida notated that the neighborhood price range was $30,000 to $200,000 with a predominant value of $65,000. Then he proceeded to appraise the Property for $181,700 with no explanation of the reasoning why the subject Property is so drastically different from the predominant home in the area. This is a violation of USPAP/industry standards and was factually inaccurate as homes do not sell for $200,000 in East Wheeling.

This variance between the subject and the predominant value of the neighborhood would in essence be a red flag and should cause the lender to call the appraiser requesting an explanation.

(f) Guida defined the neighborhood boundaries as 12th Street. Accordingly, all comparable sales should have come from 12th Street. However, none of them came from 12th Street.

(g) Guida failed to properly conduct the highest and best use test and labels the property as a single unit dwelling as opposed to a duplex.

(h) The condition of the home and effective age of the home listed by the appraiser were false.

(i) Guida notes that there were only 3 comparables sales in the subject neighborhood within the past 12 months and the sales range from $180,000 to $220,000. However, $220,000 is beyond Mr. Guida's range for one-unit housing of $30,000 to $200,000. This manifests extreme inconsistency on the part of Guida.

(j) Guida engages in what is called a line adjustment for location in which he acknowledges that the location for each comparable was inferior to the Property.

(k) Guida considered Comparable 2, (the Forest Hills property), as the most comparable to the Property. However, because Comparable 2 was adjusted more than Comparable 1, (the Hamilton Avenue property), Comparable 1 should have been given the most weight.

(l) Guida utilized a cost approach to support his appraised value. The cost approach was inappropriate because the cost of rebuilding the home was irrelevant to its market value and, moreover, accrued depreciation cannot be accurately estimated by the appraiser for a home of this age.

(m) It was not typical to have a home of this price built on a lot valued at only $5,000.

(n) Guida failed to identify the Property as having two sets of utilities in his report.

(o) In reviewing the map included in Guida's appraisal, an appraisal review analyst should immediately recognize that the comparables come from a different neighborhood than where the subject is located. Furthermore, a number of boundaries would be immediately recognized by a reader of the report. Both Route 2 and Interstate 70 separate the subject Property from the comparables.

(p) In reviewing the pictures included within Guida's report, the comparables appear to be in wooded areas with grassy lots, they appeared to be on side streets rather than on the main streets, and not in a more populated, downtown area of which the subject Property is pictured.

(59) The net effect of the negligently performed appraisal review is that all the errors of omission and commission caused a misleading and distorted report that should not have been used as a basis for approving this loan. The misleading appraisal, which was negligently performed, gave Lourie Jefferson a false sense as to her ability to repay this loan.

(60) It was the intention of Quicken Loans, after the closing of this loan, to not service the loan but instead sell the loan to a third-party. The negligently performed appraisal review facilitated the sale of this loan by giving any third-party purchaser a false sense as to the value of the Property.

(61) The inability to sell the loan to a third-party does not excuse Quicken's motivation to obtain a misleading and inflated value of the property.

III. Quicken's Causation Expert

(62) Quicken offered an expert in accounting and finance, Morgan Winfree, to opine based solely on the actual payment history, that Mrs. Jefferson would have also defaulted on the loans that she refinanced with Quicken had the subject loan not closed.

(63) However, the possibility that Lourie Jefferson might have defaulted on her outstanding debt had she not refinanced with Quicken Loans does not relieve Quicken from the cumulative effect of its misconduct in this transaction which is the subject of this litigation.

CONCLUSIONS OF LAW

Plaintiffs' have alleged the following counts against Quicken Loans: (1) Unconscionability (W. Va. Code § 46A-2-121); (2) Breach of Covenant of Good Faith & Fair Dealing; (3) Unfair and Deceptive Acts (W. Va. Code § 46A-6-104); (4) Fraud; (5) Illegal Appraisal; and (6) Illegal Balloon Note (W. Va. Code § 46A-2-105). The Plaintiff's are also seeking punitive damages within the boundaries of Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895).

Each of these counts requires that Plaintiffs prove their case by a preponderance of the evidence except for fraud, which requires proof by clear and convincing evidence. (Note:

Plaintiffs recently dropped their Intentional Infliction of Emotional Distress and Negligent Misrepresentation claims.)

I. Unconscionability

(1) Plaintiffs' first count is Unconscionability, which is governed by W. Va. Code §46A-2-121. The statute provides, in pertinent part:

> (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.
>
> (2) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.
>
> (3) For the purpose of this section, a charge or practice expressly permitted by this chapter is not unconscionable.

(2) "A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract." Syl. Pt. 4, Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co., 186 W.Va. 613, 413 S.E.2d 670 (1991).

(3) "An analysis of whether of contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of

the contract as a whole." Syl. Pt. 3, Troy Mining Corp. vs. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986).

(4) The Court **CONCLUDES** the loan was induced by unconscionable conduct due to the following:

(a) The false promise of refinancing;

(b) Introducing a balloon payment feature at closing;

(c) Failing to properly disclose the balloon payment;

(d) Falsely representing that the plaintiffs were buying the interest rate down; and

(e) Negligently conducting the appraisal review and failing to realize the highly inflated appraisal from Guida;

(5) Additionally, the Court **CONCLUDES** the loan contains several unconscionable terms:

(a) The loan included excessive closing costs of $8,889, which included fees to Quicken of $5,792 and $575;

(b) Quicken charged a "loan discount" of $5,792 without a corresponding reduction in the interest rate or any benefit to Mrs. Jefferson;

(c) A balloon payment of $107,015 that was not properly disclosed under W.Va. Code §46A-2-105(2).

(d) Lastly, this loan was based on an appraisal of $181,700 when the proper fair market value of the Property was $46,000

(6) The Court **CONCLUDES** that under these circumstances, this product in and of itself was unconscionable.

(7) Prior to refinancing with Quicken, Lourie Jefferson had approximately $25,000 in unsecured debt, along with her outstanding mortgage to CitiFinancial. The Quicken loan converted the $25,000 in unsecured debt to secured debt and raised her secured monthly debt obligation from $578 to $1,114; thus, putting the plaintiffs' home at risk. The net effect of this conversion is unconscionable.

(8) Having concluded that the loan was induced by unconscionable conduct and contained grossly unfair and unconscionable terms, the Court **CONCLUDES** the Note and Deed of Trust are unenforceable as a matter of law.

(9) The Court **CONCLUDES** the Plaintiffs are entitled to restitution of payments made to the defendant in the amount of $17,476.72.

(10) The Court **CONCLUDES** the Plaintiffs are entitled to reasonable attorney fees and litigation costs under W.Va. Code §46A-5-104.[5]

(11) The defendant and its successors and assigns shall take action consistent with the Court's Order to reflect the termination of the Deed of Trust.

(12) The defendant, Quicken and its successors and assigns, are hereby enjoined from attempting to collect any future payments under the loan.

II. Good Faith and Fair Dealing

The Plaintiffs' second count is Breach of Covenant of Good Faith and Fair Dealing, which has not been applied to a lender/borrower relationship in West Virginia, will not be addressed in this Memorandum of Opinion and Order.

[5] The Plaintiffs were asking this Court to assess a civil penalty in the amount of $1,000 pursuant to W.Va. Code §46A-5-101 and 106. However, a reading of the statute reveals that it applies only to violations of consumer leases and not consumer loan transactions. *See Mallory v. Mortgage America, Inc.*, 67 F.Supp.2d 601 (S.D. W.V. 1999)

III. Unfair and Deceptive Acts

(1) Under W.Va. Code §46A-6-104, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." W.Va. Code §46A-6-102 includes a non-exclusive list of unfair methods of competition and unfair or deceptive acts or practices. This list includes:

> (K) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reduction;
>
> (L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;
>
> (M) The act, use or employment by any person of any deception, fraud, false pretense, false promise of misrepresentation, or to concealment, suppression or omission of any material fact with the intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been mislead, deceived or damaged thereby;
>
> (N) Advertising, printing, displaying, publishing, distributing, or broadcasting or causing to be advertised, printed, displayed, published, distributed or broadcast in any statement or representation with regard to the sale of goods or the extension of consumer credit including the rates, terms or conditions for the sale of such goods or the extension of such credit, which is false, misleading or deceptive or which omits to state the material

information which is necessary to make the statement therein not false and misleading or deceptive.

(2) The Court **CONCLUDES** that the defendant engaged in unfair methods of competition and unfair or deceptive acts or practices in the following manners:

(a) Representing to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a "loan discount" on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken;

(b) Not disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment at closing; and

(c) Conducting a negligent appraisal review and approving a loan based on a grossly inflated appraisal.

(3) The Court hereby **CONCLUDES** the Note and Deed of Trust are unenforceable as a matter of law.

(4) The Court **CONCLUDES** the Plaintiffs are entitled to restitution of payments made to the defendant in the amount of $17,476.72.

(5) The Court **CONCLUDES** the Plaintiffs are entitled to reasonable attorney fees and litigation costs under W.Va. Code §46A-5-104.

(6) The defendant and its successors and assigns shall take action consistent with the Court's Order to reflect the termination of the Deed of Trust.

(7) The defendant, Quicken and its successors and assigns, are hereby enjoined from attempting to collect any future payments under the loan.

IV. Fraud

(1) The essential elements in a fraud action are: (a) That the act claimed to be fraudulent was the act of the defendant or induced by him; (b) That it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (c) That he was damaged because he relied upon it. Lengyel v. Lint, 167 W.Va. 272, 280 S.E.2d 66, Syl. pt. 1 (1981).

(2) The Court is mindful of the ruling in England v. MG Investments, Inc., 93 F.Supp.2d 718 (S.D. W.Va., 2000), in which the district court denied summary judgment to a lender that had no intent of living up to its promise to reduce a potential borrower's interest rate after one year of timely payments. The court upheld a cause of action for fraud despite the fact that the borrower executed closing documents which were inconsistent with that promise.

(3) The Court **CONCLUDES** the loan was induced by fraudulent representations and other fraudulent conduct of the defendant Quicken due to the following:

(a) Intentionally promising Lourie Jefferson it would refinance her within 3 to 4 months from the date of the closing and get her into a more affordable loan upon which she reasonably relied to her detriment in accepting the loan. Quicken had no intent at the time this misrepresentation was made of refinancing Mrs. Jefferson. Instead, the misrepresentation was made to prevent Mrs. Jefferson from walking away from the loan.

(b) Representing to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a "loan

discount" on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken; and

(c) Not disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment amount and due date at closing.

(4) Having found Quicken liable for fraud, the Court **CONCLUDES** the Note and Deed of Trust are unenforceable as a matter of law.

(5) The Court **CONCLUDES** the Plaintiffs are entitled to restitution of payments made to the defendant in the amount of $17,476.72.

(6) The Court **CONCLUDES** the Plaintiffs are entitled to reasonable attorney fees and litigation costs under W.Va. Code §46A-5-104.

(7) The defendant and its successors and assigns shall take action consistent with the Court's Order to reflect the termination of the Deed of Trust.

(8) The defendant, Quicken and its successors and assigns, are hereby enjoined from attempting to collect any future payments under the loan.

V. Violation of W.Va. Code §31-17-8(m)(8) – (Illegal Appraisal)

(1) Plaintiffs' fifth count is Illegal Appraisal (W. Va. Code § 31-17-8(m)(8)). The West Virginia statute provides, in pertinent part:

> (m) In making any primary or subordinate mortgage loan, no licensee may, and no primary or subordinate mortgage lending transaction may, contain terms which:
>
> (8) Secure a primary or subordinate mortgage loan in a principal amount that, when added to the aggregate total of the outstanding principal balances of all other primary or subordinate mortgage loans secured by the same property, exceeds the fair market value of the property on the date that the latest mortgage loan is made.

> For purposes of this paragraph, [1] a broker or lender may rely upon a bona fide written appraisal of the property made by an independent third-party appraiser, [2] duly licensed or certified by the West Virginia real estate appraiser licensing and certification board and [3] prepared in compliance with the uniform standards of professional appraisal practice.

(2) If the plaintiff establishes that the fair market value of the property exceeds the amount of the mortgage loan, the statute provides the defendant with an affirmative defense for which it has the burden:

> (1) A broker or lender may rely upon a bona fide written appraisal of the property made by an independent third party appraiser, (2) duly licensed or certified by the West Virginia Real Estate Appraiser Licensing and Certification Board and (3) prepared in compliance with the Uniform Standards of Professional Appraisal Practice.

(3) The Court **CONCLUDES** that the mortgage loan between Quicken and the Plaintiffs exceeds the fair market value of their property.

(4) The Court further **CONCLUDES** that the defendant cannot meet its burden of proving the appraisal was bona fide, that it was made by an independent appraiser or that it was prepared in compliance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), for the following reasons:

(a) The testimony of Sneddon regarding the non-compliance with USPAP is undisputed.

(b) There is sufficient evidence that the appraisal was not bona fide, including: numerous red flags appear on the face of the appraisal; and several indications that the appraisal was grossly inflated within the loan file itself.

(5) Having established a violation of W.Va. Code §31-17-8(m)(8), the Court pursuant to W.Va. Code §31-17-17(a), **HEREBY** cancels the mortgage loan obligation of the Plaintiffs. The Note and Deed of Trust are void.

(6) The Court **CONCLUDES** the Plaintiffs are entitled to restitution of payments made to the defendant in the amount of $17,476.72.

(7) The Court **CONCLUDES** the Plaintiffs are entitled to reasonable attorney fees and litigation costs under W.Va. Code §31-17-17(c).

(8) The defendant and its successors and assigns shall take action consistent with the Court's Order to reflect the termination of the Deed of Trust.

(9) The defendant, Quicken and its successors and assigns, are hereby enjoined from attempting to collect any future payments under the loan.

VI. Violation of W.Va. Code 46A-2-105(2) – Balloon Payments

(1) W.Va. Code 46A-2-105(2) states in pertinent part:

> With respect to a consumer credit sale or consumer loan whenever any scheduled payment is at least twice as large as the smallest of all earlier scheduled payments other than any down payment, any writing purporting to contain the agreement of the parties shall contain the following language typewritten or printed in a conspicuous manner. THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS: Followed, if there is only one installment which is at least twice as large as the smallest of all earlier scheduled payments other than any down payment, by: AN INSTALLMENT OF $_____ WILL BE DUE ON _____or, if there is more than one such installment, by: LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS: (The amount of every such installment and its due date shall be inserted).

(2) The Court **CONCLUDES** that the balloon note at issue here does not comply with W.Va. Code §46A-2-105 as it lacks the most pertinent disclosure, that being the amount of the balloon payment and its due date.

(3) The Court **CONCLUDES** the Plaintiffs are entitled to reasonable attorney fees and litigation costs under W.Va. Code §46A-5-104.

VII. Punitive Damages

(1) Under Syllabus Point 4 of Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895), "[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous."

(2) The Court **CONCLUDES** that the cumulative effect of Quicken Loans misconduct, as specified in the findings of fact, compels the conclusion that *a* punitive damage award is warranted in this case within the template expressed in Syl. Pt. 4 of Mayer v. Frobe, supra. (*see* Alkire v. First Nat. Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996)).

(3) Therefore, this action will continue for a determination of *the* punitive damage award within the meaning of Syllabus Point 5 of Alkire v. First Nat. Bank of Parsons, supra, on **June 28-29, 2010** starting at **8:30 a.m.**

VIII. Attorney Fees and Costs

(1) As stated in the above Conclusions of Law, this Court finds that attorney's fees and litigation costs are warranted in this case.

(2) Therefore, this action will continue for a determination of reasonable attorney fees and litigation costs within the template provided in Syllabus Point 4 of Aetna Cas. & Ins. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986) on **June 28-29, 2010** starting at **8:30 a.m.**

The Court notes the objections of the defendant, Quicken Loans, to the findings of fact and conclusions of law set forth in this Memorandum of Opinion and Order.

IT IS SO ORDERED.

Entered this 25 day of February, 2010.

THE HONORABLE ARTHUR M. RECHT

The Circuit Clerk of Ohio County is directed to send an attested copy of this MEMORANDUM OF OPINION AND ORDER to the following counsel of record:

A copy, Teste:

Brenda L. Miller
Circuit Clerk

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

Richard W. Gallagher, Esq.
ROBINSON & MCELWEE, LLP
PO Box 128
Clarksburg, WV 26302

Stephen W. King, Esq.
James P. Feeney, Esq.
Dykema Gossett, PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304-2820