

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
REPLY BRIEF**

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ARGUMENT

A. The Fact that the Court’s Role in Subpoena Enforcement is Limited does Not Mean it Will Hesitate to Deny Enforcement of Procedurally and/or Statutorily Unsound Subpoenas.

The Attorney General cites a number of West Virginia cases wherein the Hoover elements were never in doubt to propose that his subpoenas may never be questioned, lest his investigatory powers be meddled with. His reliance on Hoover itself is most perplexing; not only because he failed to meet its elements, but also because he misconstrues its principals. He cites Justice Cleckley’s statement that “an agency’s investigation should not be bogged down by premature challenges to its regulatory jurisdiction. As long as the agency’s assertion of authority is not obviously apocryphal . . . a procedurally sound subpoena must be enforced.” (Attorney General’s Memo, p. 9) (citing Hoover, 199 W. Va. at 20, 483 S.E.2d at 20). There are several things amiss with the Attorney General’s use of this passage. First, this is not a challenge to the Attorney General’s regulatory jurisdiction. There is no question that the Attorney General may regulate in the areas of consumer protection and trade. The question is not whether he has such authority, but whether he has complied with the statutes that govern the exercise thereof. His suggested reading would render all statutory delineations of subpoena power meaningless. For if a subpoena were issued in excess thereof, his interpretation would foreclose any challenge thereto.

Second, and tellingly, he omits from his quotation the fact that the *Hoover* court did, in fact, find the assertion of authority to be apocryphal. See id. (“As long as the agency’s assertion of authority is not obviously apocryphal, **as is the case here**, a procedurally sound subpoena must be

must be enforced.”). (Emphasis added) In Hoover, the Board of Medicine issued a subpoena to a privately retained court reporter in order to insure the accuracy of its meeting minutes rather than pursuant to a hearing and/or investigation of a violation of the article under which subpoena power was granted. Id. 199 W. Va. at 15-16, 483 S.E.2d at 15-16. The West Virginia Supreme Court of Appeals found that the Board had thereby exceeded its powers. Id. 199 W. Va. at 20, 483 S.E.2d at 20. Thus, contrary to the Attorney General’s assertion, the Court did not shrink from inquiring at the enforcement stage whether an agency had exceeded its statutory authority to issue a subpoena.

The Attorney General’s reliance on other West Virginia cases is similarly misguided. West Virginia Human Rights Comm’n v. Moore, 186 W.Va. 183, 411 S.E.2d 702 (1991) involved a subpoena issued pursuant to W.Va. Code § 5-11-8. That statute does not limit the Commission’s subpoena power to determinations of whether an act has been committed that was subject to an action by it. Nor does it contemplate subpoenas being issued only in the context of a hearing to make such determination. Thus, the challenges at issue here were simply not present in present in that case, as it involved an entirely different statutory scheme.

Furthermore, there was no question in that case that the information sought was relevant, and that all procedural requirements had been met. Id., 186 W.Va. at 188, 411 S.E.2d at 707. Thus, just because the Moore Court noted that agencies must “have latitude in pursuing investigations in furtherance of their objectives and purposes” does not mean that any old subpoena is enforceable regardless of whether it is procedurally sound and relevant. To the contrary, the Court specifically noted that subpoenas can only be enforced if they meet these criteria. Id., 186 W.Va. at 188, 411 S.E.2d at 707.

The West Virginia Supreme Court's holding in State ex rel. Palumbo v. Grayley's Body Shop, Inc., 188 W.Va. 501, 425 S.E.2d 177 (1992) is similarly uninformative regarding the issues here at bar. That case primarily concerned whether an enforcement action brought under West Virginia's anti-trust laws was quasi-criminal in nature. The language that the Attorney General quotes from Grayley comes from that portion of the opinion rather than the one having to do with subpoena power. The portion dealing with subpoena power, however, involves only the question of whether the subpoena adequately informed the respondent of what conduct constituted the alleged violation. That is not an issue in this case. Accordingly, the Attorney General's reliance thereon is misplaced. As with Moore, citation to cases in which all of the criteria for enforceability have been met cannot support enforcement of a subpoena in which they have not.

B. The Filing of a Complaint Terminates the Attorney General's Subpoena Power With Regard to the Allegations Contained Therein, Because His Subpoena Power is Limited Solely to Determining Whether Violations of the WVCCPA Have Occurred and Does Not Extend to a Generalized Investigation Thereof.

The Attorney General cites numerous cases dealing with entirely different statutes to argue that his subpoena power is practically limitless, and that he may continue to utilize it after he has filed a civil complaint. But cases interpreting grants of subpoena power under statutes that differ materially from the one from the one at bar do nothing to elucidate the contours of his own subpoena power under W.Va. Code § 46A-7-104.

Unlike the broad grants of subpoena power under the statutes at issue in his cited cases, the the West Virginia Legislature chose to strictly circumscribe the power it gave to the Attorney General. It gave him only the power to issue subpoenas "to the extent necessary for [the] purpose"

purpose” of “mak[ing] an investigation to determine if” “a person has engaged in an act [which is subject to action by the Attorney General],” and even then, he may only do so where he has probable cause to believe that such act has been committed. By filing a law suit, the Attorney General is certifying to a court that he has undertaken this investigation, and that he has determined that the defendant has engaged in specific acts that are subject to action by him. Thus, by the black letter of the law, his subpoena power is at an end with regard to those actions as soon as the complaint is filed.

This narrow grant of subpoena power bears no resemblance to the broad grants at issue in the cases he cites wherein courts found that administrative subpoenas could continue to be enforced after the commencement of a civil suit. For example, the statute at issue in National Labor Relations Board v. Bacchi, 2004 WL 2290736 (E.D.N.Y.) granted the National Labor Relations Board subpoena power “for the purpose of **all hearings and investigations**, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it.” 29 U.S.C. § 161. Thus, the NLRB may issue subpoenas not merely to determine **whether** an act has occurred, but may also use its subpoena power to investigate the extent of such violations, the resources of the entity who committed the violations, information that might inform possible penalties, attorney fees and/or damages, or any other matter whatsoever as long as that agency is of the opinion that such investigation is “necessary and proper for the exercise of its power.” Naturally, upon examining such a broad grant of subpoena power, it is not surprising that a court would determine that filing a complaint would not terminate it. But this sheds no light whatsoever on whether the Attorney General may continue to exercise his subpoena power once he has determined to his own satisfaction that a statutory violation has occurred, where making that

that determination is the sole purpose for which he is authorized to issue a subpoena.

Likewise, In re McVane, 44 F.3d 1127 (2nd Cir. 1995), which the Attorney General also cites, provides another example of a statute that grants dramatically greater subpoena power than the statute here at issue. In finding that a civil action did not terminate the FDIC's subpoena power, the Second Circuit Court of Appeals noted the breadth of that power:

The statute which grants the FDIC power to issue subpoenas places few restrictions on that power. The statute provides:

The Corporation may, as conservator, receiver, or exclusive manager and **for purposes of carrying out any power, authority, or duty** with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title....

12 U.S.C.A. § 1821(d)(2)(I)(i) (West Supp.1994). Section 1818(n) provides that the FDIC, among other powers, "shall have the power ... to issue, revoke, quash, or modify subpoenas [sic] and subpoenas duces tecum ..." 12 U.S.C. § 1818(n) (1988 & Supp. I 1989). Thus, the only statutory restriction on the FDIC's power to issue subpoenas is that they be issued "for purposes of carrying out any power, authority, or duty with respect to an insured depository institution."

Id. As with the statute in Bacchi, a court finding that subpoena power continues after the filing of a civil action under a statute that provides subpoena power for purposes of carrying out **any of an agency's powers at all** is not determinative of whether an agency that only has the power to issue subpoenas to determine whether a violation has occurred may continue to exercise that power once that determination has been made, as evinced by the filing of a complaint.

The same is true of all of the cases the Attorney General cites, each of which deals with statutes that grant far more comprehensive subpoena power, and none of which contains the narrow narrow circumscription of his own.¹ Therefore, the Attorney General's reliance on foreign case law law in order to argue that his own subpoena power is coextensive with that recognized under statutes

¹ See Linde Thomson v. Langworthy Kohn & Van Dyke v. RTC, 5 F.3d 1508 (D.C. Cir. 1993) (applying 12 U.S.C. § 1818, which provides the Resolution Trust Corporation with subpoena power “[i]n the course of or in connection with **any proceeding** under this section, or in connection with **any claim** for insured deposits or **any examination or investigation** under section 1820(c) of this title[.]); United States v. Frowein, 727 F.2d 227 (2nd Cir.) (applying 19 U.S.C. § 1509, which provides subpoena power under the Tariff Act of 1930 to be applied in “**any investigation or inquiry** conducted for the purpose of ascertaining the correctness of any entry, **for determining the liability of any person** for duty, fees and taxes due or duties, fees and taxes which may be due the United States, **for determining liability for fines and penalties**, or **for insuring compliance** with the laws of the United States administered by the United States Customs Service.”); American Microtel, Inc. & Others v. The Secretary of State of the Commonwealth of Massachusetts, 1995 WL 809575 (Mass. Super) (applying M.G.L.A. 110A § 407, providing subpoena power **for the purpose of any . . . such public or private investigations** within or outside of the commonwealth **as [the Secretary] deems necessary** to determine whether any person has violated or is about to violate any provision of this chapter or any rule or order hereunder, **or to aid in the enforcement of this chapter or in the prescribing of rules and forms** hereunder.”); F.T.C. v. Browning, 435 F.2d 96 (C.A.D.C. 1970) (applying 16 C.F.R. § 2.7 and 16 C.F.R. § 3.34(b)(1) which specifically provide separate processes for pre-and post complaint subpoenas, and determining which procedures should have been followed); Porter v. Mueller, 156 F.2d 278 (3rd Cir. 1946) (applying 50 U.S.C.A. Appendix, 922(a), which provides “that [t]he Administrator is authorized to **make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper** to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.”); Bowles v. Bay of N.Y. Coal & Supply Corp., 152 F.2d 330 (2nd Cir. 1945) (applying a statute that was “most broad, in terms authorizing the Administrator to obtain, by subpoena for documents or otherwise, ‘**such information as he deems necessary or proper, to assist him in enforcing the act and regulations thereunder.**’ 50 U.S.C.A. Appendix, § 922(a).”); Sutros Bros. & Co. V. Securities and Exchange Commission, 199 F. Supp. 438 (D.C.N.Y. 1961) (applying the Securities and Exchange Commission’s subpoena power “[f]or the purpose of **any investigation, or any other proceeding** under this chapter,” investigations being any at all that the SEC “deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association . . . or, as to any act or practice, or omission to act.”); United States v. Merit Petroleum, Inc., 731 F.2d 901 (Temp. Emr. Ct. App. 1984) (applying the Department of Energy’s Subpoena power under 10 C.F.R. § 205.8, providing him authority to subpoena any documents at all to which he is entitled); Reich v. Hercules Inc., 857 F. Supp. 367 (D.N.J. 1994) (applying 29 U.S.C. § 657), granting the Secretary of Labor subpoena power in making any inspection or investigation.”); State Dep’t of Transp. V. Electrical Contractors, Inc., 2001 WL 50736 (D. Conn. 2001) (applying statute providing Department of Transportation agency subpoena power “concerning all matters within the jurisdiction of the Department.”); and United States v. Thriftyman, Inc., 704 F.2d 1240 (Temp. Emr. Ct. App. 1983).

statutes granting entirely different and far broader powers must fail. The black letter of his own statute, W. Va Code § 46A-7-104, terminates his subpoena power upon his determination that a violation has occurred. Once he certifies to a court that the violations enumerated in a civil complaint have occurred, therefore, his subpoena power terminates with regard to those violations. violations.

Nor does it ever extend beyond that which is needed to determine the bare fact of whether a violation has occurred. Unlike the cited foreign statutes, W.Va. Code § 46A-7-104 grants the Attorney General no subpoena power whatsoever to explore the scope and exact contours of the violations, or what recovery may be obtained therefor. While those may be proper subjects for discovery in a civil action, they are not proper subjects of an investigative subpoena under the terms of W.Va. Code § 46A-7-104.

Moreover, even if he could continue to exercise his subpoena power with regard to other violations not enumerated in the complaint, he certainly may not do so without making a showing of showing of probable cause regarding those violations. See W. Va Code § 46A-7-104 (“If the attorney attorney general has probable cause to believe that a person has engaged in an act which is subject to subject to action by the attorney general, he may. . . make an investigation to determine if the act has has been committed and, to the extent necessary for this purpose, may . . . subpoena witnesses and require the production of any matter which is relevant to the investigation[.]”). Many of the the requests contained in the subpoenas here at issue have nothing whatsoever to do with the violations alleged in the complaint,² and Attorney General admits that they are basically a fishing

² Of the 23 requests contained in the subpoena and their subparts, only nos. 2, 3, 4,6-8,10-15, the first clause of 16, the body, but not the subparts of 17, 18, 20, and 23 could be said to be directly related to ascertaining whether the violations alleged in the complaint had occurred. The remainder are either unrelated to the complaint and not supported by

expedition. In fact, support of these requests he offered the precise opposite of probable cause, stating:

There are many more [violations] that we do not know, but we suspect. We hope we won't, but we suspect that we may learn of new violations when the subpoena is complied with, and we would ask the Court to order Cavalry to comply with the subpoena."

App. 652. Suspicion is not the same as probable cause. Nor did the Attorney General offer any evidence whatsoever to elevate his bare suspicion to the realm of probable cause. The only evidence evidence he offered was in support of the subpoena requests that dealt with the allegations in the complaint. As explained above, these requests became moot upon the filing of the law suit. Even if Even if his subpoena power could extend beyond the filing of a law suit with regard to allegations allegations *outside* the complaint, the statute still requires a showing of probable cause to support it. it. Because he offered none, the circuit court erred in enforcing subpoena requests regarding allegations outside the complaint in the absence of any showing of probable cause.³

C. The Attorney General's Subpoena Statute Unambiguously Authorizes the Issuance of Subpoenas Only in the Context of a Hearing.

The Attorney General entirely misconstrues Appellants' argument regarding the procedural procedural impropriety of his subpoenas. The Hoover test requires that administrative subpoenas be subpoenas be procedurally sound. W.Va Code § 46A-7-104 requires that subpoenas be issued in the the context of an administrative hearing. The Attorney General never conducts and had no intention intention of conducting an administrative hearing in this matter. Therefore, the subpoenas were

probable cause, or are calculated merely to discover the extent of violation and/or possible recovery. As discussed above, the Attorney General's subpoena power does not extend to such inquiry. That is what civil discovery is for. ³The Attorney General complains that Appellants did not offer any evidence at the hearing. However, Appellants' arguments being entirely statutory rather than factual, they were under no obligation to present evidence.

procedurally unsound. Appellants have never argued, as the Attorney General insists, that he must hold a hearing *prior* to issuing a subpoena. Nor do they argue that the Administrative Procedures Act governs all of the Attorney General's powers, or that his subpoena power is derived therefrom. Instead, they simply point out that the black letter of the statute from which he does derive his subpoena power requires that they be issued as part of an administrative process that includes a hearing. Because, by his own admission, he never has held such a hearing, and does not intend to do so in this case, his subpoenas were procedurally unsound.

As discussed in detail in Appellants' brief, several portions of W.Va. Code § 46A-7-104 indicate that subpoenas are to be issued only in aid of an administrative hearing. But one portion that is most clearly unavoidable is the bestowal of jurisdiction to hear subpoena enforcement proceedings only on the court "in the circuit where the hearing is to be held." *Id.* If the Attorney General is not even entertaining the possibility of ever having an administrative hearing - which he admits in his response brief that he is not - then there is no circuit court that can properly hear his enforcement request.

In all of the statutes that grant various entities subpoena power, the Legislature has been quite specific about which courts have the power to enforce subpoenas. When the Legislature does not intend for subpoena power to be restricted to the context of administrative hearings, it explicitly grants jurisdiction to hear subpoena enforcement proceedings to a broader spectrum of circuit courts, rather than limiting it to only those where an administrative hearing will eventually be held. For example, the Secretary of State's subpoenas may be enforced in "any circuit court." W.Va. Code § 3-1A-6. The Commission on Special Investigations' subpoenas may be enforced in "the circuit court of Kanawha County, or any other court of competent

jurisdiction[.]” W.Va. Code § 4-5-3. W.Va. Code §§ 5-20-3 and 5B-2B-8 contain identical provisions for subpoenas issued by the Willow Island Commission and the Economic Development Commission, respectively. Subpoenas issued to investigate Fair Housing Act violations may be enforced in “the circuit court for the circuit in which the person to whom the subpoena was addressed resides, was served, or transacts business.” W.Va. Code § 5-11A-15. Subpoenas issued to investigate violations of the West Virginia Capital Company Act may be enforced in “the circuit court of the county in which the company or center is located or the persons persons subpoenaed reside.” W.Va. Code § 5A-1-6.

These examples of the many and varied subpoena statutes that exist in the West Virginia Code illustrate that where the Legislature intends to bestow jurisdiction on courts to enforce subpoenas beyond the context of an administrative hearing, it does so explicitly. Thus, if it had intended for the Attorney General to have subpoena powers beyond the context of his administrative hearing process, it would have bestowed enforcement jurisdiction on the “the circuit court of Kanawha County, or any other court of competent jurisdiction,” or some other similarly broad spectrum of courts like those contained in the above-cited statutes. It did not. This illustrates its determination that the Attorney General’s subpoena power simply does not extend beyond the administrative hearing process with which it endowed him, but which he has chosen to eschew.

The Attorney General accuses Appellants of being “illogical and nonsensical,” but what could be more illogical or nonsensical than reading this jurisdictional provision in any other way? What could the words “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” mean, if not that the circuit

court must be the one where the administrative hearing is to be held? Certainly it cannot refer to the enforcement hearing itself. Where else could one possibly apply for an enforcement order other than the circuit court in which the enforcement proceeding is going to be held? The only possible reading of this phrase is that enforcement orders are to be obtained from the circuit court in the county in which the administrative hearing is to be held. No administrative hearing equals no circuit court empowered to enforce the subpoena. This unequivocally evinces the Legislature's command that the Attorney General's subpoena power only exists within the context of an administrative hearing process. That is not to say that such hearing must be held *before* the subpoena is issued - that would indeed be nonsensical. Rather, it is to say that his subpoena power exists solely to obtain documents and things for the purpose of adducing evidence at such eventual hearing.

This is another way in which the subpoena statute here at issue differs fundamentally from those cited by the Attorney General, and it illustrates that, unlike the power bestowed under those statutes, his does not extend to the arena of a civil proceeding, but is instead limited to being an instrument in aid of his powers to hold administrative hearings. Because the subpoenas here at issue were not issued for the purpose of gathering evidence for an administrative hearing, they were not procedurally sound, nor were they issued for an authorized purpose. They therefore they fail the Hoover test.

The Attorney General's protestations to the contrary notwithstanding, the fact that this Court Court has never addressed this issue in any of the subpoena enforcement cases before it does not mean that it has found that the administrative hearing requirement does not exist. It simply means means that the argument had not previously been presented to this Court in any of those cases. There are as many arguments as there are litigants in the world. The law books would be thin indeed if

issues of first impression were precluded by virtue of their never having been previously addressed.

D. Appellants Did Not Waive Their Objections By Failing to Move to Quash the Subpoenas.

The Attorney General alleges that by failing to move to quash, Appellants have waived their objections. However, Hoover makes clear that the burden always remains on the Attorney General to establish that he has met necessary elements. In both West Virginia Human Rights Comm'n v. Moore and Hoover, the courts premised the enforceability of a subpoena on *legislative authority* to issue the subpoena. The fact that Appellants chose to object to the subpoenas rather than move to quash them does not alter that restriction on the Attorney General's power.

Hoover does state that "the party seeking to quash the subpoena must disprove through facts and evidence the presumed relevance and purpose of the subpoena." Hoover, 199 W.Va. at 19, 483 S.E.2d at 19. Obviously, however, the Court used this phrasing simply because the mechanism before it happened to be a motion to quash instead of written objections. The very sentence preceding it makes it clear the Court did not mean to make a motion to quash the exclusive vehicle by which to take issue with a subpoena. Hoover, 199 W.Va. at 19, 483 S.E.2d at 19 ("If [the Hoover elements] are satisfied, the subpoena is presumably valid and the burden shifts to *those opposing the subpoena*." (Emphasis added) There is no reason to think that objections are any less valid method to oppose a subpoena than is a motion to quash.

Thus, even though the Attorney General argues that Appellants have the burden to prove the

the Subpoena should not be enforced, Hoover makes clear that the burden rests on the Attorney General to show that the Subpoena is proper and that the Attorney General has adhered to all applicable criteria when issuing the Subpoena. For all of the reasons stated in the preceding arguments, the Attorney General has failed that burden.

The Attorney General's reliance on foreign case law to support his position is also unfounded. State by and Through Alan G. Lance v. Hobby Horse Ranch Tractor and Equipment Co., 929 P.2d 741 (Idaho 1996) did not even deal with administrative subpoenas, but rather, with a particular creature of Idaho statute called an Investigative Demand. The issue in that case was "whether the failure to respond or object *in any fashion* within the time period specified constitutes a waiver of [the party opposing the demand] of its right to object to the demand." (Emphasis added) In that case, the object of the Investigative Demand made no response whatsoever thereto, and failed to make any objection until the Idaho Attorney General filed a motion to compel a response. Under those circumstances, the court found that the appellant had waived its objections.

This holding has no bearing on this case, however, where Appellants did in fact respond to the subpoena, immediately objected thereto, and did not wait until the enforcement stage to lodge any challenge. Moreover, the objections at issue in Hobby Horse were merely to the breadth of breadth of the Investigative Demand rather than to the Attorney General's very authority to issue that Demand. The fact that a party may waive its right to file technical objections when they have have rested on their rights until the enforcement stage has no bearing on whether a party may challenge the very statutory authority to issue and/or enforce a subpoena that was timely responded responded and objected to.

Moreover, Idaho, unlike West Virginia, has no body of law whatsoever on challenges to the statutory legitimacy of administrative powers of investigation. There is no reason to think that an Idaho court would have rejected a challenge to the attorney general's statutory authority to issue an Investigative Demand merely based on the timing of the objection thereto. In this case, either the Attorney General was authorized to issue the subpoenas and have them enforced, or he was not. The timing and manner of Appellants' challenge thereto cannot bestow him with authority he does not otherwise have. As Hoover and Moore illustrate, when an administrative agency seeks to enforce its subpoena, it will be denied unless it is statutorily and procedurally sound. Foreign case law regarding waiver cannot render a subpoena that does not meet the Hoover test enforceable. Therefore, the Attorney General's argument regarding waiver must fail.

E. The Attorney General Failed to Properly Serve Subpoenas.

The issues regarding proper service have been thoroughly briefed, and Appellants will not rehash them. They would simply note that unity of ownership and address do not erase the statutory requirements of proper service, as the Circuit Court itself found when it ordered from the bench that only those entities that had been properly served would be compelled to respond to the subpoenas. The fact that it ignored its own finding by adopting the written Order submitted by the Attorney General that compelled all of the LLC Defendants to respond to the subpoenas was error.

F. The Extent to Which Appellants Have or Have Not Complied With the Subpoenas is Irrelevant to the Enforceability Thereof.

The fact that Appellants have not complied in full with the subpoenas at issue does not render

render their hands “unclean,” nor, even if it did, would this render an illegitimate subpoena enforceable. First, it should be noted that Appellants have not, in fact, completely ignored the subpoenas at issue. Rather, they have, pursuant to an agreement with the Attorney General, produced thousands of pages of documents in response thereto while preserving their right to challenge in good faith his statutory authority to issue and enforce the subpoenas. Therefore, they have done nothing that rises to the level of fraud or evil conduct to which the doctrine of “unclean hands” would apply. See 4 A.L.R. 44, He Who Comes in Equity Must Come With Unclean Hands (noting that the doctrine applies to “reprehensible” conduct); Hale v. Hale, 62 W.Va. W.Va. 609, 59 S.E.1056 (1907) (refusing to apply the doctrine in absence of fraud).

Second, the doctrine is only applicable to equitable relief. Beard v. Worrell, 158 W.Va. 248, 212 S.E.2d 598 (1974). The challenge to statutory authority here at issue is not a matter of equity, but of law. As this Court has found, the doctrine of “unclean hands” does not apply to challenges to acts of an official in excess of his jurisdiction. Id. 158 W.Va. at 252, 212 S.E.2d at 601. In Beard, this Court found that the doctrine of unclean hands would not lie in cases that “[were] not proceeding[s] with antecedents in equity.” Id. In Beard, the petitioner sought a writ of prohibition against a circuit judge. The Court found that the doctrine was inapplicable to such a remedy, because it was one of law rather than equity. Id., Syl. Pt. 1.

Specifically, the Court noted that where one is seeking “to prohibit a court from operating outside its proper jurisdiction [the writ] is not governed by equitable principals because its issuance is predicated upon the State’s interest in preserving the rule of law and the administration of orderly justice.” Id. The same is true of the case at bar. Appellants do not seek relief in equity. Rather, they seek to prevent the Attorney General from acting in excess of his jurisdiction by issuing and seeking

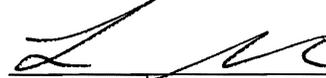
to enforce subpoenas beyond the power granted him by statute. Thus, here, as in Beard, the relief sought “is predicated upon the State’s interest in preserving the rule of law and the administration of orderly justice.” Id. Therefore, here, as in Beard, the doctrine of unclean hands is inapplicable.

CONCLUSION

WHEREFORE, for the reasons set forth herein, and for such and other reasons as may appear to the Court, Appellants pray this Honorable Court reverse the Circuit Court’s Order enforcing the Attorney General’s subpoena.

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

BY: SPILMAN THOMAS & BATTLE, PLLC



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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

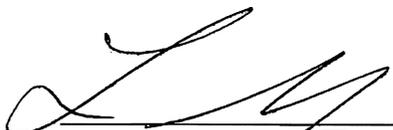
Darrell V. McGraw, Attorney General,

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 Reply Brief* thereto, has been made via U.S. Mail, on this 12th day of September, 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)