

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 12-0546

Cavalry SPV I, LLC; Cavalry SPV II, LLC, and  
Cavalry Investments, LLC

,

**Defendants Below, Petitioners**

v.

**Civil Action No.: 10-C-994  
Kanawha County Circuit Court**

**Darrell V. McGraw, Attorney General,**

**Plaintiff Below, Respondent**

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

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... iii-iv**

**I. ASSIGNMENTS OF ERROR..... 1**

**II. STATEMENT OF THE CASE ..... 1**

**III. SUMMARY OF ARGUMENT..... 5**

**IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 7**

**V. ARGUMENT ..... 8**

**A. Standard of Review ..... 8**

**B. Standards For and Scope of Temporary Injunctive Relief..... 8**

**C. The Temporary Injunction Should Be Dissolved Because the Debtors Will Suffer No Harm in its Absence. Instead the Only Harm at Issue is That Which Both Debtors and Petitioners Stand to Suffer by Its Imposition.**

**1. There is No Need for an Injunction Because the Debtors Are Suffering No Harm.....10**

**2. The Temporary Injunction irreparably harms Petitioners by permanently divesting them of their interests in property.....12**

**3. The ban on collecting payments harms both Debtors and Petitioners.....13**

**D. The Temporary Injunction Should Be Dissolved Because, By Treating the Judgments and Settlements as Void and Enjoining the Filing of Law Suits to Collect Outstanding Debts, it Effectuates a Purpose of the Litigation Without Trial on the Merits.**

**E. The Temporary Injunction Should Be Dissolved Because Rather Than Preserving the Status Quo of the Parties, it Radically Alters Their Position and Impermissibly Divests Defendants of Legal Rights.**

**1. The Status Quo Requires No Injunction to Preserve it.....17**

**2. The Temporary Injunction Impermissibly Changes the Status of the Parties.....17**

3.	<b>The Temporary Injunction Divests Defendants of Their Legal Rights and Undoes Completed Transactions.....</b>	<b>18</b>
	i. <b>Temporary Injunctions cannot be used to divest defendants of legal rights.....</b>	<b>18</b>
	ii. <b>Temporary Injunctions cannot be used to undo completed transactions.....</b>	<b>20</b>
F.	<b><u>In the Alternative, the Court Should Modify the Temporary Injunction Because Its Purpose Can Be Effectuated Through Less Drastic Means, and Many of the Terms Thereof Go Beyond What the Court Ordered During the Hearings, What the Law Provides For, and What the Attorney General Has Asked For.....</u></b>	<b>22</b>
VI.	<b>CONCLUSION .....</b>	<b>26</b>

## TABLE OF AUTHORITIES

### CASES:

#### WEST VIRGINIA CASES

<u>Leslie Co. v. Cosner Coal Co.</u> , 131 W.Va. 483, 48 S.E.2d 332 (1948) .....	5, 8, 10, 15, 16
<u>Powhatan Coal &amp; Coke Co. v. Ritz</u> , 60 W.Va. 395, 56 S.E. 257 (1906) .....	5, 6, 16, 18
<u>State ex rel. United Mine Workers of America, Local Union 1938 v. Waters</u> , 200 W.Va. 289, 489 S.E.2d 266 (1997) .....	8
<u>State ex rel McGraw v. Imperial Marketing</u> , 196 W.Va. 346, 472 S.E.2d 792 (1996) .....	9
<u>Tennant v. Kilcoyne</u> , 120 W.Va. 137, ---, 196 S.E. 559, 561 (W.Va. 1938) .....	10
<u>State ex rel. Donely v. Baker</u> , 112 W.Va. 263, 164 S.E. 154 (1932) .....	10
<u>Lamon v. Gold</u> , 79 S.E 728, 729 (W.Va.1913) .....	20

#### OUT OF STATE CASES

<u>Calvert v. State</u> , 52 N.W. 687 (Neb. 1892) .....	18
<u>Jacobs v. Regas</u> , 221 N.E.2d 140 (Ill. 1966) .....	18, 20
<u>Max and Tookah Campbell Co., Inc. v. T. G. &amp; Y. Stores</u> , 623 P.2d 1064 (Okl. 1981) .....	18, 21
<u>K.C. Enterprise v. Jennings</u> , 851 A.2d 426 (D.C.,2004) .....	20

#### FEDERAL CASES

<u>Fein v. Security Banknote Co.</u> , 157 F. Supp. 146 (N.Y. 1957) .....	18
<u>In re Robinson</u> , 2007 WL 1848016 (Bnkr. N.D.W.Va. 2007) .....	20
<u>Linde Thomson Langworthy Kohn &amp; Vandyke, P.C. v. Resolution Trust Corp.</u> , 5 F.3d 1508 (D.C. Cir. 1993).....	11

**STATUTES:**

**WEST VIRGINIA STATUTES**

W. Va. Code § 11-12-3..... 11  
W. Va. Code § 38-3-6..... 19  
W.Va. Code § 38-12-8..... 12  
W. Va. Code § § 46A-6-104.....2, 9, 12  
W. Va. Code § 46A-7-110.....2,7, 9, 12  
W. Va. Code § 47-16-2.....24, 25

**OTHER MATERIALS**

10 Fletcher Cyc. Corporations § 4852.....6,16  
43A Corpus Juris Secundum §8.....6, 17

## **I. ASSIGNMENTS OF ERROR**

1. Did the Circuit Court err in refusing to dissolve a temporary injunction where there was no injury to balance against its refusal?
2. Did the Circuit Court err by refusing to dissolve a temporary injunction that permanently deprived Petitioners of property rights?.
3. Did the Circuit Court err by refusing to dissolve a temporary injunction that altered the status quo and undid completed transactions?
4. Did the Circuit Court err in entering an Order that exceeded the scope of its written findings, its stated ruling from the bench, what the Attorney General asked for and what the law calls for?

## **II. STATEMENT OF THE CASE**

### **Facts**

#### **B. Activity of the Petitioners**

Petitioners purchase charged-off debts from third parties outside the state of West Virginia. The act of charging off a debt refers to a mechanism whereby creditors determine that a debt is unlikely to be repaid by the borrower and, therefore, cannot be collected. As a result, the loan is written off, deemed a loss of principal and interest by the original creditor, and sold to a third party such as the Petitioners.

Petitioners engage a collection agency, Cavalry Portfolio Services, LLC, (“CPS”) to collect the debts that it has purchased. CPS has at all relevant times been licensed by the Tax Commissioner to conduct the business of a collection agency within West Virginia. When the collection activities for which Petitioners engage CPS have failed, they sometimes file suit on the

debts that are owed to them, or enter into negotiated settlements with debtors to avoid the filing of such suits.

**C. Allegations on Which Temporary Relief Was Based**

The Complaint alleged various violations of the West Virginia Consumer Credit and Protection Act (“the WVCCPA”). The temporary injunction related to only one allegation – that Petitioners had violated W.Va. Code § 46A-6-104 by collecting debts in West Virginia without a license and surety bond. (A.R. 52)

At the time that the Complaint was filed, Petitioners did not have a collection agency license because they had been advised that they did not need one since they merely purchased but did not collect debt. Later, under a different Tax Commissioner, the Tax Department adopted the position that debt purchasers did require collection agency licenses

Although Petitioners are engaged in a vigorous dispute in the lower court regarding this issue, and still contend that the law does not require them to have such licenses, in a show of good faith, they obtained collection agency licenses after the Attorney General filed his Complaint. (A.R.280-288)

Although CPS handles all collection calls and sends all collection letters, the Debt Purchasers do file law suits and enter into settlement agreements when those collection efforts fail. (A.R. 493-594) The Attorney General contended that this constituted collection activity, and that Petitioners should be enjoined from collecting on any garnishments, liens, judgments or settlements obtained before the Petitioners became licensed. (A.R. 46-74)

The Complaint does not contain any allegations challenging the legitimacy of the underlying debts. (A.R. 46-74) The Attorney General presented no evidence challenging the

legitimacy of the underlying debts at the hearings on this matter. (A.R. 468-578).<sup>1</sup>

**D. Temporary Injunctive Relief Ordered**

Finding that “[t]he Attorney General has presented some credible evidence that [Petitioners] have violated portions of the [WVCCPA] by collecting debts originally owed to others at times when they were not licensed to do so by the State Tax Department beginning in about 1996 up until the time they became licensed in October 2010[.]” the Circuit Court enjoined Petitioners from “engaging in any actions to collect debts acquired prior to the date that they became licensed . . . .” (A.R. 7-8) It further ordered Petitioners to “release all garnishment of wages and liens or attachments filed against real or personal property prior to the time that they became licensed . . . .” (A.R. 7-8) Although this Circuit Court permitted Petitioners to receive unsolicited, voluntary payments, it ordered the Petitioners to send an explanatory letter to all potentially affected consumers informing them that Petitioners had been enjoined from collecting their debts. (A.R. 7-8)

**Procedural History**

**A. The Complaint**

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 Cavalry SPV I, LLC (“SPV I”), (A.R. 46-74) Cavalry SPV II, LLC (“SPV II”), Cavalry Investments (“Petitioners”), and Cavalry Portfolio Services (“CPS”) (sometimes referred to collectively herein as “the LLC Defendants”). In addition to those entities, the Attorney General also named four individuals who occupy

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<sup>1</sup> At the hearing on the Motion to Dissolve the Temporary Injunction, Petitioner claimed that he was challenging the legitimacy of the debt by stating “we’ve gone beyond that. We’ve disputed the very legitimacy of Cavalry’s right to collect these debts, at all.” [A.R.738] But challenging Petitioner’s right to collect the debt is an entirely different question from challenging the legitimacy of the underlying debt itself.]

various positions within the LLC Defendants, even though the Complaint contains no allegation of any activity taken by these individuals whatsoever: Michael Godner (“Godner”), Steve Anderson (“Anderson”), Don Strauch (“Strauch”) and Christian Parker (“Parker”) (collectively, “Individual Defendants”).<sup>2</sup> (See A.R. 46.)

Petitioners filed a Motion to Dismiss on July 9, 2010. The Individual Defendants moved to dismiss the same day. (A.R. 75-80) The Attorney General filed a Memorandum of Law in Support of State’s Motion for Temporary Injunction and Enforcement of Investigative Subpoena on September 22, 2010. (93-229) 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. (A.R. 468-670) The Court announced its decision to grant the Attorney General temporary injunctive relief from the bench at the hearing on August 22, 2011. (A.R. 479-480) As part of that relief, the Court ordered Petitioners to cease all efforts to collect on debts purchased before they had obtained a collection agency license from the State Tax Department. On September 9, 2011, the Court heard arguments from Defense counsel regarding the fact that this portion of the temporary injunctive relief might actually impose a burden on some debtors who wished to pay off their debts. (A.R. 579-602) Accordingly, the Court modified that portion of its ruling, and provided that Petitioners could continue to accept payments made voluntarily through no action on Petitioners’ part. (A.R. 579-602)

Thereafter, the Attorney General submitted a Proposed Order, and Petitioners filed objections thereto, noting that it deviated substantially from what the Court had actually ruled from the bench. (A.R. 415-420)

**B. The Circuit Court’s October 7, 2011 Order Granting Temporary Injunctive Relief.**

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<sup>2</sup> Each of the Individual Defendants is involved in the operation of one or more Petitioners.

On October 7, 2011, the Circuit Court entered the Attorney General's Proposed Order verbatim. (AR 4-8) The Circuit Court enjoined Petitioners from "engaging in any actions to collect debts acquired prior to the date that they became licensed . . . ." (A.R. 7-8) It further ordered Petitioners to "release all garnishment of wages and liens or attachments filed against real or personal property prior to the time that they became licensed . . . ." (A.R. 7-8) Although this Circuit Court permitted Petitioners to receive unsolicited, voluntary payments, it ordered the Petitioners to send an explanatory letter to all potentially affected consumers informing them that Petitioners had been enjoined from collecting their debts. (A.R. 7-8)

**C. Post-Hearing Motions, Briefing and Hearing**

On October 28, 2012, Petitioners filed a Motion to Dissolve or in the Alternative to Modify Temporary Injunction Order. (A.R. 674-677) On December 1, 2011, the Attorney General filed a response thereto (A.R. 425-463) On December 12, 2012, Petitioners filed a reply to the Attorney General's response. (A.R. 771-725) On February 10, 2012, a hearing was held on Petitioner's Motion to Dissolve, and other pending motions. (A.R. 726-775) On March 20, 2012, the Circuit Court entered an Order denying Petitioners' Motion to Dissolve. (A.R. 464-467) The instant appeal follows.

**III. SUMMARY OF ARGUMENT**

It is well-established that "a temporary injunction should be . . . dissolved on motion" when the balance of harms does not favor it, and/or when its effect would be to accomplish the purpose of litigation without trial of the merits. Leslie Co. v. Cosner Coal Co., 131 W.Va. 483, 490, 48 S.E.2d 332, 337 (1948). Moreover, the only purpose of a preliminary injunction "is to preserve the status quo until, upon final hearing, the court may grant full relief." Powhatan Coal & Coke Co. v. Ritz, 60 W.Va. 395, ---, 56 S.E. 257, 260 (1906), reversed on other grounds

Eastern Associated Coal Corp. v. Doe, 159 W.Va. 200, 220 S.E.2d 672 (1978). See also 10 Fletcher Cyc. Corporations § 4852. Therefore, a temporary injunction should not divest a party of legal rights, Powhatan Coal & Coke Co. v. Ritz, 60 W.Va. at ---, 56 S.E. at 260, or change the position of the parties. 43A Corpus Juris Secundum § 8.

The temporary injunction here at issue violates each of these principals because: (1) the debtors are suffering no harm at all during the pendency of this litigation since they are merely making payments on debts they undisputedly incurred to third parties; the only question regarding debtors is not whether they are being harmed, but whether they will enjoy a windfall due to an alleged administrative error by the Petitioners who purchased their debts; (2) by contrast the Petitioners stand to suffer irreparable harm if they are forced to release liens and debtors are allowed to forgo payments that they are still legally bound by judgments and settlement agreements to make; not only does the temporary injunction disrupt Petitioners' finances during this litigation, they may never be able to fully recoup, since many of the debtors may not ever be able to make up the arrearages that will accumulate during the pendency of this case; (3) by allowing debtors to ignore payment obligations on judgments and settlements and forcing the Petitioners to dissolve liens and attachments stemming therefrom, the Court is treating those judgments and settlements as if they were void, thereby accomplishing one of the purposes of the litigation without a trial on the merits; and (4) far from preserving the status quo, the temporary injunction dramatically alters the positions of the parties, impermissibly deprives the Petitioners of their property interests in the judgments they have obtained, and effectively undoes transactions completed and memorialized in voluntary settlement agreements.

Moreover, even if a temporary injunction were warranted in this case, simply allowing all payments – whether voluntary or not - to be deposited in an escrow account would fully

accomplish the goal of protecting any interest the debtors may have in repayment thereof in the event the Attorney General ultimately prevails.

Finally, if the Court elects not to dissolve the injunction, Petitioners pray it to alter the terms thereof, because the terms proposed by the Attorney General and adopted by this Court are materially different from what this Court ordered during the hearings on this matter, what the law calls for, and even what the Attorney General himself purports to seek.

#### **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(3). This appeal deals with the appropriate scope of temporary relief issued to the Attorney General pursuant to W.Va. Code § 46A-7-110. In State ex rel. McGraw v. Imperial Marketing, this Court indicated that the “method of analysis which governs the propriety and scope of an injunction under W.Va. Code § 46A-7-110 deviates from the customary standard for the issuance of temporary relief[.]” 196 W.Va. 346, 472 S.E.2d 792 (1996). However, while that statute does mandate a different evidentiary threshold for obtaining injunctive relief, there is nothing in W.Va. Code § 46A-7-110 to indicate that the scope thereof should be any greater or lesser than what would otherwise be obtainable. Imperial Marketing dealt only with the evidentiary standard necessary for the Attorney General to obtain a temporary injunction. The question of whether this Court meant to imply in that case that the scope of injunctive relief under W.Va. Code § 46A-7-110 is somehow broader than other forms of injunctive relief would be one of first impression.

This 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. Not only can this devastate a business that may ultimately prove to be innocent, it also places unwarranted pressure to settle cases well beyond what the Legislature evinced any intent to allow under the black letter of the law.

This case also involves the constitutional infirmity of the Circuit Court's command that Petitioners release liens and forgo collections on undisputed debts prior to a hearing on the merits. This ruling deprives Petitioners' of property rights without due process of law. Therefore, oral argument under Rule 20 would be appropriate.

## V. ARGUMENT

### A. Standard of Review.

Issuance of preliminary injunction is examined in light of due process guarantees in West Virginia and United States Constitutions. State ex rel. United Mine Workers of America, Local Union 1938 v. Waters, 200 W.Va. 289, 489 S.E.2d 266 (1997) Supreme Court of Appeals applies abuse of discretion standard of review with respect to issuance, scope, and terms of preliminary injunction. Id. Findings of fact made by the circuit court are reviewed under a clearly erroneous standard. Id. Conclusions of law are reviewed *de novo*. Id.

It is well settled that a temporary injunction should be dissolved where the damage to the defendant outweighs the plaintiff's injury, or when the injunction essentially grants plaintiff the ultimate relief he seeks before a determination on the merits. Leslie Co. v. Cosner Coal Co., 131, W.Va. 483, 48 S.E.2d 332 (1948).

### B. Standards For and Scope of Temporary Injunctive Relief.

When the Attorney General brings an action to enjoin alleged violations of the West Virginia Consumer Credit and Protection Act, he

may apply to the court for *appropriate* temporary relief against a respondent pending final determination of the proceedings. If the court finds . . . that there is reasonable cause to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems *appropriate*.

W.Va. Code § 46A-7-110. (Emphasis added).

The West Virginia Supreme Court of Appeals has noted that

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 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 in view.

State ex rel McGraw v. Imperial Marketing, 196 W.Va. 346, 472 S.E.2d 792 (1996). While the evidentiary standard that the Attorney General must meet may “deviate from the customary standard for the issuance of temporary relief[,]” that does not mean that contours of that relief are completely unbound from traditional concerns regarding the relative harms and ultimate reach thereof; for although the statute requires only a minimal showing to obtain temporary relief, it still requires that the relief must be “appropriate” and there is nothing in the statute to indicate that the breadth of a temporary injunction awarded thereunder should be any greater or lesser than would be otherwise obtainable.

Regarding the appropriate scope of temporary relief, it is well-settled that

A temporary injunction should be . . . dissolved on motion, when injury to plaintiff by its refusal is light as compared with damage which would be done to defendant by granting it if defendant should finally prevail, or when effect of injunction would be to accomplish whole purpose of litigation without trial of the merits.

Leslie Co. v. Cosner Coal Co., 131, W.Va. 483, 48 S.E.2d 332 (1948). See also, Tennant v. Kilcoyne, 120 W.Va. 137, ---, 196 S.E. 559, 561 (W.Va. 1938) (superseded by statute on other grounds as stated in State ex rel McGraw v. Telecheck Services, Inc., 213 W.Va. 438, 582 S.E.2d 885 (W.Va. 2003)); Syl. pt. 3, State ex rel. Donely v. Baker, 112 W.Va. 263, 164 S.E. 154 (1932). As described in detail below, the temporary injunction here at issue violates both of these prohibitions, and should be dissolved.

**C. The Temporary Injunction Should Be Dissolved Because the Debtors Will Suffer No Harm in its Absence. Instead the Only Harm at Issue is That Which Both Debtors and Petitioners Stand to Suffer by Its Imposition.**

**1. There is No Need for an Injunction Because the Debtors Are Suffering No Harm.**

At the outset, it must be remembered that the debts Petitioners purchased are obligations that the debtors did in fact incur to third parties and which they fully expect to be paying. Even assuming, *arguendo*, that Petitioners should not have been collecting those debts without a license, the debts were obligations that the debtors bargained for, and if Petitioners had not been collecting them, then someone else would have.<sup>3</sup> Whether or not the Petitioners had a license when they collected those debts, they are debts that the debtors bargained for, and that they are not suffering any undue or unforeseen burden in paying. Should the Attorney General prevail in the end, the debtors may simply enjoy a windfall, having a debt that they incurred forgiven because of an administrative error made by the entity that purchased their debt; an entity of which they likely had no knowledge, and an error that had no effect on them whatsoever.

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<sup>3</sup> The Attorney General did not challenge the legitimacy of the underlying debts in his Complaint. Therefore, despite his tardy protestations to the contrary at the hearing on the Motion to Dissolve, the underlying debts are not in dispute for the purposes of this appeal. Nor can the debts that have been reduced to judgments and settlements be disputed at all since, through the doctrine of merger, those judgments have become the sole evidence of the debt, Am. Jur.2d Judgments § 458., and the settlements represent entirely new and independent obligations.

In fact, debtors experience no consequence at all from the fact that the Petitioners were not licensed with the Tax Department when they were sued by or reached voluntary settlements with them. There is nothing about the nature of the suits or the settlements that would have been any different if the Petitioners had possessed a license. This might at least be theoretically different if the licensing statute, like the many other licensing statutes cited by Petitioners in their Reply to the State's Memorandum of Law in Opposition to Cavalry's Motion to Dismiss, had any consumer protection component to it. [A.R. 290-384] But unlike those statutes, under W.Va. Code § 11-12-3, the Petitioners did not have to supply the Tax Department with any documentation or information whatsoever that would have revealed any potential threat to consumers, even if there had been one. Because there is no consumer protection component to the licensing statute, licensure can do, and is not designed to do, anything at all to ensure that collection agencies will be less likely to act in ways harmful to consumers. Moreover, as the Circuit Court found, the entity that actually performed collections was fully licensed at all times. Therefore, debtors have already been afforded whatever protections that could possibly be gleaned from W.Va. Code § 11-12-3.

The fact that debtors are suffering no harm from the action sought to be enjoined simply further illustrates, as argued in Defendants' Reply to the State's Memorandum of Law in Opposition to Cavalry's Motion to Dismiss, that the lack of licensure is not a violation of the WVCCPA at all. [A.R. 290-384] However, accepting for the purposes of the temporary injunction that it is, even though the Court has found that a violation of the WVCCPA "is in view," there is still no harm to the debtors "in view" from the activities sought to be enjoined. In fact, as discussed below, the only harm in view to the debtors is that to be wrought by the temporary injunction itself.

Since they are suffering no harm during the pendency of this law suit there is nothing for an injunction to alleviate or prevent. With no harm to prevent, an injunction serves no purpose, and therefore is not “appropriate” as called for in W.Va. Code § 46A-7-110. It should therefore be dissolved.

**2. The Temporary Injunction irreparably harms Petitioners by permanently divesting them of their interests in property.**

The Circuit Court ordered Petitioners to release all liens filed prior to the date they became licensed. (A.R. 7) If Petitioners comply with the preliminary injunction order, and release these liens, the effect will be that “such lien[s] shall be discharged and extinguished.” W. Va. Code § 38-12-8. Further, the liens are not only extinguished, but the real estate, of whatever kind, shall be deemed to be “vested in the former owner or those claiming under him, as if such lien had never existed.” Id.

Therefore, the practical effect of the preliminary injunction order is to award the Attorney General the relief requested in the complaint prior to a final determination on the merits. It causes irreparable harm to Petitioners, because, if they prevail they will be unable to receive the benefit of the extinguished and discharged liens. Any real property that is sold, transferred, or otherwise alienated after the releases of the judgment shall not be impaired by the lien. Because the property is not subject to the lien, Petitioners will not receive payment for the judgment, and will not be able to obtain any relief from the real property at issue. Any real property that is subject to a re-financing shall not be impaired by the lien. This means that a judgment debtor will not have to pay the judgment, despite receiving consideration in the form of re-financing, and the Petitioners will not be able to obtain relief from the real estate, or to assert any priority of lien position.

Thus, the practical effect of the preliminary injunction order is to change the status quo in such a manner as to provide the same relief as a permanent or final injunction without any consideration of whether the relief is an appropriate measure or without any ability of the matter to be reviewed on appeal since the deprivation would be permanent. Therefore, the preliminary injunction order is depriving Petitioners of the benefit to be derived from having hundreds of judgment liens worth millions of dollars. To cause such a substantial loss a loss to a party as a preliminary ruling changes the status quo and represents significant and irreparable harm.

**3. The ban on collecting payments harms both Debtors and Petitioners.**

Discontinuing collections on payments due and owing under as-yet valid judgments and settlements will harm debtors and Petitioners alike. The fact that collection may resume if Petitioners ultimately prevail is insufficient to mitigate against the harm done to them - and to the debtors themselves – in the meantime. If debtors are allowed to ignore payments due under judgments and settlements during the pendency of this lawsuit, there is no guarantee that they will have the money to repay the Petitioners when and if those Petitioners do ultimately prevail. Petitioners would suggest the Court may take judicial notice of the fact that not all of the debtors will be carefully setting aside the payments they would otherwise have to make during the months or years that this lawsuit is pending to ensure their ability to make all the payments that will be in arrears should Petitioners ultimately prevail. The resultant obstacles to making arrearage payments in that event would have unnecessarily burdensome consequences for the Petitioners and the debtors.

The burden on the Petitioners is obvious. Not only will they be less able to meet monthly expenses as they miss out on payments to which they are still legally entitled, but they may never be able to recover those payments at all, as many debtors may not be able to make up the

arrears accrued pending a final judgment. The money some debtors owe to Petitioners will doubtless have long been spent, never to return, leaving the Petitioners unable to collect on debts that may ultimately be found legitimate. This is especially unjust considering that these are payments on debts that no one even contests the debtors actually incurred and thus, reasonably expect to be paying.

Moreover, the injunctive relief ordered also places a substantial burden on the very people the Attorney General purports to be helping. It is one thing to make a \$100 dollar payment when it is due. It is quite another to have to make a \$1,000 payment to make up for all those one chose to miss after receiving a Court-ordered letter from a creditor inviting one to do so. Even were the Petitioners to pro-rate such arrears, that would still increase the debtors' monthly payments, adding a needless burden to the debtors all in the name of being "helped" by the Attorney General. Certainly burdening the allegedly injured party is antithetical to the whole purpose of injunctive relief. Such harm to the debtors could be avoided by simply ordering, as Petitioners requested, that all payments be held in escrow. That would not alleviate the undue burden on the Petitioners regarding their monthly finances, but it would at least allow the debtors to manage theirs in a more predictable fashion.

**D. The Temporary Injunction Should Be Dissolved Because, By Treating the Judgments and Settlements as Void and Enjoining the Filing of Law Suits to Collect Outstanding Debts, it Effectuates a Purpose of the Litigation Without Trial on the Merits.**

Whether or not any judgments or settlements obtained without a license are void is the ultimate issue in this case. To prohibit Petitioners from collecting on debts (and to order release of garnishments and liens) is to bar them from benefitting from judgments that are still in effect on debts that are not even contested, thus effectively rendering those judgments void and thereby

“accomplishing the whole purpose of litigation without a trial of the merits.” Leslie Co., 131 W.Va. at 490, 48 S.E.2d at 337.

The Petitioners have hundreds of judgments on completely uncontested debts that are still in effect and have not been – and may not ever be – declared void. Because, unless and until those judgments are declared void, the Petitioners have a legal right to enjoy all of the rights and privileges that enure to being the prevailing party in those cases, the Circuit Court does not have the right to deprive them thereof. See *infra*, Section F. The same is true of settlement agreements voluntarily entered into without litigation. The judgments and settlements are either void or valid. There can be no in between. Either the Petitioners have a right to the payments attendant to judgments and settlements, and the right to avail themselves of liens and garnishments to enforce payments, or they do not. Ordering that they may not receive payments and must release all garnishments liens, and attachments during the pendency of this law suit is to treat the judgments and settlements as if they were void before any such determination has been made, thus imposing the ultimate relief at a preliminary stage.

Likewise, enjoining the Petitioners from “engaging in any action to collect debts acquired prior to the date they became licensed” deprives them of their right to bring suits against debtors in arrears even now that they are licensed to bring such suits. It thereby treats those debts as if they were void before any determination has been made on such issue. (Temporary Injunction Order, ¶ 5)

In the mean time, the statute of limitations to file suit on such debts will be ticking and many will and already have expired during the pendency of this suit, thereby permanently depriving the Petitioners of their property rights in the debts they have purchased.

The statute of limitations also poses a problem for debts on which judgments had already been rendered when Petitioners purchased them. For instance, the Petitioners have purchased five such existing judgments that expired between November, 2011 and January 2012. To renew the judgments, they would have to have filed a writ of execution, obtained an abstract of execution, and recorded the abstract of execution. The temporary injunction prevented each of these actions.

As with the temporary injunction's effect on judgments and settlements already reached, its effect on law suits yet to be filed and renewal of purchased judgments has already accomplished one of the Attorney General's goals without any adjudication on the merits. As the West Virginia Supreme Court has noted, any temporary injunction that has the effect of granting final relief should be dissolved. Leslie Co., 131 W.Va. at 490, 48 S.E.2d at 337; Tennant, 120 W.Va. at ---, 196 S.E. at 561; Syl. pt. 3, State ex rel. Donely, 112 W.Va. 263, 164 S.E. 154. Therefore, the Circuit Court erred when it refused to dissolve its temporary injunction to prevent this deprivation of due process.

**E. The Temporary Injunction Should Be Dissolved Because Rather Than Preserving the Status Quo of the Parties, it Radically Alters Their Position and Impermissibly Divests Defendants of Legal Rights.**

“The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief.” Powhatan Coal & Coke Co., 60 W.Va. 395, ---, 56 S.E. at 260 (1906) (reversed on other grounds Eastern Associated Coal Corp. v. Doe, 159 W.Va. 200, 220 S.E.2d 672 (1978)). See also 10 Fletcher Cyc. Corporations § 4852. A temporary injunction “should not disturb existing conditions further than the effectual prevention of the apprehended injury requires.” Id. “A preliminary injunction does not seek to undo completed transactions, change the position of the parties, or require the doing of acts

which constitute all or part of the ultimate relief sought.” 43A Corpus Juris Secundum § 8. The temporary injunction here at issue violates each of these tenants. It destroys rather than preserves the status quo, radically alters the position of the parties, divests Defendants of legal rights, and undoes completed transactions.

**1. The Status Quo Requires No Injunction to Preserve it.**

As discussed above, the purpose to be served by preserving the status quo – preventing harm to the plaintiff (or in this case, the debtors plaintiff seeks to protect) - is not even applicable here, since they are suffering no harm during the pendency of this litigation. Nor is there anything that Petitioners could do pending the final outcome to thwart any ultimate relief, since such relief would simply be repayment, which could be just as easily, if not more easily, be effectuated in the event of their victory without the restraints imposed by the temporary injunction. If the debtors continued to make payments into an escrow account, as Petitioners requested, they could be easily refunded at the conclusion of the case should the Attorney General prevail. Therefore, the very justification for imposing a temporary injunction is entirely lacking.

**2. The Temporary Injunction Impermissibly Changes the Status of the Parties.**

Rather than preserving the status quo, this temporary injunction instead drastically alters the position of the parties. Right now, consumers who have had judgments entered against them or have entered into settlement agreements are debtors, and the Petitioners are creditors. The temporary injunction erases that relationship, allowing consumers to ignore payments they are still legally bound to make on debts that they undisputedly incurred, and which the Petitioners undisputedly own. Under the terms of the temporary injunction, the duty to pay has been replaced with an opportunity to pay if they want to. It thus changes the relationship from debtor-

creditor to benefactor-recipient. Such radical alteration of the position of the parties is the antithesis of what injunctive relief – which is meant as a tool to preserve the status quo – is supposed to accomplish.

**3. The Temporary Injunction Divests Defendants of Their Legal Rights and Undoes Completed Transactions.**

Applying the principals outlined above, courts around the country, including the West Virginia Supreme Court of Appeals, have noted that temporary injunctions cannot be used to divest a party of legal rights, Powhatan Coal & Coke Co., 60 W.Va. at ---, 56 S.E. at 260, Voss v. Clark, 671 S.W.2d 580 (Tex. 1984); Calvert v. State, 52 N.W. 687 (Neb. 1892) or to undo completed transactions, Jacobs v. Regas, 221 N.E.2d 140 (Ill. 1966); Max and Tookah Campbell Co., Inc. v. T. G. & Y. Stores, 623 P.2d 1064 (Okl. 1981); Fein v. Security Banknote Co., 157 F. Supp. 146 (N.Y. 1957). The temporary injunction here at issue would do both of these things. It divests the Petitioners of their legal rights to payments secured by judgments, and undoes completed transactions by depriving them of their right to collect on payments agreed to in completed settlement agreements.

**i. Temporary Injunctions cannot be used to divest defendants of legal rights.**

In Powhatan Coal & Coke Co. v. Ritz, the West Virginia Supreme Court held that “A preliminary injunction which deprives a party to the suit in which it is awarded of his possession of property, real or personal, under good title, or a bona fide claim of title, without a hearing, is null and void, the awarding thereof being an act in excess of the jurisdiction of the court.” Id. 60 W.Va. at ---, 56 S.E. at 260. Accordingly, the West Virginia Supreme Court of Appeals found that the lower court had exceeded its authority in granting a temporary injunction that forced a defendant to continue to sell coke through the plaintiff agent pending a law suit regarding the

contract between them. The court held that the injunction impermissibly invaded the defendant's property rights to dispose of its coke how it saw fit.

Applying these same principals, in Voss v. Clark, 671 S.W.2d 580 (Tex. 1984), an appellate court dissolved a temporary injunction that divested a party of rights to real property, holding “[a]s we view the record, the trial judge, by issuing a writ of temporary injunction, disturbed and upset the status quo. A court, generally speaking, is without authority to divest a party or diminish a party's property rights in real estate without a trial.”

Similarly, in Calvert v. State, 52 N.W. 687 (Neb. 1892), the appellate court dissolved a temporary injunction divesting a railroad company of possession of its property and giving it instead to a street railway company, finding that “[t]he judge, in effect, has undertaken to dispose of the merits of the case without a hearing. A temporary injunction merely prevents action until a hearing can be had. If it goes further, and divests a party of his possession or rights in the property, it is simply void.” Id. at 692.

Certainly the Petitioners have a property right in the judgments they have obtained. See In re Robinson, 2007 WL 1848016 (Bnkr. N.D.W.Va. 2007). West Virginia Code § 38-3-6 makes all money judgments rendered in this state into liens against any real property “of or to which the defendant in such judgment is or becomes possessed or entitled[.]” Thus, in Robinson, the United States Bankruptcy Court for the Northern District of West noted that

under West Virginia law, a judgment creditor is afforded an in rem property right with the entry of the judgment and no further step is necessary to transform what was formerly only a debtor's personal liability into that in rem right. While the judgment is a declaration of personal liability, the judgment lien represents security for the underlying debt and conveys a right of execution to the judgment creditor in satisfaction of the debt.

Id. (citing Lamon v. Gold, 79 S.E 728, 729 (W.Va.1913)). See also K.C. Enterprise v. Jennings, 851 A.2d 426 (D.C.,2004) (noting that judgment creditors have a property interest in the judgments they have obtained, citing analogous D.C. statute).

As previously discussed, judgments constitute in rem property rights. See In re Robinson, 2007 WL 1848016 (Bnkr. N.D.W.Va. 2007) Lamon v. Gold, 79 S.E 728, 729 (W.Va.1913)). See also K.C. Enterprise v. Jennings, 851 A.2d 426 (D.C.,2004) (noting that judgment creditors have a property interest in the judgments they have obtained, citing analogous D.C. statute). Thus, the principal in the cited cases that a preliminary injunction may not disturb a property right are as applicable to the Petitioners' property rights to the judgments they have obtained and the property secured thereby as they were in the cited cases. Therefore, the portion of the temporary injunction that divests them of their right to receive payment on judgments, and to release any garnishments securing such payments is void.

**ii. Temporary Injunctions cannot be used to undo completed transactions.**

The same principals hold in cases noting that temporary injunctions cannot be used to undo completed transactions. As with divesting rights, such action is prohibited because it changes the status of the parties, awards ultimate relief and disturbs the status quo. In Jacobs v. Regas, 221 N.E.2d 140 (Ill. 1966) (reversed on other grounds, Jacobs v. Regas, 229 N.E.2d 417 (Ill. 1967)), the court dissolved a temporary injunction that undid a stock sale, finding, inter alia, that “[t]he issuance of the injunction in this case did not preserve the status quo, but rather disturbed the status quo. The sale of the Goldammer stock in August was a completed transaction.” Id. at 142

In Max and Tookah Campbell Co., Inc. v. T. G. & Y. Stores, 623 P.2d 1064 (Okl. 1981) an appellate court affirmed the lower court's refusal to grant a temporary injunction

that would have undone a sublease, even though it was undisputed that the sublease violated the terms of the lease at issue. Id. at 1067. In so doing, the court noted that “the sublease had long since been executed by the time this action was filed making it impossible for the court to ‘enjoin T. G. & Y. from subleasing the property.’ It is not the function of a preliminary injunction to undo completed transactions or change the position of the parties, but to maintain the status quo until the merits of the principal action can be determined.” Id.

Similarly, in Fein v. Security Banknote Co., 157 F. Supp. 146 (N.Y. 1957), the court refused to issue a temporary injunction that would undo a stock sale that violated anti-trust laws, holding that

[t]he plaintiffs, having conceded by their complaint and affidavits that the exchange of Security stock for Columbian assets has been fully consummated in law and fact, have no basis for . . . injunctive relief by reason of a threatened violation of the antitrust act. Obviously, the purpose of a preliminary injunction is to preserve the status quo *pendente lite*, not to undo completed transactions.

Id. at 148.

Applying these principals to the instant case, this Court cannot prohibit the Debt Purchasing Defendants from receiving payments made (or collected through garnishments or liens) pursuant to voluntary settlement agreements, since those settlement agreements have already been fully consummated in law and fact. As discussed above, by prohibiting the Debt Purchasing Defendants from collecting such payments the Court is treating such settlement agreements as void – i.e., it is effectively undoing these completed transactions. Because, as the foregoing cases show, such unraveling before an adjudication on the merits is impermissible, the temporary injunction should be dissolved.

F. **In the Alternative, the Court Should Modify the Temporary Injunction Because Its Purpose Can Be Effectuated Through Less Drastic Means, and Many of the Terms Thereof Go Beyond What the Court Ordered During the Hearings, What the Law Provides For, and What the Attorney General Has Asked For.**

The Temporary Injunction Order drafted by the Attorney General, and entered by the Circuit Court directly contradicts not only what the Court actually found at the hearings, but goes beyond what the Attorney General even asked for. (A.R. 557-558) The Court found that “that the Attorney General has presented some credible evidence the [Petitioners] violated portions of the West Virginia Consumer Protection Act in being unlicensed and *collecting* debt that was not originally their own throughout the years . . . 1996 up to October 2010.” (Ex. A, p. 4) The Attorney General himself stated at the hearing that “we’re not asking that [Petitioners] be enjoined from activities that they are engaging on since October of 2012, when they became licensed. **They have every lawful right to engage in collection and to file lawsuits.** We’re only asking for relief from the period when they were not licensed.” (A.R. 557-558) (Emphasis added)

Accordingly, at the hearing, the Court ordered Petitioners are “prohibited from taking action to *collect* on any judgments obtained during that time period that they were not licensed.” (A.R.479-480) This would enjoin Petitioners from obtaining funds through garnishments, liens and attachments on debts reduced to judgments at a time when they were not licensed. But it would permit them to continue to file suit to obtain judgments now that they do have a license, to continue to prosecute suits filed after they were licensed, to avail themselves of garnishments, liens and attachments arising from judgments obtained after they were licensed, and to collect payment arising from oral or written agreements reached after they became licensed.

Petitioners were quite surprised then to find that the Attorney General included language in his Proposed Order that would enjoin them from each of those activities. The Proposed Order, which the Court adopted, enjoins Petitioners from:

collecting or continuing to collect the debts that they *acquired* prior to the time that they were 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 law suits; (ii) 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.

(A.R. 6-7) By failing to differentiate between pre and post licensure activities, the Order thus enjoins Petitioners from filing suits even now that they are licensed to do so, prosecuting suits filed even after they were licensed, collecting on judgments and settlements obtained even after they were licensed, and availing themselves of liens and garnishments obtained even after they were licensed. This is all in direct contravention of what the Court found, what the Attorney General asked for, and what the law allows. Naturally, Petitioners objected to this language (A.R.697-702)

They pointed out that this was directly contradictory to the factual finding on which the Court had based its ruling (and which, in the end, would be repeated in the written Order that it eventually entered). Petitioners pointed out that the Court had *not* found that there was credible evidence that Petitioners violated portions of the WVCCPA by *acquiring* debts without a collection agency license. It found that there was credible evidence that they had violated the law by *collecting* debts without a collection agency license. [A.R. 699] Petitioners noted that the language of the Proposed Order was broader than what the Court actually ordered at the

hearing, and was at odds with the oral findings of fact on which that Order was based, or even the written findings of fact in what would eventually become the Order as entered.

In response, the Attorney General actually *agreed* with Petitioners that acquiring debt without a collection agency license is not a violation of law. (A.R. 703 “Our Order does not say that the Defendant violated the law by ‘acquiring’ debt at a time that they were not licensed.”) paragraph 1) Inexplicably, he asserted that his Proposed Order “merely prohibits them from collecting or continuing to collect the debts that they acquired prior to the time that they were licensed” and that his Proposed Order would *not* prohibit Petitioners from “prosecuting or continuing to prosecute suits filed after they became licensed.” (A.R. 703-704) He maintained that other unspecified language in the Order clarified the Order would “only stay[] suits that were filed prior to the time that the Defendants became licensed to collect debts.” (A.R. 703-704)

But the above quoted language unambiguously prohibits all collection activity even after licensure, and, notwithstanding the Attorney General’s protestations to the contrary, there is no language elsewhere in the Order that would limit these prohibitions only to “suits filed prior to the time that the Defendants became licensed to collect debts.” (A.R.703-704)

Again, Petitioners strenuously maintain in the underlying action that they are not required to be licensed as a debt collection agency in order to sue or otherwise collect on debts that they own, since the statute only requires licenses for entities “collecting **for others** any account, bill or indebtedness originally due or asserted to be owed or due another.” W.Va.Code § 47-16-2. But even assuming *arguendo* that Petitioners are required to have a collection agency license to file suits, prosecute suits, or avail themselves of settlement agreements, garnishments or liens

regarding debts that they own, since they are now each licensed, they cannot legally be enjoined from taking any of these actions.

That is precisely why, at the hearing, the Circuit Court correctly limited the injunction to collecting on judgments obtained when Petitioners were unlicensed rather than prohibiting them from collecting on judgments entered after they were licensed. (A.R. 7 “[Petitioners] are prohibited from taking action to *collect* on any judgments obtained during that time period that they were not licensed.”) (Emphasis added) And that is also why the Attorney General stated that he was not even asking for such a prohibition. Given his admission that this is not what he was seeking, his inclusion of a blanket prohibition in his Proposed Order and the Circuit Court’s adoption thereof is a mystery. But because it goes against what the Circuit Court ruled from the bench, what it stated in its written findings, what W.Va.Code § 47-16-2 calls for, and what the Attorney General himself repeatedly stated he even seeks, the Circuit Court erred as a matter of law by refusing to dissolve the blanket prohibition in its Temporary Injunctive Order

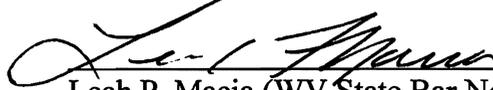
For the foregoing reasons, Petitioners strenuously urge the Court to dissolve the temporary injunction in its entirety. However, should the Court elect not to do so, then Petitioners pray this Court amend the temporary injunction to provide that all payments made pursuant to judgments and settlements obtained at a time when they were not licensed be deposited into an escrow account pending the outcome of the instant litigation. In addition the Petitioners pray the Court to modify the temporary injunction to accurately conform to what the Circuit Court ordered at the hearings in this matter, and what the Attorney General claims to seek.

**V. CONCLUSION**

For the foregoing reasons, Petitioners respectfully request this Honorable Court reverse the Circuit Court's denial of Petitioners' Motion to Dissolve or in the Alternative Modify Temporary Injunctive Relief and order that the Temporary Injunction be dissolved, or in the alternative, modified as described above.

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

**BY: SPILMAN THOMAS & BATTLE, PLLC**



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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, and  
Cavalry Investments, 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 and Cavalry Investments, LLC's Brief and Appendix* thereto, has been made via U.S. Mail, on this 23rd day of July, 2012, addressed as follows:

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