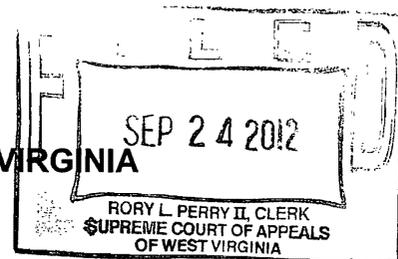


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 12-0546



**CAVALRY SPV I, LLC, CAVALRY SPV II, LLC;
CAVALRY INVESTMENTS, LLC; and
CAVALRY PORTFOLIO SERVICES, LLC,**

Defendants Below, Petitioners

v.

**CIVIL ACTION NO. 10-C-994
Kanawha County Circuit
Court**

**STATE OF WEST VIRGINA, ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,**

Plaintiff Below, Respondent.

**STATE'S RESPONSE TO PETITIONER'S PETITION FOR
APPEAL AND BRIEF**

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**STATE'S RESPONSE TO PETITIONER'S PETITION FOR
APPEAL AND BRIEF**

I. ASSIGNMENTS OF ERROR

The trial court did not make any errors that warrant acceptance of this appeal or reversal of the order below.

II. STATEMENT OF THE CASE

In January, 2010, the Attorney General opened an investigation of the Petitioners (collectively "Cavalry" or "Cavalry Debt Buyers") after receiving complaints and other information disclosing that Cavalry SPV I, LLC, Cavalry SPV II, LLC, and Cavalry Investments, LLC were collecting debts without a license and surety bond as required by the West Virginia Collection Agency Act ("Collection Agency Act"), specifically, W.Va. Code § 47-16-2(b) and W.Va. Code § 47-16-4(a) & (b). Inasmuch as these companies were engaged in the business of buying charged-off consumer debts for collection, they met the definition of "collection agency" as defined by the Collection Agency Act. App. at 493-94. See *also* State Tax Department's Administrative Notice 2010-19, attached as Exhibit A to the Complaint. App. at 58-59. The Attorney General also had received complaints indicating that Cavalry may also be engaging in other debt collection practices that are prohibited by the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va. Code § 46A-1-101, *et seq.*, such provisions to be found generally in W.Va. Code § 46A-2-122 through W.Va. Code § 46A-2-129a.

After informal efforts to secure Cavalry's compliance were not successful, on January 25, 2010, the Attorney General issued an investigative subpoena ("Subpoena")

as authorized by W.Va. Code § 46A-7-104 directing Cavalry to produce all documents and records pertaining to its debt collection activities in West Virginia to the Attorney General on or before February 19, 2010. A copy of the Subpoena, which is the subject of a separate appeal filed by Cavalry arising from the same Temporary Injunction issued by the trial court below (see Docket No. 11-1564), is attached as Exhibit B to the State's Complaint. App. at 60. After a brief extension was granted, Cavalry filed a written response asserting 32 general objections and failed to produce a single document in response to the Subpoena. See record in separate appeal, Docket No. 11-1564, App. at 22 therein.

In light of Cavalry's refusal to cooperate with the Attorney General's investigation, and its continued refusal to become licensed and bonded as required by the Collection Agency Act, the Attorney General commenced a civil action by filing a Complaint against Cavalry and its principals in the Circuit Court of Kanawha County on June 3, 2010. App. at 46. In its Complaint, the Attorney General asked that Cavalry be temporarily and permanently enjoined from continuing to collect debts in West Virginia without a license and surety bond as required by the Collection Agency Act and that they be enjoined from engaging in other violations of the WVCCPA. The Attorney General also asked that the Court enter an order at its first hearing compelling Cavalry to respond in full with the Subpoena. See Complaint, First Cause of Action and Prayer, App. at 6, 9.

After consideration of extensive briefing by the parties, oral argument, and an opportunity to present evidence at hearings on August 22 and 23, 2011, and September

9, 2011, the trial court entered its Order Granting Temporary Injunction Against Certain Defendants and Denying Motions to Dismiss (“Order” or “Temporary Injunction”) on October 7, 2011. App. at 4. In its Order, the trial court compelled the four Cavalry collection agencies¹ to comply in full with the Attorney General’s Subpoena within 60 days after entry of its Order. As of this date, more than nine months after full compliance was due, Cavalry has not complied with the Order compelling compliance with the Subpoena even though the Order has never been stayed. For this reason, the Attorney General has not been able to complete the investigation of Cavalry that began prior to the filing of the Complaint.

In its Order, the court also found that the State had presented some credible evidence that the Cavalry Debt Buyers had violated portions of the WVCCPA by collecting debts originally owed to others prior to the times when they were licensed to do so by the State Tax Department and, accordingly, granted the State’s motion for Temporary Injunction as authorized by W.Va. Code § 46A-7-110. The Temporary Injunction required in pertinent part:

5. The Defendants SPV I, SPV II, and Calvary [sic] Investments should be, and they hereby are, ENJOINED from engaging in any actions to collect debts acquired prior to the date that they became licensed, including but not limited to, (i) collecting or continuing to collect payments arising from oral or written agreements; (ii) prosecuting or continuing to prosecute pending collection suits; (iii) collecting or continuing to collect payments arising from judgments already entered in lawsuits; and (iv) placing or continuing to place liens or attachments on personal or real property, including garnishment of wages, arising from judgments already entered in lawsuits. In addition, SPV I, SPV II, and Calvary [sic] Investments are hereby ORDERED to release all garnishments of wages

¹ Cavalry’s affiliate, Cavalry Portfolio Services, LLC, is a defendant in the State’s case below but is not a petitioner in this appeal.

and liens or attachments filed against real or personal property prior to the time that they became licensed to collect debts in West Virginia.

6. Notwithstanding all of the foregoing, SPV I, SPV II, and Calvary [sic] Investments may receive or continue to receive payments made voluntarily by consumers to them without solicitation or effort on their part. Provided, however, all such money received shall be placed in an escrow account and the LLC Defendants shall make appropriate periodic reports accounting for such funds to the Attorney General.

* * *

9. SPV I, SPV II, and/or Cavalry Investments will send an explanatory letter to all consumers who may be affected by this Order informing them of the existence of this Order so that they may decide whether to voluntarily continue to make payments to these entities as a result of any judgments, settlement agreements, or other collection activities initiated prior to the time that they became licensed to collect debts in West Virginia. The content of the letter will be the product of mutual agreement between SPV I, SPV II, Cavalry Investments and the Attorney General.

(Emphasis added.)

After entry of the Order, Cavalry filed a motion to dissolve or, in the alternative, to modify the Order as authorized by Rule 59(e) of the West Virginia Rules of Civil Procedure, thereby suspending the running of the time for filing an appeal from the Order. Cavalry's motion came on for hearing before the trial court on February 10, 2012, along with State's motion to compel compliance with injunction and for stay of discovery pending Defendants' compliance with Attorney General's investigative subpoena. App. at 464. Although Rule 59 authorizes the movant to support its motion with affidavits and to present additional testimony and evidence, Cavalry failed to do so. Instead, Cavalry merely made new legal arguments, the same legal arguments it makes again now in this petition for appeal. See *generally* App. at 694-696.

On March 20, 2012, the court entered an order denying Cavalry's motion to dissolve or, in the alternative, to modify Temporary Injunction and also denying State's motion to compel compliance with injunction and for stay of discovery pending Cavalry's compliance with the Attorney General's investigative Subpoena. The order also declared that the court's previous ruling concerning compliance with the Subpoena shall be deemed to be a "final order" for appeal purposes and resolved the parties' dispute concerning the content of the letter to be sent to all affected consumers informing them of the existence of the Temporary Injunction previously entered by the court. App. at 464.

It is pertinent to recount the evidence presented by the parties at the Temporary Injunction hearing on August 22, 2011, that supports the basis of the trial court's decision to grant the injunction and the subsequent decision to refuse to dissolve or modify the injunction. During the hearing, the State presented the testimony and evidence of Angela B. White, a long-time paralegal employed by the Attorney General's Consumer Protection Division. Ms. White explained that she prepared and sent a letter at the direction of the undersigned counsel to the clerks of all magistrate and circuit courts in the State of West Virginia asking that they provide information about all lawsuits filed by Cavalry. This task was necessary because Cavalry had refused then, and has continued to refuse as of this date, to produce the records of the suits it filed as required by the State's investigative subpoena and as ordered by the court in its Order. Ms. White explained that she received records from 54 magistrate courts and 49 circuit courts concerning lawsuits filed by Cavalry. She compiled this information into a

database, from which she was able to make certain findings concerning Cavalry's filing of suits in West Virginia. See *generally* testimony of Angela White, App. at 474-477.

During the period beginning 1996 through September 2010 (when her affidavit was completed), she found that Cavalry filed 1,312 lawsuits in which it was awarded a total of \$3,049,391.25 against West Virginia consumers. Of the 1,312 suits filed, 743 resulted in judgments, of which 369 were judgments by default. See *generally* testimony of Angela B. White, App. at 477-480. Cavalry declined to ask Ms. White any questions on cross examination. App. at 480. Ms. White was recalled to provide further testimony later in the hearing, at which time she offered her opinion that the Cavalry Debt Buyers were the plaintiffs in 95% of the suits filed in West Virginia based on the court records she reviewed. App. at 533-34.

At the conclusion of Ms. White's initial testimony, the court afforded the parties an opportunity to present oral argument on the State's motion for Temporary Injunction, during which the undersigned counsel explained precisely the relief the State was seeking and the underlying legal justification for granting it. See *generally* App. at 481 - 490. Cavalry responded briefly to the State's argument, electing to reserve the balance of its argument after presenting the testimony of its witness. App. at 490-91.

Cavalry then presented the testimony of its one witness, Anne Thomas, who identified herself as the Compliance Counsel at Cavalry Portfolio Services. App. at 492. She explained that Defendant Cavalry Portfolio Services (which did not appeal from the Order) is the only entity that does letters, phone calls, and credit reporting for the three Cavalry Debt Buyers. App. at 494-95. She said that the Cavalry Debt Buyers do not

pay corporate net income tax in West Virginia and do not collect or withhold any tax administered under W.Va. Code § 11-10-1. App. at 497. She also testified concerning the duties of Mr. [Lewis] Harper, who is a mail clerk employed by Cavalry Portfolio Services, Inc. in connection with the issue of whether certain parties were properly served. App. at 498. Finally she testified briefly about Cavalry's training program. App. at 499.

During cross examination, Ms. Thomas offered her opinion that the Cavalry Debt Buyers are not engaging in any debt collection activity because they arrange for collection letters, collection calls, and credit reporting activities to be conducted on their behalf by its affiliate, Cavalry Portfolio Services, or by other entities. App. at 506-07. She also confirmed that Cavalry Portfolio Services does report information to credit bureaus about debts allegedly purchased by the Cavalry Debt Buyers, but this information does not identify the actual owner of the account. App. at 510-511. Ms. Thomas could not and did not dispute any of the testimony of Angela White concerning the lawsuits filed by the Cavalry Debt Buyers in West Virginia. App. at 515.

Ms. Thomas initially refused to concede that the filing of at least 1, 312 lawsuits by Cavalry in West Virginia constituted engaging in "debt collection" However, by the end of cross examination, she grudgingly admitted that the purpose of the suits was to collect debts:

Q. Do you think the filing of a lawsuit constitutes debt collection?

A. Well, I think you're asking me for a legal conclusion, but I do not think it constitutes debt collection.

Q. So what is it?

- A. I believe, and I am not familiar with West Virginia law as intimately as my lawyers are, but I do believe that you have a right, under the Limited Liability Company Act, to bring a lawsuit on your behalf.
I do not believe that's transacting business, and I do not believe it's attempting to collect a debt.
- Q. Well, if a telephone call is made to a consumer making a demand that the consumer, is that debt collection?
- A. If the demand is made by a third-party collection agency, it could be.
- Q. But what if it was made by the one who owns the debt, for example, a debt buyer? Many debt buyers conduct calls and send letters in-house; isn't that correct?

[The questioning resumed after objections by Cavalry's counsel.]

- Q. You do agree, though, that a telephone call asking a consumer to pay a delinquent debt; that's debt collection, right?
- A. It may - -

[Additional objections by Cavalry's counsel]

- Q. Well, what can it be if it's not that? What is it?
- * * *

- Q. So you don't even know what debt collection is, do you?
- A. I don't think that's a true statement.
- Q. Well - - but didn't I understand that today you testified earlier about the various things that constitute collection or not.
In fact, you testified that the three debt buyers, they don't engage in debt collection. Wasn't that your testimony?

[Objection to this question by Cavalry's counsel sustained.]

- Q. So if - - When one of the debt buyer affiliates files suit in which they are the plaintiff, if that's not debt collection, what would you call that action?
- A. That is - -

[Cavalry counsel's objection to this question as a legal characterization is overruled.]

WITNESS MS. THOMAS: My belief - - and, again, I'm not familiar with West Virginia law, but my belief is under the Limited Liability Company Act, that bringing a lawsuit in your name is not transacting business within the state and it is not debt collection.

*

*

*

- Q. Ms. Thompson [sic], when a suit is filed - - when a lawsuit is filed in West Virginia on behalf of one of the three Cavalry debt buyers, what is the goal of that legal action?
- A. The goal would presumably be for the consumer to enter into some sort of payment arrangement and payment be made.
- Q. And if no voluntary arrangement or agreement can be reached, then what would be the goal of the lawsuit?
- A. Ultimately, it would be to collect the money. How you get there, I'm sure you're aware, could be variety of ways. It depends if the consumer appears in the action or not.
- Q. And if the consumer fails to appear in the action, what would likely happen?
- A. A default judgment would likely be entered. Again, I'm not familiar with the practice in West Virginia, but I do believe that would be the next step.
- Q. Okay. And that would be a judgment - - if it was a default, it would be a judgment for the amount that the Cavalry debt buyers sued for, plus court costs; is that correct?
- A. I, again, am not aware....
- Q. Okay, but at a minimum the goal would be to obtain a judgment for the amount that was alleged to be owed in the complaint?
- A. Yes.
- Q. And once that judgment is obtained, what would be the next step by the plaintiff in that suit?
- A. To collect the judgment.

See generally App. at 517. (Emphasis added.)

Notwithstanding the trial court's refusal to dissolve, modify, or stay its Temporary Injunction, Cavalry has not complied with the Order. First, Cavalry unduly and unreasonably delayed sending the letter notifying affected consumers of the injunction, which resulted in an unknown number of consumers continuing to make payments to Cavalry after the injunction was issued. The delay in sending the letter defeated the court's purpose in permitting consumers to make voluntary payments. These payments

are now being held in escrow when the funds should have remained with the consumers.

After receiving new consumer complaints, the State discovered that Cavalry had decided on its own that it would not release the liens it filed against the homes or other real property owned by West Virginia consumers in violation of the Temporary Injunction. This conduct, which has continued to this day, is set forth in detail in the State's Petition For Contempt And Amended Petition For Contempt, filed of record with the trial court below and are now attached as Exhibits 1 and 2 to State's Motion To Supplement The Appendix.

As of this date, the trial court has declined to enter a show cause order on the petitions for contempt filed by the State. Although the court has not stated its reasons for failing to take up the petitions for contempt, it is apparent that the Court is reluctant to do so while Cavalry's two petitions for appeal are pending before this Court.

III. SUMMARY OF ARGUMENT

After failing to appeal the initial Order granting the State's motion for Temporary Injunction, Cavalry now appeals the later order entered by the court denying its motion to dissolve or, in the alternative, to modify the Temporary Injunction. Based upon the testimony and evidence presented at the August 22, 2011 hearing, it was undisputed that the Cavalry Debt Buyers had been engaging in the collection of debts in West Virginia for many years without a license and surety bond as required by the State Tax Department. The court had no difficulty reaching this conclusion, even though Cavalry's one witness, the "Compliance Counsel" for Cavalry Portfolio Services, was reluctant to

admit that the filing of lawsuits to obtain money judgments against consumers constituted debt collection. As noted above, she finally agreed that the purpose of the suit, after a judgment was obtained, was “to collect the judgment.” App. at 523. After further questioning, she acknowledged that the next step after obtaining the judgment would be to try to collect the money “through post-judgment proceedings, whatever the courts here in West Virginia would allow - - garnishments or bank attachments.” App. at 524. In light of the State’s evidence of the Cavalry Debt Buyers’ extensive debt collection activities in West Virginia, undisputed by Cavalry’s Compliance Counsel, the court had little difficulty concluding that the Cavalry Debt Buyers were collecting debts in West Virginia without a license.

Once this conclusion was reached, the only task that remained for the court was to determine whether the State had presented some credible evidence, even if disputed, that reasonable cause exists to believe that Cavalry was engaging in or is likely to engage in conduct sought to be restrained. In this case, the State alleged that the Cavalry Debt Buyers were collecting debts in West Virginia without a license or surety bond as required by the State Tax Department, which is an unfair or deceptive practice under W.Va. Code § 46A-6-104. The parties agreed that the Cavalry Debt Buyers did not obtain licenses and surety bonds to collect debts in West Virginia until October 2010, and the court so found. Thus, the State had presented evidence that the Cavalry Debt Buyers had filed at least 1,312 debt collection suits against West Virginia consumers prior to the time they were licensed to collect debts.²

² Inasmuch as the State failed to obtain records from one magistrate court and six circuit courts, it is likely that Cavalry filed more than 1,312 debt collection suits in West Virginia.

As indicated by the voluminous memoranda of law filed by the parties, including the extensive oral argument permitted by the court at its hearing on August 22, 2011, the State asserted that debt buyers such as Cavalry must be licensed to collect debts. This is so because the West Virginia Collection Agency Act, W.Va. Code § 47-16-2(b), specifically defines “collection agency” for licensing purposes as including companies that collect debts “originally due or asserted to be owed or due another....” In addition, the State Tax Department, the agency which issues the licenses, has concluded definitively that debt buyers must be licensed. See Administrative Notice 2010-19 attached as Exhibit A to the State’s complaint. App. at 58. Although the Cavalry Debt Buyers asserted belatedly that they were exempt from licensing, this was disputed by the Commissioner of the State Tax Department. See Affidavit of Craig Griffith, West Virginia State Tax Commissioner, attached as Exhibit A to State’s Second Supplemental Memorandum Of Law In Support Of State’s Motion For Temporary Injunction And Enforcement Of Investigative Subpoena. App. at 401.³

The central legal question that must guide this Court in determining the merits of Cavalry’s appeal is whether the trial court properly applied the correct standard for granting temporary injunctions under the WVCCPA as enunciated by this Court in its seminal case of *State of West Virginia ex rel. Darrell V. McGraw, Jr. v. Imperial Marketing, infra*. As explained in more detail in the Argument section below, the Court

³ The State’s position that the Cavalry Debt Buyers must be licensed and bonded to collect debts in West Virginia is set forth in great detail in various memoranda of law filed of record in the trial court below, including the following: Memorandum Of Law In Support Of State’s Motion For Temporary Injunction And Enforcement Of Subpoena, Appendix at 93; State’s Supplemental Memorandum Of Law In Support Of State’s Motion For Temporary Injunction And Enforcement Of Subpoena, Appendix at 273; State’s Second Supplemental Memorandum Of Law In Support Of State’s Motion For Temporary Injunction And Enforcement Of Investigative Subpoena, Appendix at 385.

in *Imperial Marketing* established a “deferential” standard of review of a trial court in granting temporary relief under the WVCCPA which differs significantly from the customary standard applied in West Virginia for issuing a preliminary injunction. This Court in *Imperial Marketing* held that a Temporary Injunction may be granted under the WVCCPA when the Attorney General has shown by the existence of some credible evidence, even if disputed, that reasonable cause exists to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained. Under this standard, the Attorney General need not prove that the Respondent has in fact violated the Act, but only needs to make a “minimal evidentiary showing of good reason to believe that the essential elements of a violation of the Act are imbued.” *Imperial Marketing, infra*.

A review of the testimony and evidence presented to the trial court below shows that the Attorney General easily met the *Imperial Marketing* standard.

After first failing to avail itself of the opportunity to dispute the State’s evidence before the trial court, Cavalry now embarks upon a campaign to state incredibly, almost hysterically, that the consumers who have been relieved temporarily of the obligation to make payments to the Cavalry Debt Buyers will be “harmed” by the injunction. Although Cavalry had an opportunity to present evidence to that effect, it failed to do so; instead, Cavalry apparently is of the view that if it simply restates a proposition over and over again it will be accepted by a court even without any evidence to support it.

Despite its acknowledgement of the deferential standard established by this Court in *Imperial Marketing*, Cavalry proceeds to argue its case exclusively under the

customary standard for granting injunctions in private litigation as opposed to temporary relief under the WVCCPA, the precise standard rejected by *Imperial Marketing*. This is evident by Cavalry's repeated reference to the terms "harm," "irreparable harm," or "balance of harm" throughout its petition for appeal (the State counted at least 12 such references). While these terms are pertinent to review of the issuance of a preliminary injunction in private litigation under the customary standard, they are not part of the court's analysis in granting Temporary Injunctions under the WVCCPA.

Finally, Cavalry asserts that the Order issued by the court was different from the ruling announced by the Court from the bench at the hearing and from the relief sought by the Attorney General. This is not correct and, in any event, it is a non-issue because a court only speaks by its written orders. Moreover, it is undisputed that the Cavalry Debt Buyers purchase giant portfolios of charged-off debts for collection. Even before commencement of more aggressive collection activity such as the making of collection calls or the sending of collection letters, the Cavalry Debt Buyers report their trade line to credit bureaus. As explained below, courts have held that the reporting of trade lines constitutes debt collection; thus, debt collection commences almost immediately upon acquisition of purchased accounts. Accordingly, the court quite properly held that Cavalry must be enjoined from continuing to collect debts that it acquired prior to the time that it was licensed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The trial court did not make any error that warrants acceptance of this appeal or reversal or modification of the Temporary Injunction entered below. Thus, Petitioner's

appeal should be rejected. In the event this Court decides to hear the appeal, this case should be selected for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because it involves an apparent attempt to alter the deferential standard established by this Court in its seminal case of *Imperial Marketing* in the review of temporary injunctions granted to the Attorney General under the WVCCPA, which is an issue of fundamental public importance. A ruling overturning the trial court's granting of the Temporary Injunction in this case would greatly hinder the Attorney General's effort to seek prompt and meaningful temporary relief at the commencement of actions to enforce the WVCCPA.

V. ARGUMENT

A. **The Power to Grant or Refuse to Modify, Continue, or Dissolve a Temporary or Permanent Injunction, Whether Preventive or Mandatory in Character, Ordinarily Rests In The Sound Discretion Of The Court.**

This Court held as early as 1956 that the standard of review applicable to the analysis of a temporary or permanent injunction rests in the sound discretion of the Court. Specifically, the Court in *Stuart v. Lake Washington Realty Corporation*, 92 S.E.2d 891, 906 (W.Va. 1956) held:

[U]nless an absolute right to injunctive relief is conferred by statute, the power to grant or refuse or to modify, continue, or dissolve a temporary or a permanent injunction, whether preventive or mandatory in character, ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion.

(Emphasis added.) This standard has been repeatedly followed throughout the decades. For example, the Court in *Haislop v. Edgell*, 593 S.E.2d 839, 841-42 (W.Va.

2003) held: “[i]t is clear that trial courts have great discretion when deciding to grant or deny an injunction” (emphasis added), *citing Stuart v. Lake Washington Realty, supra*. See also *Baisden v. West Virginia Secondary Schools Activities Commission*, 568 S.E.2d 32, 34 (W.Va. 2002); *Webster County Commission v. Clayton*, 522 S.E.2d 201, 205 (W.Va. 1990); and *G Corp., Inc. v. Mackjo, Inc.*, 466 S.E.2d 820, 824 (W.Va. 1995).

It is important to note that the Court in *Stuart* held that the applicable standard of review for a temporary or permanent injunction was the “sound discretion of the court” whether the injunction was “preventive or mandatory in character.” *Stuart*, 92 S.E.2d at 906. Some courts have explained that a mandatory injunction may “alter the status quo by commanding or requiring a party to perform a positive act.” See *Calvary Christian Center v. City of Fredericksburg*, 800 F.Supp.2d 760, 764 (E.D.Va. 2011). But this Court has explained:

While, in general, an injunction may not be used to remedy a past wrong, it is recognized that in cases of necessity,...or if serious hardship or injustice will result without injunction, courts have equitable authority to grant mandatory injunctions compelling a defendant to undo the wrong done, except as limited by statute or constitutional provision.

Board of Education of the County of Taylor v. Board of Education of the County of Marion, 578 S.E.2d 376, 380 n. 3 (W.Va. 2003).

Although courts have often held that a mandatory injunction requires a greater showing, the Second Circuit Court of Appeals has noted correctly that the distinction between a mandatory and prohibitive injunction is more semantical than substantive:

The distinction between mandatory and prohibitory injunctions, however, cannot be drawn simply by reference to whether or not the *status quo* is to be maintained or upset. As suggested by the terminology used to describe them, these equitable cousins have been differentiated by

examining whether the non-moving party is being ordered to perform an act, or refrain from performing. In some instances, this distinction is more semantical than substantive. For to order a party to refrain from performing a given act is to limit his ability to perform any alternative act; similarly, an order to perform in a particular manner may be tantamount to a proscription against performing in any other.

Abdul Wall v. Coughlin, III, 754 F.2d 1015, 1025-26 (2nd Circuit 1985)(emphasis added).

The Eighth Circuit Court of Appeals once observed that “the purpose and effect of these [interlocutory] injunctions were to restore and maintain the status quo that existed before the unconstitutional acts...” (emphasis added). *Love v. Atchison, T. & E.F. Ry. Co.*, 185 F. 321, 332 (8th Cir. 1911). Continuing, the court in *Love* held: “Plenary power is conferred, and the undoubted duty is imposed, upon a court of equity to issue an injunction for that purpose” (emphasis added). *Id.*

It is also important to note the important distinction between injunction sought by the State, as is the case here, as opposed to injunction in private litigation. This distinction was addressed by the court in *Securities and Exchange Commission v. Unifund SAL*, 910 F.2d 1028 (2d Cir. 1990), wherein it held “the standards of the public interest, not the requirements of private litigation, measure the propriety and need for relief in these”. *Id.* at 1035 (emphasis added), quoting *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). This same distinction has been made by the Fourth Circuit Court of Appeals in its review of the propriety of preliminary injunctions: “As the Supreme Court has said, courts of equity may go to greater lengths to give relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” *East Tennessee Natural Gas Company v. Sage*, 361 F.3d 808 (4th Cir. 2004)(internal quotations omitted)(emphasis added).

In this case, as explained further below, it was necessary for the court to order certain affirmative actions be taken by Cavalry in order to effectuate what was essentially a prohibitive injunction to ensure discontinuation of all coercive debt collection conduct. Moreover, when the necessity of protecting consumers is viewed through the prism of the public interest, it is clear that the granting of this Temporary Injunction was well within the sound discretion of the trial court.

It is also well settled that a circuit court's underlying factual findings are reviewed "under a clearly erroneous standard." See *Burgess v. Porterfield*, 409 S.E.2d 114 (W.Va. 1996), Syl. Pt. 4. This Court has defined "clearly erroneous" as follows:

A finding is 'clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

In the interest of: Tiffany Marie S., 470 S.E.2d 177 (W.Va. 1996), Syl. Pt. 1, (emphasis added).

As can be seen by the recitation of the testimony and evidence of the parties outlined in the Statement Of The Case, *supra*, the requisite findings of fact made by the trial court below are well supported and could not be found to be clearly erroneous under any circumstances. Moreover, the trial court's finding that the Attorney General has presented "some credible evidence" that the Cavalry Debt Buyers violated the WVCCPA by collecting debts without a license and surety bond, thereby necessitating

the Temporary Injunction, was equally well founded and likewise could not be deemed to be a clear showing of an abuse of discretion under any circumstances.

B. The Method Of Analysis Which Governs The Propriety And Scope Of A Temporary Injunction Under The WVCCPA Is A Deferential Standard Of Review That Deviates From The Customary Standard For Issuance Of Temporary Relief In Litigation Involving Private Parties.

In its seminal case of *State of West Virginia ex rel. Darrell V. McGraw, Jr. v. Imperial Marketing*, 472 S.E.2d 792 (W.Va. 1996), this Court held that the standard for review of injunctions sought by the Attorney General under W.Va. Code § 46A-7-110 differed significantly from the customary standard applied in review of injunctions sought in litigation by private parties. Specifically, the Court in *Imperial Marketing* held:

The method of analysis which governs the propriety and scope of an injunction under W.Va. Code § 46A-7-110 (1974) deviates from the customary standard for the issuance of temporary relief and may best be described as whether the Attorney General has shown by the existence of some credible evidence, even if disputed, that reasonable cause exists to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained. In other words, the Attorney General need not prove that respondent has in fact violated the Act, but only needs to make a minimal evidentiary showing of good reason to believe that the essential elements of a violation of the Act are in view.

472 S.E.2d at 798. See also Syl. Note 2, *id.* at 794 (emphasis added).

The Court in *Imperial Marketing* explained that the “customary standard” it was referring to that applied to the issuance of preliminary injunctions in litigation involving private parties requires that the party seeking the temporary relief:

...must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction;

(2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Imperial Marketing at 798, citing *Jefferson County Bd. Of Educ. v. Jefferson County Educ. Assn.*, 393 S.E.2d 653, 662 (W.Va. 1990), quoting further from opinions of the Fourth Circuit Court of Appeals (some internal quotations and citations omitted).

A review of the arguments that Cavalry has made in this appeal shows that it has repeatedly analyzed the Temporary Injunction issued by the trial court under the incorrect customary standard that is not applicable to review of Temporary Injunctions granted to the Attorney General under the WVCCPA. This conclusion is evidenced by Cavalry's multiple references to such terms as "harm," "irreparable harm," "balance of harm," and "likelihood of harm" throughout its brief. The undersigned counsel has counted at least 12 such instances. It is clear that Cavalry either misunderstands the correct legal standard applicable to a Temporary Injunction under the WVCCPA or seeks to mislead the Court by purposely citing the wrong standard. Of even greater concern, perhaps Cavalry's real goal is to weaken the *Imperial Marketing* standard that has served to protect the public well since it was enunciated in 1996.

In its zeal to argue the alleged injustice of the Temporary Injunction issued in this case, Cavalry argues that "[t]his is a matter of fundamental public importance, as the Attorney General files hundreds of petitions for temporary injunctive relief each year, and the overbreadth of preliminary injunctive relief can drain and/or deprive a business of considerable resources long before an adjudication on the merits has taken place." Cavalry's Brief at 8. The actual number of suits filed during the current calendar year to date in which temporary injunctions were sought is six. This is merely one glaring

example of how Cavalry has sought to inflame this Court by injecting alleged facts that are not in the record and that are in fact grossly inaccurate.

When this Temporary Injunction is reviewed calmly and soberly under the applicable legal standard enunciated by this Court in *Imperial Marketing*, it is clear that the Temporary Injunction was well within the sound discretion of the court and the findings of fact contained therein are not clearly erroneous.

C. The Temporary Injunction Issued By The Trial Court Does Not Impermissibly Alter The Status Quo.

Cavalry has sought to discredit the reasoned and well-founded Temporary Injunction issued by the trial court by the hurling of a seemingly endless stream of epithets and invective, as if simple repetition would make them true. What follows is but a small sampling of such false characterizations:

1. Cavalry asserts there is no need for an injunction because the debtors are suffering no harm. Cavalry's Brief at 10. Cavalry asserts there is no need for an injunction because the debtors are suffering no harm. If the Cavalry Debt Buyers collected debts without a license and surety bond as required by law, as alleged by the Attorney General and preliminarily found by the trial court, it is obvious that the consumers have been harmed, perhaps irreparably. In connection with this point, Cavalry also asserts "it must be remembered that the debts Petitioner purchased are obligations that the debtors did in fact incur to third parties and which they fully expect to be paying." *Id.* But Cavalry failed to produce any evidence at the hearing of the debts it purchased or of their alleged legitimacy.

In fact, the debt buying industry is notorious for filing suits against unsophisticated, unwitting consumers without providing proof that it owns the debt and in the absence of any admissible proof of the amount of the debt or that it is owed by the consumer it sued. These concerns about the debt buying industry are enumerated in detail in the scholarly article attached as Exhibit A to State's Response To Cavalry's Three Post-Injunction Motions. See Peter A. Holland, *The One Hundred Billion Dollar Problem In Small Claims Court: Robo-Signing And Lack Of Proof In Debt Buyer Cases*, Journal of Business & Technology Law (5/25/2011). App. at 435. The Subpoena issued by the Attorney General to the Cavalry Debt Buyers sought to discover whether the debts in question were legitimate, whether Cavalry had proof of ownership of the debts, and whether Cavalry had admissible proof of the amount of the debts or that the debts were owed by the consumers as alleged. But, as has been alleged in various pleadings below (i.e., Petition For Contempt and Amended Petition For Contempt), Cavalry has refused to comply with the Subpoena despite being ordered to do so by the court. Thus, these potential concerns about the Cavalry Debt Buyers remain under investigation and no conclusions about these possible violations may be reached until the Cavalry Debt Buyers produce the subpoenaed records.

In this same vein, Cavalry asserts "the Attorney General did not challenge the legitimacy of the underlying debts in its Complaint." Cavalry Brief at 10. As previously stated, the Attorney General has subpoenaed records that would shed light on the legitimacy (or lack of legitimacy) of the underlying debts. Cavalry cannot on the one hand refuse to produce subpoenaed records while saying on the other hand that the

Attorney General did not challenge the legitimacy of the underlying debt. Yet, that is precisely what Cavalry has done here.

2. There is no consumer protection component to the licensing statute and therefore it doesn't matter that the Cavalry Debt Buyers collected debts without a license. Cavalry Brief at 11. First, there is an extensive consumer protection component to the Collection Agency Act, which requires companies meeting the definition of "collection agencies" to be licensed and bonded with the State Tax Department and to comply with other substantive requirements. The features of the Collection Agency Act that protect both consumers and creditors alike were outlined in detail in State's Second Supplemental Memorandum Of Law In Support Of State's Motion For Temporary Injunction And Enforcement Of Subpoena. App. at 385. The trial court obviously agreed.

3. The Temporary Injunction irreparably harms petitioners by permanently divesting them of their interest and property. Cavalry Brief at 12. It is the consumers, and not Cavalry, whose interest and property have been impaired by the unlawful actions of Cavalry. If the Cavalry Debt Buyers collected debts without a license and surety bond, as alleged by the Attorney General and found by the trial court, then it had no right to bring the suits in the first place, even if the debts were legitimate, Cavalry legitimately owned the debts, and Cavalry had admissible proof of the amount of the debt and that it was owned by the consumer in question (all of which is in doubt and remains under investigation). As the State found in its investigation (without any cooperation by Cavalry) and has presented as evidence to the trial court, Cavalry filed

at least 1,312 debt collection suits against West Virginia consumers before it became licensed to collect debts; of this amount, 743 resulted in judgments against consumers totaling \$3,049,391.25, of which 369 were by default. App. at 477-78.

It is undisputed that Cavalry has sought to execute on these judgments by the filing of liens against consumers' personal property (most commonly garnishment of wages) and real property (most commonly placing liens on homes owned by consumers). The State could not provide evidence of the full extent of these practices at the Temporary Injunction hearing because Cavalry had refused to comply with the investigative subpoena as it has refused to do to this day. If the Cavalry Debt Buyers were not authorized to collect debts in West Virginia, then the judgments in question were unlawfully obtained and may be vacated as part of the final relief sought by the Attorney General in this case. Likewise, if the Cavalry Debt Buyers were not authorized to collect debts, then Cavalry should not be permitted to continue to collect such debts that were reduced to judgments, payment plans, or were subjected to other collection activities prior to the time Cavalry became authorized. The Temporary Injunction issued by the trial court does not vacate any judgments already obtained nor does it grant any other permanent relief sought by the Attorney General in this case. Instead, by enjoining Cavalry from continuing to collect the tainted debts during the pendency of the case, the Temporary Injunction preserves the status quo and prevents any further unjust enrichment to Cavalry flowing from its unlawful collection activities.

4. The Temporary Injunction harms Cavalry. Cavalry brief at 13. If the judgments obtained and the payments received by Cavalry to date were the result

of unlawful collection activities, then Cavalry has been unjustly enriched and is not entitled to any benefit from such wrongful activities. In light of the allegations of unlawful debt collection activities against it, Cavalry cannot argue that it has been harmed by the Temporary Injunction. The only purpose of the Temporary Injunction is to prevent further unjust enrichment by Cavalry and harm to aggrieved consumers pending final hearing on the merits, which is precisely what the injunction does.

Although the injunction requires certain affirmative actions by Cavalry, i.e., release of liens on personal and real property, these affirmative actions are intended only to effectuate the prohibitive effect of the injunction. Were the court to permit Cavalry to retain liens on consumers' real and personal property pending final hearing, it would in essence be permitting Cavalry to continue to collect the debts in question, as the only purpose of those liens is to coerce consumers to pay the alleged debts.

5. The Temporary Injunction treats the judgments and settlements as void. As has been previously stated, the judgments already obtained and payment agreements already reached have not been vacated. Instead, the Temporary Injunction merely prohibits Cavalry from continuing to collect payments arising from those judgments and settlement agreements pending final hearing in the case. If the Attorney General prevails in his claims, the judgments and settlements may be voided by a final order of this Court. If Cavalry prevails, all judgments obtained and payment settlements previously reached remain intact and Cavalry will be permitted to resume collection of all such payments. The Temporary Injunction does not void the

judgments and settlement agreements; it merely enjoins Cavalry from continuing to collect payments arising from such judgments and settlements pending final hearing.

6. The Temporary Injunction radically alters the position of the parties and impermissibly divests defendants of legal rights. Cavalry Brief at 15. As previously explained, the Temporary Injunction does nothing of the kind. It is simply intended to prevent further harm to the potentially aggrieved consumers pending final hearing in this case. Were the court to permit Cavalry to continue to collect payments from consumers (even if all such payments were placed into escrow) and retain all liens on personal and real property, it would thwart the very purpose of W.Va. Code § 46A-7-110, which permits the Attorney General to seek a Temporary Injunction against continued violations of the WVCCPA pending the final hearing. It is the purpose of the WVCCPA, particularly W.Va. Code § 46A-7-110, to prevent further harm to potentially aggrieved consumers pending final hearing, as opposed to protecting the right of the alleged wrongdoer to continue its unlawful conduct throughout the litigation.

7. The status quo requires no injunction to preserve it. Cavalry Brief at 17. Cavalry argues, incredibly, that no Temporary Injunction would be needed to protect consumers from further harm during the pendency of the litigation, even if all of the Attorney General's claims are upheld. There is no harm done, Cavalry says, because all payments made by consumers could simply be returned to them at the end of the litigation (maybe two years later and subject to whether Cavalry remains in business). The only way to preserve the status quo is to enter a Temporary Injunction prohibiting the collection of further payments. Likewise, the only way to effectuate such

a Temporary Injunction is to require the further affirmative actions by Cavalry of releasing the liens on personal and real property. While Cavalry has allegedly released its garnishments of wages, it has refused to release its liens on consumers' homes. The inequity of Cavalry's refusal to release these liens is discussed in detail below.

8. Temporary Injunctions cannot be used to undo completed transactions. Cavalry Brief at 18. The Temporary Injunction issued by the trial court does not undo any completed transactions; rather, it merely prohibits Cavalry from continuing to benefit unjustly from completed transactions until the final hearing in this case. If the Attorney General prevails on the claims in his complaint, the court will likely find that the transactions are void and only then will the alleged completed transactions be undone.

9. The Temporary Injunction goes beyond what the court ordered, what the law provides for, and what the Attorney General has asked for. Cavalry Brief at 22. Cavalry alleges that the Order exceeded what the judge actually held from the bench and what the Attorney General asked for, but this is not the case. The precise "temporary relief" sought by the Attorney General in his complaint is as follows:

(b) That the Court enter a temporary order as authorized by W.Va. Code § 46A-7-110 enjoining Defendants (i) to refrain from engaging in any debt collection activities in the State of West Virginia until further or final hearing in the above civil action, including the filing of any new debt collection suits, the prosecution of any pending debt collection suits, and the continued garnishment of wages or attachment of property arising from any cases in which the Defendants have obtained a judgment; and (ii) to notify all consumer reporting agencies to which it has reported any information about debts allegedly owed to Cavalry Investments, SPV I, SPV II, and any other unlicensed debt purchaser affiliated with Cavalry by

West Virginia consumers to delete this information from consumers' credit reports.

See Complaint, Temporary Relief, Appendix at 54-55. At the time the Attorney General filed his complaint, none of the Cavalry Debt Buyers were licensed to collect debts in West Virginia and, therefore, the Attorney General sought a total ban on all debt collection by Cavalry pending final hearing in the case. After the complaint was filed, but prior to the hearing on the Attorney General's Temporary Injunction, the Cavalry Debt Buyers decided to become licensed and bonded, which necessitated a modification in the temporary relief sought by the Attorney General. See Order, App. at 2. Because the Cavalry Debt Buyers became legally authorized to collect debts in West Virginia in October, 2010, the purpose of the temporary relief was to prohibit the Cavalry Debt Buyers from continuing to collect payments arising from debts that they acquired or on which they had commenced debt collection activities prior to the time they became licensed.

It is customary for a debt buyer to report its trade line to credit bureaus shortly after it acquires a debt. At the hearing, it was confirmed that Cavalry Portfolio Services was authorized to report the debts purchased by the Cavalry Debt Buyers to the credit bureaus. See testimony of Anne Thomas, App. at 510. Many federal courts have held in cases brought under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1601,

et seq., that the reporting of trade lines to credit bureaus constitutes debt collection.⁴ Accordingly, enjoining the Cavalry Debt Buyers from continuing to collect debts that they acquired prior to the time they became licensed constituted an appropriate and necessary provision in order to ensure discontinuation of the alleged unlawful debt collection practices.

Finally, it is well settled that a court speaks only through its orders. See *Davis v. Mound View Health Care*, 640 S.E.2d 91, 95 (W.Va. 2006)(“We have previously stated that ‘a court speaks only through its orders.’”). See also *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727, 736 (W.Va. 2000)(“[I]t is clear that where a circuit court’s written order conflicts with its oral statement, the written order controls”)(emphasis added). In this case, Kanawha Circuit Court Judge Stucky advised the parties of his ruling on the Temporary Injunction from the bench, the parties were unable to reach agreement on the wording of the order to be submitted to the court for entry. The parties ultimately submitted separate orders reflecting what they believed to be an accurate memorialization of the court’s ruling. Accordingly, much deliberation occurred before the trial court entered the Order submitted by the State, said Order being the one that Cavalry now questions in this appeal. Even if the Order did not use the precise

⁴ Reporting a debt to a credit bureau is “a powerful tool designed, in part, to wrench compliance with payment terms....” *Rivera v. Bank One*, 145 F.R.D. 614, 623 (D.P.R. 1993). See also *Ditty v. CheckRite, Ltd., Inc.*, 973 F.Supp. 1320, 1331 (D. Utah 1997)(“[I]t is clear that the practice [of reporting the trade line to credit bureaus] was also designed to provide CheckRite with additional leverage in collecting the debts created by plaintiffs’ dishonored checks”); *Akalwadi v. Risk Management Alternatives, Inc.*, 336 F.Supp.2d 492, n. 4 (D.Md. 2004)(the act of a debt collector reporting the status of a consumer debt to a credit reporting agency is an activity that would certainly appear to meet the statute’s requirement [that a communication be] in connection with the collection of a debt.” The Federal Trade Commission also agrees: “[W]e believe the reality is that debt collectors use the reporting mechanism as a tool to persuade consumers to pay, just like dunning letters and telephone calls.” Letter of Dec. 4, 1997, to Cass, reprinted in National Consumer Law Center, *Fair Debt Collection Appx. B2* at 720 (5th ed. 2004).

verbiage to describe the nature and scope of the injunction as used by the judge at the hearing, since a court only speaks by its orders, it must be viewed now as the accurate and only representation of what the court actually intended in granting the Temporary Injunction to the Attorney General.

D. The Temporary Injunction Entered By The Court Represented A Sound Exercise Of The Court's Equitable Powers To Prevent Further Harm To The Potentially Aggrieved West Virginia Consumers Pending Final Hearing In The Case.

A second decision issued by this Court involving Imperial Marketing, sometimes known as *Imperial Marketing II*, stands as this Court's seminal pronouncement on the scope and nature of the Attorney General's powers to seek equitable relief under the WVCCPA. In that case, Benjamin Swarez, an Ohio-based telemarketer, challenged the trial court's order requiring refunds to consumers who had been victimized by his company's deceptive telemarketing practices. In upholding the refund order, the Court held that the use of the phrase "other appropriate relief" in W.Va. Code § 46A-7-108 "indicates that the Legislature meant the full array of equitable relief to be available in suits brought by the Attorney General." *State of West Virginia ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799, 812-813 (W.Va. 1998)(emphasis added). It is also significant that when enacting the WVCCPA in 1974 the Legislature declared:

The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal court to the various federal statutes dealing with the same or similar matters. To this end, the article shall be liberally construed so that its beneficial purposes may be served.

See W.Va. Code § 46A-6-101(1)(emphasis added).

The long-range goal of the State's Complaint against Cavalry is to obtain a final order requiring disgorgement of the entire amount it gained from its unlawful debt collection activities. Disgorgement is an equitable remedy that has been used repeatedly by the federal courts to strip wrongdoers of "ill-gotten gains." *Federal Trade Commission v. Leshin*, 618 F.3d 1221, 1237 (11th Cir. 2010)(district court did not abuse its discretion in ordering disgorgement of gross receipts instead of profits against debt consolidation service engaged in deceptive telemarketing practices; court not required to find that company committed fraud before ordering disgorgement). The Ninth Circuit Court of Appeals explained: "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *Securities And Exchange Commission v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1113 (9th Cir. 2006). The Eleventh Circuit Court of Appeals also observed "Disgorgement is an equitable remedy designed to deprive a wrongdoer of its unjust enrichment and to deter others from violating the securities laws." *Federal Trade Commission v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996).

In light of the Legislature's intention that State courts be guided by the interpretation given by the federal court to the various federal statutes dealing with the same or similar matters, it is particularly appropriate to turn to federal courts in determining the proper scope and nature of a Temporary Injunction such as the one issued by the trial court here.

Many courts have relied upon the much-cited case of *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) in defining the broad contours of courts' power to fashion equitable relief. In *Porter*, the court noted importantly:

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake (Citation omitted.) Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' (Citation omitted.). . . In addition, the Court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. (Citation omitted.)

Id., at 398 (emphasis added). Continuing, the Court explained:

[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'

Id. (emphasis added). See also *U.S. v. Lane Labs*, 427 F.3d 219, 225 (3rd Cir. 2005) ("[w]hen a statutory provision gives the courts power to 'enforce prohibitions' contained in a regulation or statute, congress would be deemed to have granted as much equitable authority as is necessary to further the underlying purposes and policies of this statute.").

When "the public interest is involved in a proceeding," a court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Holding Co.* at 398. Likewise, a West

Virginia Court is empowered by “the great principles of equity” to grant such relief to the aggrieved consumers as may be necessary to “secure complete justice” in enforcement actions brought by the Attorney General under the WVCCPA. *Id.* at 398.

As explained above, it is the Attorney General’s intention to seek disgorgement of Cavalry’s “ill-gotten gains” resulting from its unlawful debt collection activities. But that was not the question before the court at the hearing on the Attorney General’s motion for Temporary Injunction. Rather, the objective at that hearing was to enjoin Cavalry’s continued unjust enrichment from the debt collection activity it engaged in prior to obtaining the required collection agency licenses and surety bonds. In order to accomplish that objective, it was necessary for the court to grant a Temporary Injunction prohibiting the Cavalry Defendants from collecting and continuing to collect any payments arising from lawsuits or other collection activities that occurred prior to the effective date of their collection agency licenses and surety bonds. The Temporary Injunction issued by the court was precisely the kind of relief authorized by the Legislature under the WVCCPA and intended to be granted by a court when necessary to protect aggrieved consumers from further harm during the pendency of an action within the meaning of W.Va. Code § 46A-7-110.

E. A Party That Has Willfully Failed To Comply With An Order May Be Barred By The Equitable Doctrine Of Unclean Hands From Seeking Relief From That Order

As indicated by numerous pleadings in the record below, Cavalry has willfully failed to comply with the Order issued by the court below. First, Cavalry has failed to comply with the Attorney General’s investigative Subpoena, which is the subject of a

separate appeal pending before this Court, Docket No. 11-1564. Second, Cavalry has failed to comply with a material provision of the Temporary Injunction by refusing to release the liens it placed against the homes or other real property owned by consumers arising from the judgments it obtained against them prior to the time it was licensed to collect debts in West Virginia. See Petition for Contempt and Amended Petition for Contempt, attached as Exhibits I and II to State's Motion to Supplement Appendix that the State has filed contemporaneously with this brief. See also State's Motion To Compel Compliance With Injunction And For Stay Of Discovery Pending Defendants' Compliance with Attorney General's Investigative Subpoena. App. at 697.

In this appeal, Cavalry seeks relief from the Temporary Injunction even though it has admittedly refused to comply with one of its material provisions; by this refusal, Cavalry has subjected consumers to continued harm in contravention of the Temporary Injunction. It is well settled in West Virginia that a party who has engaged in inequitable conduct in connection with the same matter in which it seeks relief from the court may be denied such relief under the equitable doctrine of unclean hands. In *Gideon v. Putnam Development Co.*, 1 S.E.2d 399 (W.Va. 1939), this Court held: "Equity will not grant affirmative relief to a defendant guilty of inequitable conduct directly concerning the subject in controversy." This Court recently reaffirmed the vibrancy of this equitable doctrine in *Foster v. Foster*, 655 S.E.2d 172 (W.Va. 2007), wherein it refused to reimburse a party for an acknowledged overpayment in child support because of a past child support arrearage that had not been enforced by his ex-wife and was so old that it was past the statute of limitations for enforcement. In *Foster*, the Court noted "[e]quity never helps those who engage in fraudulent transactions, but leaves them where it finds

them.” *Id.* at 177, citing *Provence v. Provence*, 473 S.E.2d 894 (W.Va. 1996). The Court in *Foster* also noted: “This [unclean hands] doctrine has been expressly and specifically made a part of the organic law in this State.” 655 S.E.2d at 177. The Court in *Foster* also observed that the doctrine of unclean hands need not be pleaded or set up as a defense but may be applied by the court on its own whenever such inequitable conduct is disclosed. *Id.*

The equitable doctrine of unclean hands has been universally applied by federal courts and was explained best by the Supreme Court in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945):

The guiding doctrine in this case is the equitable maxim that ‘he who comes into equity must come with clean hands.’ This maxim is more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be ‘the abetter of iniquity.’

* * *

This maxim necessarily gives wide range to the equity court’s use of discretion in refusing to aid the unclean litigant. It is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion. Accordingly, one’s misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

Moreover, where a suit in equity concerns the public interest as well as the private interest of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case, it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the

public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance.

(Some internal quotations and citations omitted)(emphasis added).

Cavalry has sought to justify its willful refusal to comply with the Temporary Injunction, as stated herein by asserting that the court erred in awarding the Injunction and that compliance would subject it to irreparable harm. But Cavalry's noncompliance with the Order is not excusable under established federal and state law. The United States Supreme Court in *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947), explained the applicable principle: "[W]e find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." (Numerous citations omitted.) As evidenced by a case cited by Cavalry, this principle has also been adopted in West Virginia:

An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void, law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Eastern Associated Coal Corp. v. Doe, 220 S.E.2d 672, 679 (W.Va. 1975)(some internal citations omitted)(emphasis added). As explained herein above, Cavalry has admittedly violated the Temporary Injunction by refusing to comply with the investigative subpoena and by refusing to release the liens on consumers' real property. In doing so, Cavalry has violated the well-established principle that an order must be respected and

obeyed, even if the party believes it to be erroneous. For this reason, Cavalry now comes to this Court with unclean hands and should not be permitted to seek relief from this Court from the Order entered below that it asserts (incorrectly) to be erroneous.

VI. CONCLUSION

WHEREFORE, for all the reasons set forth herein above, the State prays that Cavalry's petition for appeal be denied.

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 12-0546

CAVALRY SPV I, LLC, CAVALRY SPV II, LLC;
CAVALRY INVESTMENTS, LLC; and
CAVALRY PORTFOLIO SERVICES, LLC,

Defendants Below, Petitioners

v.

CIVIL ACTION NO. 10-C-994
Kanawha County Circuit
Court

STATE OF WEST VIRGINIA, ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Norman Googel, Senior Assistant Attorney General, hereby certify that a copy of the foregoing **State's Response To Petitioner's Petition For Appeal And Brief** was served by personal delivery this 24th day of September, 2012, upon the following:

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