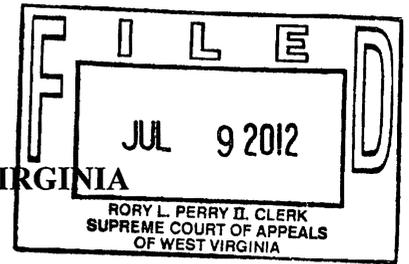


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 11-1564



**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**

Darrell V. McGraw, Attorney General,

Plaintiff Below, Respondent

**PETITIONER CAVALRY SPV I, LLC's; CAVALRY SPV II, LLC's; CAVALRY
INVESTMENTS, LLC's; and CAVALRY PORTFOLIO SERVICES, LLC'S BRIEF**

Leah P. Macia (WV State Bar No. 7742) *Counsel of Record*
Bruce M. Jacobs (WV State Bar No. 6333)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (Zip 25301)
P.O. Box 273
Charleston, WV 25321-0273
304.340.3800
304.340.3801 (facsimile)
lmacia@spilmanlaw.com
bjacobs@spilmanlaw.com

***Counsel for Petitioners SPV I, LLC; Cavalry SPV II, LLC;
Cavalry Investments, LLC; and Cavalry Portfolio Services, LLC***

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I. ASSIGNMENTS OF ERROR

1. Where West Virginia Code section 46A-7-104 authorizes the Attorney General to issue subpoenas only to the extent necessary to determine whether certain wrongful acts have occurred, did the Circuit Court of Kanawha County (“Circuit Court”) err in enforcing an investigative subpoena after the Attorney General had already made that determination, as evinced by his filing of a verified complaint?

2. Where West Virginia Code section 46A-7-104 provides authority for the Attorney General to issue subpoenas only within the context of an administrative hearing, did the Circuit Court err by ordering Petitioners to comply with subpoenas issued in the absence of such hearing?

3. Where West Virginia Code section 46A-7-104 requires subpoenas to be supported by probable cause, did the Circuit Court err in enforcing all portions of wide-ranging subpoenas that sought materials well beyond allegations of unlicensed debt collection when that was the sole allegation about which the Circuit Court made a probable cause determination, and where many request were made via interrogatories for which there is no statutory authority?

4. Even if the Subpoenas were legitimate, did the Circuit Court err by ordering Cavalry Investments and CPS to comply with them when the investigative Subpoenas were never served on Cavalry Investments or CPS?

II. STATEMENT OF THE CASE

The Attorney General has exceeded the scope of and procedural constraints regarding authority to issue and enforce investigative subpoenas. The Circuit Court condoned the Attorney General’s conduct when it ordered Petitioners Cavalry SPV I, LLC (“SPV I”); Cavalry SPV II, LLC (“SPV II”); Cavalry Investments, LLC (“Cavalry Investments”); and Cavalry Portfolio

Services, LLC (“CPS”) (collectively, “Petitioners”) to comply with the Subpoenas, even though (1) the Attorney General subpoena power had been brought to an end by the filing of a law suit; (2) the Attorney General issued the Subpoenas without an administrative hearing, in disregard of West Virginia Code section 46A-7-104; (3) the Circuit Court failed to make any probable cause determination to support the vast majority of the scope of the subpoenas; and (3) the investigative Subpoenas were not served on Cavalry Investments or CPS.

The Attorney General’s authority is limited to that derived from the West Virginia Constitution and the West Virginia Legislature. *See State ex rel. Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 313, 438 S.E.2d 338, 345 (1993). When public officers such as the Attorney General exceed or disregard their statutory authority, the courts of West Virginia provide the appropriate checks and balances to protect the public, including businesses, from abuse of that authority. When the circuit courts condone the Attorney General’s errant conduct, it falls to this Court to clearly articulate the scope of the Attorney General’s authority and procedures by which he may exercise it. Unless corrected, the Circuit Court’s errors of law will serve only to undermine the Legislature’s role as the proper source of, and limitation on, the Attorney General’s power. The Circuit Court’s October 7, 2011 order should be reversed and the investigative Subpoenas held unenforceable against Petitioners or, at the very least, unenforceable against Cavalry Investments and CPS.

A. The Subpoenas.

On or about January 26, 2010, the Attorney General served investigative Subpoenas on SPV I and SPV II¹ seeking information regarding alleged violations of the WVCCPA. (A.R. 50, at ¶ 20.) The investigative Subpoenas “concern[] an investigation into alleged unlawful debt

¹ For the time period in which the Attorney General served the Subpoenas and Petitioners responded to them, SPV I and SPV II were purchasers and holders of credit card debt, among other things.

collection, unfair or deceptive acts or practices [(“UDAP”)], and other possible violations of the [WVCCPA]” (A.R. 11.) Cavalry Investments² and CPS³ were not served with the Subpoenas. Rather, the definition section of the investigative Subpoenas included for its definition of “Cavalry SPV” the following:

Cavalry SPV I, LLC; Cavalry SPV II, LLC; Cavalry Investments, LLC; Cavalry Portfolio Services, LLC; Michael Godner; Steven Anderson; Christian Parker; Don Strauch; and their predecessors; successor(s); parent corporations, corporate subsidiaries, affiliates, associates, agents, officers, directors, managers, members, partners, owners, and employees.

(A.R. 11, at ¶ 1.)

SPV I and SPV II sought and received an extension until March 16, 2010 to respond to the investigative Subpoenas. (A.R. 50, at ¶ 21.) On March 16, 2010, both SPV I and SPV II responded to the investigative Subpoenas by providing information responsive to several of the requests contained in the investigative Subpoenas, as well as reserving appropriate objections. (A.R. 22.) As an accommodation to the Attorney General, SPV I and SPV II produced more than 45,000 pages of documents that were sought by the Subpoenas.

B. The Lawsuit.

On June 3, 2010, the Attorney General instituted an enforcement action for alleged violations of the WVCCPA by filing a “Complaint for Injunction, Consumer Restitution, Civil Penalties, and Other Appropriate Relief” (“Complaint”) against SPV I and SPV II. In addition to those entities, the Attorney General added Cavalry Investments and CPS as defendants in the Complaint. The Attorney General also named four individuals as defendants, even though the Complaint contains no allegation of any activity taken by these individuals in their individual capacities: Michael Godner (“Godner”), Steve Anderson (“Anderson”), Don Strauch (“Strauch”)

² Cavalry Investments is a purchaser and holder of different types of obligations, including credit card debt.

³ CPS is a collection agency that is licensed by the West Virginia State Tax Department.

and Christian Parker (“Parker”) (collectively, “Individual Defendants”).⁴ (See A.R. 46.)

Petitioners filed “Defendants Cavalry SPV I, Cavalry SPV II, Cavalry Investments, LLC, and Cavalry Portfolio Service’s Motion to Dismiss” (“Motion to Dismiss”) on July 9, 2010. The Individual Defendants moved to dismiss the same day. The Attorney General filed a “Motion for the Temporary Injunction and Enforcement of Investigative Subpoena” on September 22, 2010. After extensive briefing, the Circuit Court heard oral argument on the Petitioners’ “Motion to Dismiss” and the Attorney General’s “Motion for Temporary Injunction And Enforcement of Investigative Subpoena” on August 22, 2011, August 23, 2011, and September 9, 2011.

C. The Circuit Court’s October 7, 2011 Order Granting Enforcement of the Attorney General’s Subpoenas.

On October 7, 2011, the Circuit Court entered its “Order Granting Temporary Injunction Against Certain Defendants and Denying Motions to Dismiss” (“Order”). The Circuit Court ordered that “[t]he Defendants SPV I, SPV II, Cavalry Investments, and CPS, but not the individual Defendants, shall **comply in full with the Attorney General’s investigative subpoena**” (A.R. 7, at Concl. of Law ¶ 8) (emphasis added). The Order contained findings of fact, but none of that sufficiently explained why the Circuit Court deemed the investigative Subpoenas enforceable against Petitioners, particularly Cavalry Investments or CPS.

III. SUMMARY OF ARGUMENT

The Circuit Court erred when it entered an order granting the Attorney General’s request to enforce the investigative Subpoenas against Petitioners. Because the Attorney General filed a civil action in which he asserted that Petitioners had violated the WVCCPA, the Subpoenas, which were specifically investigative subpoenas, should have terminated. Section 46A-7-104 of the WVCCPA authorizes the Attorney General to issue subpoenas only to the extent necessary to

⁴ Each of the Individual Defendants is involved in the operation of one or more Petitioners.

determine whether any violations of the WVCCPA have occurred. By filing a verified complaint, the Attorney General was evincing the fact that he had concluded to his satisfaction that such violations had indeed occurred. Therefore, under the black letter of the law, his subpoena power was at an end, and any further investigation he wished to make would have to be done pursuant to the rules of civil discovery. Thus, the Circuit Court committed reversible error when it enforced the Subpoenas after the Attorney General had already concluded that violations had occurred, and was engaged in the process of prosecuting them.

Even if the investigative Subpoenas and Complaint can exist simultaneously (they cannot), the Subpoenas were improperly issued. West Virginia Code section 46A-7-104 requires that the Attorney General issue investigative subpoenas in the context of an administrative hearing. No such hearing was held. The Attorney General freely admits that he chooses not to use the statutory procedure for issuing subpoenas. (A.R. 663, at 61:15-20.) The Attorney General fails to acknowledge that statutory procedures are not options from which he can choose, but rather Legislative requirements defining the scope and procedural prerequisites for his authority. Because the investigative Subpoenas were improperly issued, they are invalid. The Circuit Court erred in ordering Petitioners to comply with the investigative Subpoenas.

Finally, even if this Court finds that the investigative Subpoenas are effective and valid, enforcement against Cavalry Investments and CPS is improper. At the September 9, 2011 motions hearing, the Circuit Court expressly limited its enforcement order to the *properly served* entities. (A.R. 665-66, at 63:21-64:2.) Without explanation, the Order compels all Petitioners to comply with the investigative Subpoenas. Cavalry Investments and CPS were never served with the Subpoenas. They were merely listed as two of several persons and/or entities in the definition section for “SPV Cavalry” in the Subpoenas served on SPV I and SPV II. Inclusion of

an entity in the definition of a term used in a subpoena does not constitute service of the subpoena upon the included entity. The Circuit Court recognized this on September 9, 2011. Its Order is in error and should be reversed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioners respectfully request that this Court grant oral argument under Revised Rules 20(a)(1), (a)(2), and a(4). The Attorney General consistently issues investigative subpoenas and attempts to enforce them by filing complaints. A ruling by this Court is needed on the proper scope of the Attorney General's investigative subpoena power and procedures for asserting it. The Attorney General also readily admits that it is his practice to issue subpoenas without holding administrative hearings, which contravenes West Virginia Code section 46A-7-104. (A.R. 663, at 61:15-20.) The Attorney General, as a public official, is charged with upholding statutes and protecting the public. It is an issue of great public importance if the Attorney General refuses to comply with those statutes which grant and define the scope of and procedural requirements for his authority. Finally, this appeal presents due process issues insofar as the Circuit Court has attempted to enforce a subpoena against two entities that were not properly served with that subpoena.

V. ARGUMENT

A. Standard of Review.

“A party to a civil action may appeal to [this Court] . . . from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims” W. Va. Code § 58-5-1. Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure,

[w]hen more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the

claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of the parties.

W. Va. R. Civ. P. 54(b).

Following entry of the Order, Petitioners moved the Circuit Court for a finding of express finality as to that portion of the Order which pertains to Petitioners' compliance with the investigative Subpoenas, and for a finding of no just cause for delay in appealing that portion of the Order. (A.R. 421.) The Attorney General stipulated to the finality of the Circuit Court's Order pertaining to Petitioners' compliance with the investigative Subpoenas. (A.R. 425, at ¶ 1.) Following a hearing on February 10, 2012, the Circuit Court granted Petitioners' motion for express finality of that portion of the Order pertaining to compliance with the Subpoenas. (A.R. 464, at ¶ 3.)

“Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the Court] appl[ies] a *de novo* standard of review.” *State ex rel. McGraw v. Pawn Am.*, 205 W. Va. 431, 432, 518 S.E.2d 859, 860-61 (1998) (quoting Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)). Because this appeal presents questions of law and statutory interpretation, a *de novo* standard is appropriate.

B. The Subpoenas Cannot Be Enforced Because They Do Not Meet the Criteria Set Out in *Hoover*.

The controlling case when a court is asked to review an administrative subpoena for enforcement is *Hoover*. In *Hoover*, the West Virginia Supreme Court of Appeals stated:

In order to obtain judicial backing for the enforcement of an administrative subpoena, **the agency must prove** that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. If these requirements are satisfied, the subpoena is presumably valid and the burden shifts to those opposing the subpoena to demonstrate its invalidity.

Syl. pt. 1, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) (emphasis added)

(stating that the trial court had committed plain error when enforcing a subpoena issued by the Board of Medicine where the subpoena was issued in excess of the Board's statutory authority).

The subpoenas here at issue meet none of these standards.

1. ***The Attorney General cannot simultaneously seek to enforce its investigatory powers under West Virginia Code section 46A-7-104 while also maintaining a lawsuit against Petitioners. Therefore, the Subpoenas Were Not Issued for a Legally Authorized Purpose.***

By instituting a civil action, the Attorney General extinguished his ability to enforce the investigative Subpoenas. The Attorney General is only empowered under the statute to issue subpoenas “to the extent necessary for [the] purpose” of “determin[ing] if the [alleged wrongful act] has been committed[.]” W. Va. Code § 46A-7-104(1) (emphasis added). West Virginia courts have recognized this limitation. *See, e.g., State ex rel. Palumbo v. Graley's Body Shop*, 425 S.E.2d 177, 182 n.2 (W. Va. 1992) (“the investigatory power of the Attorney General . . . is best compared to the authority of an administrative agency to investigate *prior* to making any charges of a violation of the law.”) The Attorney General has conducted an investigation, has determined that alleged wrongful acts have been committed by Petitioners, and has instituted an action based upon those acts. Accordingly, he has reached the limits of his subpoena power under the statute and cannot enforce it further.

The Attorney General can only act in accordance with the power given him by constitution and statute. *See State ex rel. Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 313, 438 S.E.2d 338, 345 (1993). The statute under which he claims authority for the Subpoenas specifically states that, when the Attorney General has probable cause to believe that a person has engaged in an act subject to action by him,

he may . . . make an investigation to **determine if the act has been committed** and, **to the extent necessary for this purpose**, may . . . subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation

W.Va. Code § 46A-7-104(1) (emphasis added).

The Attorney General cannot pursue an investigation under West Virginia Code section 46A-7-104(1) and, at the same time, maintain a lawsuit against Petitioners. By its very terms, West Virginia Code section 46A-7-104(1) permits the Attorney General to invoke his investigatory powers when there is “probable cause to believe that a person has engaged in an act which is subject to action by the attorney general... .” *Id.* The Attorney General is empowered, via the use of various discovery and investigation devices, to explore whether a violation of the WVCCPA has, in fact, been committed. *See* W. Va. Code § 46A-7-104 (stating the Attorney General may “make an investigation to determine if an act [that violates the WVCCPA] has been committed”).

On the other hand, the Attorney General is only permitted to bring a civil action to seek redress once he has determined that a violation of the WVCCPA has occurred. The Attorney General’s power to bring a civil action is contained in section 7-108 through 7-111 of the WVCCPA. Section 7-108 permits him to “bring a civil action to restrain a person *from violating this chapter* [the WVCCPA] and for other appropriate relief.” (emphasis added). Section 7-109

permits the Attorney General to “restrain a creditor or a person acting in his behalf *from engaging in a course of*” conduct that violates the WVCCPA. (emphasis added). Section 7-110 allows the Attorney General to obtain temporary relief in “an action brought *to enjoin violations of this chapter* or unconscionable agreements or fraudulent or unconscionable conduct.” (emphasis added). Finally, section 7-111 allows the Attorney General to bring a civil action “against a creditor *for making or collecting charges in excess of those permitted by this chapter.*” (emphasis added). Nowhere is the Attorney General given the authority to commence a civil action to *investigate if* a violation of the WVCCPA has occurred.

On June 3, 2010, when the Attorney General filed a lawsuit in the Circuit Court, he alleged that Petitioners had already committed violations of the WVCCPA. Otherwise, he would have run afoul of his obligation to ensure that every pleading is grounded in fact. W. Va. R. Civ. P. 11(b)(3). Indeed, the Attorney General verified his Complaint by his Assistant Attorney General, Norman Googel, thereby swearing that the allegations are true. (A.R. 57.) Through Mr. Googel’s verification of the Complaint, the Assistant Attorney General swore under oath that he has already concluded that violations of the WVCCPA have occurred. (*See id.*) The Circuit Court erred in permitting the Attorney General to maintain a lawsuit (which, by its initiation, signaled that the Attorney General believed violations of the WVCCPA had already occurred) while also permitting the Attorney General to enforce his investigative powers under West Virginia Code section 46A-7-104 to continue to investigate “to determine if the act has been committed.” The Attorney General either possessed sufficient facts to seek redress, or he did not.

The Attorney General’s Complaint alleges that numerous violations of the WVCCPA were committed by Petitioners. (*See* A.R. 46.) Within the same Complaint, the Attorney

General also sought to enforce its investigatory powers under West Virginia Code section 46A-7-104. (A.R. 51, at ¶¶ 29-31). Once the Attorney General opted to file suit against Petitioners, he forfeited the right to concurrently pursue his earlier investigation. The powers granted to the Attorney General by West Virginia Code section 46A-7-104 extend only so far as to allow the Attorney General to determine if a violation of the WVCCPA has occurred. *See* W. Va. Code § 46A-7-104(1).

In response to the argument that he could not simultaneously pursue an investigative subpoena and a civil action, the Attorney General claimed before the Circuit Court that “the Attorney General’s ability to enforce its subpoenas is not foreclosed by the filing of this Complaint.” (A.R. 104.) In support of his argument, the Attorney General cited various federal cases based on federal subpoena statutes bearing no resemblance to the West Virginia statute at issue here. This is vividly illustrated by his reliance on *Linde Thomson Langworthy Kohn & Vandyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1518 (D.C. Cir. 1993), where the court held that the Resolution Trust Corporation (“RTC”) could continue to pursue a subpoena because “the clear language of the order of investigation leaves no room for the conclusion that this administrative subpoena serves no other purpose.” *Linde Thomson Langworthy Kohn & Vandyke, P.C.*, 5 F.3d at 1518. The Attorney General quoted a passage from *Linde* that precisely illustrated its irrelevance to this case. The quoted passage contained the court’s finding that the federal statute empowered the RTC to issue investigative subpoenas “for purposes of carrying out *any* power, authority or duty under statute.” *Id.* at 1518. The Attorney General completely failed to acknowledge that the RTC’s subpoena statute is considerably broader than its counterpart in West Virginia. Rather than allowing the Attorney General to issue subpoenas to carry out *any* of his powers, the West Virginia statute limits subpoenas to carrying out the

Attorney General's investigative powers. W. Va. Code § 46A-7-104(1). Once the Attorney General's investigation ended and his enforcement began, his subpoena power terminated.⁵

The statutory provisions relating to the investigation of potential violations is highly specific regarding investigations, hearings and civil actions, and the Attorney General (and the Circuit Court) completely disregarded these statutes. The relevant statutes provide for an investigation, which may include a subpoena and/or testimony, notice and hearing, and then, there may be a civil action relating to the violations. For the investigation, the Attorney General has the ability to investigate potential wrong-doing. *Id.* If a party fails to “obey a subpoena or to give testimony,” then the Attorney General may “apply to the circuit court of the county in which the hearing is to be held for an order compelling compliance.” *Id.* at § 46A-7-104(3). The Attorney General is not permitted to publicize the investigation until an action or enforcement proceeding is filed. *Id.* at § 46A-7-104(4). Then, “after notice and a hearing the attorney general may order a creditor or other person to cease and desist from engaging in violations of [the WVCCPA.]” *Id.* at § 46A-7-106(1). The Attorney General may, also, “[a]fter demand, [] bring a civil action against a creditor” and seek civil penalties for violations of the Act. *Id.* at § 46A-7-111. The Attorney General may bring a civil action for injunctive relief to “restrain a person from violating” the WVCCPA. *Id.* at § 46A-7-108.

What the Attorney General may *not* do is take an instrument specified by black letter law as being used **solely** for the purpose of determining whether a violation has occurred, and continue to employ it once that determination has already been made in the Attorney General's mind. At that stage, the law provides he must move along and either hold a hearing wherein he

⁵ In the Attorney General's “Memorandum of Law in Support of State's Motion for Temporary Injunction and Enforcement of Investigative Subpoena,” the Attorney General attempted to support his position that an investigative subpoena is not mutually exclusive with filing a civil action by citing other cases. (A.R. 104-07) Each of the cases cited by the Attorney General in support is based on a statute or subpoena unlike West Virginia Code section 46A-7-104. (A.R. 254.)

can issue an order, or make a demand and file a civil action. He must not continue to harass the object with an instrument intended for investigation rather than prosecution.

Besides failing to hold a hearing regarding Petitioners' compliance with the investigative Subpoenas, the Attorney General represented, by filing the Complaint, that he had enough evidence to prove that Petitioners allegedly violated numerous sections of the WVCCPA. The Complaint was not a narrow request solely to enforce the Subpoenas as contemplated in section 46A-7-104. Rather, it included numerous causes of action and requested injunctive relief, temporary relief, and civil penalties. By requesting such relief, the Attorney General was "certifying that to the best of [his] knowledge, information and belief" that the "claims [and] other legal contentions therein are warranted." W. Va. R. Civ. P. 11(b). The Attorney General, therefore, had to have sufficient support to assert the various allegations in the Complaint. If he had the necessary support for the allegations, there was no logical necessity to enforce the Subpoenas.

Having chosen to file the civil action, the Attorney General was bound, just like Petitioners, to the West Virginia Rules of Civil Procedure. Under the Rules of Civil Procedure, the Attorney General remained entitled to information from Petitioners. However, unlike an investigative subpoena, the filing of a civil action allows Petitioners to obtain information from the Attorney General, too. In the context of the Attorney General's civil action, the parties were required to engage in a *reciprocal* discovery process.

Despite the limited scope of West Virginia Code section 46A-7-104, the Circuit Court granted the Attorney General's request for an order compelling Petitioners to comply with the Subpoenas. In its Order, the Circuit Court merely held, without explanation, that "[t]he Attorney General's request for an Order compelling the [Petitioners] to comply with his investigative

subpoena should be, and it hereby is, GRANTED.” (A.R. 7, at Concl. of Law ¶ 7.) No finding of fact or conclusion of law addressed Petitioners’ contention that the Subpoenas and the Attorney General’s Complaint were mutually exclusive under West Virginia Code section 46A-7-104. By entering an order compelling Petitioners to comply with the Subpoenas in contravention of the scope of and procedural requirements for the Attorney General’s authority under West Virginia Code section 46A-7-104, the Circuit Court erred.

2. ***The Attorney General did not issue the subpoenas in the context of an administrative hearing as required by statute. Therefore, they were not issued in accordance with proper procedures.***

In order to enforce the Subpoenas, the Attorney General must prove that he followed proper procedures when issuing them. Syl. pt. 1, *State ex rel. Hoover*, 199 W.Va. at 12, 483 S.E.2d at 12. He did not. The Attorney General did not follow the precise guidelines for administrative investigations contained in the WVCCPA. Even when permitted to pursue an administrative investigation, the Attorney General is required to conduct a hearing in conjunction with investigations under the WVCCPA and may only issue subpoenas in conjunction with that hearing. *See* W. Va. Code § 46A-7-104. West Virginia Code section 46A-7-104(1) specifically designates the Attorney General's powers to conduct that investigation:

[A]nd, to the extent necessary, . . . [the Attorney General may] administer oaths or affirmations, and, upon his own *motion* or upon request of any party, *may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation*, including the existence, description, nature, custody, condition and location of any books, records, documents or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

W. Va. Code § 46A-7-104(1) (emphasis added). The plain language of the statute contemplates that the Attorney General's issuance of a subpoena will be done in the context of an investigatory

hearing to determine potential violations of the WVCCPA. The Attorney General has failed to convene such a hearing. Thus, the Subpoenas are invalid.

While the Attorney General prefers to ignore statutory mandates, this Court should not. The Attorney General failed to issue his investigatory subpoenas in a lawful manner because he never intended to have a hearing as contemplated by the WVCCPA. Certainly, the fact he has already determined that a violation has occurred indicates that he has no intention of convening such a hearing. In fact, it is his practice to proceed without them. To accept the Attorney General's practice of issuing subpoenas completely unconnected to any hearing renders several portions of the statute meaningless. The same statute that empowers the Attorney General to conduct an investigation clearly references the requirement of a hearing, stating: "Failure of a person to obey the Attorney General's subpoena may result in the Attorney General's application to the circuit court of the county in which the *hearing* is to be held for an order compelling compliance." W. Va. Code § 46A-7-104(3). If no hearing is provided by the Attorney General in connection with the Subpoenas, then what does this language mean?

In like fashion, § 46A-7-104(1) provides that the Attorney General may:

administer oaths or affirmations, and, upon his own *motion* or upon request of any *party*, may *subpoena witnesses, compel their attendance, adduce evidence*, and require the production of any matter which is relevant to the investigation

W. Va. Code § 46A-7-104(1) (emphasis added). Permitting the Attorney General to "administer oaths or affirmations" and, upon a "motion" or a request of a "party," "subpoena witnesses, compel their attendance, [and] adduce evidence" unmistakably contemplates that the Attorney General will conduct some sort of hearing. If no hearing is provided, then in what forum may the Attorney General "administer oaths or affirmations"? To whom must the "motion" be made? Upon the request of a "party" to what? To what forum may the Attorney General "subpoena" or

“compel . . . attendance” of a witness? In what forum may evidence be adduced? The plain language of these provisions demonstrates that the WVCCPA contemplates that the Attorney General’s issuance of a subpoena will be done in the context of an investigatory hearing to determine potential violations of the WVCCPA. Absent the statutorily required hearing, the Attorney General’s investigation would be conducted in a vacuum with no opportunity for the subject of the subpoena to oppose the subpoena or otherwise protect itself from the Attorney General’s investigation.

The Subpoenas did not afford Petitioners a hearing. Until the filing of Civil Action No. 10-C-994, Petitioners had no forum in which to seek relief from the unreasonable and oppressive requirements of the investigative Subpoenas. Because the Attorney General failed to provide Petitioners with the opportunity for a hearing required by the WVCCPA, the investigative Subpoenas were issued in an unreasonable and oppressive manner that did not comply with proper procedures. When the Circuit Court enforced the Subpoenas without explanation, it committed reversible error.

3. *The Subpoenas seek information that is not relevant to the Attorney General's investigation, and seek information by unauthorized means.*

In order to enforce the Subpoenas, the Attorney General must prove that the Subpoenas' requests are relevant to the authorized purpose of the Subpoenas. The Attorney General cannot show that the documents requested are relevant. The Attorney General alleges, among other things, that Cavalry has violated the WVCCPA by: (1) collecting debts without a license in violation of W.Va. § 46A-6-104; (2) collecting debts for unlicensed debt purchasers in violation of W.Va. § 46A-6-104; (3) repeatedly contacting consumers who do not owe a debt in violation of W.Va. § 46A-2-125(d) and W.Va. § 46A-6-104; and (4) harassing consumers by telephone in violation of W. Va. Code § 46A-2-125(d).

However, the Subpoenas' requests are not limited to these alleged violations of the WVCCPA. The Attorney General seeks, in essence, every document in Cavalry's possession. Many of the requests have absolutely no relationship to the alleged violations of West Virginia law or the Attorney General's investigation. Nor did the Court make any finding of probable cause to support any request in the subpoena beyond those regarding allegations of unlicensed debt collection. (A.R. 5.) Thus, the subpoenas meet neither the relevancy requirements of *Hoover*, nor the probable cause requirement of the statute pursuant to which they were issued.

Moreover, several of the requests in the subpoena are actually in the form of interrogatories. W. Va. Code § 46A-7-104 does not provide the Attorney General authority to propound interrogatories. Therefore, the Circuit Court erred in enforcing those portions of the subpoena.

C. Even if the Subpoenas are legitimate (they are not), they cannot be enforced against companies not served with the Subpoenas, namely Cavalry Investments and CPS.

The Circuit Court's Order enforcing the Subpoenas as to all Petitioners is in error because Cavalry Investments and CPS were never served with the Subpoenas. Rather, the Attorney General improperly attempted to capture them by creating an overly broad definition of "Cavalry SPV" and then including under that purported definition every possible separate entity that might be connected to Cavalry SPV I and Cavalry SPV II, regardless of the way they are affiliated or whether SPV I or SPV II has any control over any of the other named entities. More specifically, the Attorney General defined "Cavalry SPV" to include:

Cavalry SPV I, LLC; Cavalry SPV II, LLC; Cavalry Investments, LLC; Cavalry Portfolio Services, LLC; Michael Godner; Steven Anderson; Christian Parker; Don Strauch; and their predecessors; successor(s); parent corporations, corporate subsidiaries, affiliates, associates, agents, officers, directors, managers, members, partners, owners, and employees.

(A.R. 11, at ¶ 1.) Neither “Cavalry” nor “Cavalry SVP” exist as entities. Neither SPV I nor SPV II is a parent of any of the other Petitioners. There was no evidence from which the Circuit Court could have found that service of the Subpoenas on SPV I and SPV II constituted service on Cavalry Investments and CPS. (A.R. 502, at 35:1-6; A.R. 505, at 38:2-8; 38:11-14.)

Under the WVCCPA, the Administrative Procedures Act applies except where expressly provided otherwise. W. Va. Code § 46A-7-105. West Virginia Code section 29A-5-1(b) governs the issuance of subpoenas under the Administrative Procedures Act. Specifically, West Virginia Code requires that, for the purpose of conducting a hearing in contested cases, the agency may utilize subpoenas and subpoenas duces tecum. Proper service of the subpoena or subpoena duces tecum is required:

Every such subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail, but a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

W. Va. Code § 29A-5-1(b). Section 29A-5-1(b) further provides that

In the case of disobedience or neglect of any subpoena or subpoena duces tecum **served on any person . . .** the circuit court . . . upon application by such agency . . . shall compel obedience by attachment proceedings for contempt

Id. Nothing in the WVCCPA modifies the applicability of West Virginia Code section 29A-5-1(b) to the Attorney General’s investigative subpoena powers.

Despite clear statutory instruction requiring the Attorney General to serve the Subpoenas by personal service or certified mail, the Attorney General failed to serve Cavalry Investments and CPS. “Every such subpoena and subpoena duces tecum” really means that, without exception or limitation, the Attorney General must properly serve subpoenas. Under the statute, the Attorney General is only entitled to compel the obedience of **persons served with**

subpoenas. Because the Attorney General did not serve Cavalry Investments or CPS, the Circuit Court’s Order compelling Cavalry Investments and CPS to comply with the Subpoenas is invalid.

The Circuit Court initially recognized the impropriety of enforcing the Subpoenas against Cavalry Investments and CPS. At a hearing on September 9, 2011, the Circuit Court specifically narrowed its enforcement order to only SPV I and SPV II (the Petitioners actually served with the Subpoenas): “At this time, I’m going to order the defendants – And let me state that I’m going to order the defendants who have been properly served with the investigative subpoenas to answer them” (A.R. 665-66, at 63:21-64:2.)

The Circuit Court’s Order, however, expressly includes Cavalry Investments and CPS: “The Defendants SPV I, SPV II, Cavalry Investments, and CPS, but not the individual Defendants, shall comply in full with the Attorney General’s investigative subpoena” (A.R. 7, at Concl. of Law ¶ 8.) The Circuit Court neither explains why it reversed its bench ruling in its written order, nor does it justify the inclusion of Cavalry Investments and CPS in its Order. The ruling is in error because, as the Circuit Court plainly understood at the September 9, 2011 hearing, Cavalry Investments and CPS were not properly served with the Subpoenas. Subpoena by fiat, rather than proper service, has never been the standard in West Virginia, nor should it be. The Circuit Court committed reversible error.

VI. CONCLUSION

The Circuit Court granted the Attorney General’s request that Petitioners be compelled to respond to the Subpoenas. Because the Attorney General’s request was improper, the Circuit Court erred in compelling Petitioners to comply with the Subpoenas. When the Attorney General filed a Complaint alleging that Petitioners actually violated the WVCCPA, his

investigation under West Virginia Code section 46A-7-104 ended. He no longer “suspected” violations: he verified that he knew of alleged violations. Further, the Subpoenas were improperly issued in the first instance. Instead of issuing the Subpoenas in the context of an administrative hearing, as required by West Virginia Code section 46A-7-104, the Attorney General simply issued the Subpoenas and then decided to enforce them in court. (A.R. 665-66, at 63:21-64:2.) Because the Attorney General’s power derives solely from the West Virginia Constitution and the West Virginia Legislature, the Attorney General did not have the luxury of such a choice. The Subpoenas were – and are – invalid. Finally, even if this Court finds that the Subpoenas are valid and effective, they cannot be enforced against Cavalry Investments and CPS. Service is essential to protect due process rights and to bring entities within the jurisdiction of the court. Cavalry Investments and CPS were not served with the Subpoenas and judicial fiat should not be a substitute for proper service.

Based on the foregoing, Petitioners respectfully request that this Honorable Court:

1. reverse the decision of the circuit court, and
2. grant such other and further relief as this Court deems just and proper.

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

BY: SPILMAN THOMAS & BATTLE, PLLC



Leah P. Macia (WV State Bar No. 7742) *Counsel of Record*
Bruce M. Jacobs (WV State Bar No. 6333)
300 Kanawha Boulevard, East (Zip 25301)
P.O. Box 273
Charleston, WV 25321-0273
304.340.3800
304.340.3801 (*facsimile*)
lmacia@spilmanlaw.com
bjacobs@spilmanlaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 11-1564

**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**

Darrell V. McGraw, Attorney General,

Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, Leah P. Macia, hereby certify that service of the foregoing *Petitioners SPV I, LLC's; Cavalry SPV II, LLC's; Cavalry Investments, LLC's; and Cavalry Portfolio Services, LLC's Brief and Appendix* thereto, has been made via U.S. Mail, on this 9th day of July, 2012, addressed as follows:

Norman Googel, Esquire
Assistant Attorney General
Consumer Protection and Antitrust Division
812 Quarrier Street
Charleston, WV 25301
Counsel for Respondent


Leah P. Macia (WV State Bar No. 7742)