IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

v.

Civil Action No.: 08-C-1964
Judge Louis H. Bloom

CASHCALL, INC., and
J. PAUL REDDAM, in his capacity as president and CEO of CashCall, Inc.
Defendants.

FINAL ORDER ON PHASE I OF TRIAL: THE STATE'S DEBT COLLECTION CLAIMS

On October 31 and November 1, 2011, came the Plaintiff, the State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General ("State" or "Attorney General"), by Norman Googel and Douglas Davis, Assistant Attorney Generals, and the Defendants, CashCall, Inc. ("CashCall") and J. Paul Reddam ("Mr. Reddam" or collectively "Defendants"), by counsel, Charles L. Woody, Bruce M. Jacobs, and Eric N. Whitney, *pro hoc vice*, for a bench trial pursuant to W. Va. Code § 46A-7-112, upon the "Amended Complaint for Injunction, Consumer Restitution, Civil Penalties, and Other Appropriate Relief" ("Amended Complaint") in the above-styled action. Upon the parties' agreement, the Court bifurcated for trial the counts of the Plaintiff's Amended Complaint. On October 31 and November 1, 2011, the Court heard all of the evidence on the State's debt collection claims, as set forth in the fifth through fifteen causes of action in the Amended Complaint. On January 3, 2012, the Court heard all of the evidence on the State's usury and lending claims, as set forth in the second through fourth causes of action in the Amended Complaint. Upon review of the evidence, including the testimony offered at trial, the pleadings of record, the parties' proposed findings of fact and conclusions of law, and the

applicable law, the Court makes the following findings of fact and conclusions of law, as to the State's debt collection claims.

FINDINGS OF FACT

Background and Procedural History

1. In 2007, the State opened a formal investigation of CashCall and Mr. Reddam, its sole owner and shareholder, after receiving many complaints from West Virginia consumers about CashCall's usurious interest rates and its debt collection practices.

2. On August 30, 2007, the Attorney General issued an investigative subpoena, as authorized by W. Va. Code § 46A-7-104, directing CashCall to produce all of its lending and debt collection activities in West Virginia.

3. By letter dated October 22, 2007, CashCall responded but did not comply with the subpoena. In the letter, CashCall asserted that it was not the lender, but was merely a "marketing agent" for the state-chartered bank, First Bank & Trust, Milbank, South Dakota ("Bank").[1] Ex. C, Amended Complaint, Subpoena Response Letter, p. 3.

4. Based upon its investigation of the consumer complaints, CashCall's responses and its independent review of the applicable law, the State concluded that the lending program established by CashCall with the Bank was essentially a sham intended to make improper use of federal preemption in order to unlawfully evade West Virginia's lender licensing and usury laws. The State also concluded that CashCall's debt collection practices violated numerous provisions of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). *See* Amended Complaint. Based on its conclusions, the State demanded that CashCall cease the continued

[1] The State originally included a claim for failure to comply with the subpoena against CashCall ("First Cause of Action"), but agreed to dismiss this claim as moot. *See* Pre-Trial Order.

collection of its loans and make appropriate restitution to aggrieved consumers. CashCall declined to do so.[2]

5. On October 8, 2008, the State commenced the above-styled civil action by filing a "Complaint for Injunction, Consumer Restitution, Civil Penalties and Other Appropriate Relief" ("Complaint") against the Defendants.

6. On November 17, 2008, the Defendants removed the case to federal court, asserting that the Bank is the real party in interest and as such the State's usury law claims against CashCall are completely preempted by §27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d. Defendant's Notice of Removal.

7. By order entered March 11, 2009, U.S. District Court Judge Joseph R. Goodwin found that because the State only asserts state law claims against CashCall, a non-bank entity, "the claims do not implicate the FDIA, the FDIA does not completely preempt the state-law claims, and there are no federal questions on the face of the Complaint." *West Virginia v. CashCall, Inc.*, 605 F.Supp.2d 781 (S.D.W. Va. 2009). The case was remanded back to this Court. *See id.*

8. The State filed a motion for leave to amend its Complaint, which was granted by this Court by order entered June 4, 2010. It is the Amended Complaint that is before the Court in this trial.

9. On October 27, 2011, the Court entered a Pre-Trial Order by which it granted, in part, and denied, in part, the Motion to Dismiss filed by the Defendant, J. Paul Reddam. Specifically, the Court found that because there is no allegation in the Amended Complaint, except ¶ 13, referencing the Defendant J. Paul Reddam as a party and that the State does not seek any relief

[2] CashCall made and/or collected the loans in West Virginia from August 2006 to March 2007. Ex. C, Amended Complaint, Subpoena Response Letter, p. 2; Transcript of January 3, 2012 Trial ("Tr. Vol. III"), p. 105.

against Defendant Reddam, the Court would not impose any liability on Defendant Reddam. However, Defendant Reddam was ordered to remain a party to the action. Pre-Trial Order, ¶ 2.

10. The Court ordered the trial be bifurcated into two phases: (1) Phase I on the State's debt collection claims; and (2) Phase II on the alleged violations of West Virginia usury and lending laws by CashCall. This Final Order only addresses Phase I of the trial.

DISCUSSION[3]

Overview of State's Staff Witnesses

1. After conclusion of the testimony of the 10 consumers, the State presented the testimony of Raquel Gray and Angela B. White, both long-time paralegals with the Attorney General's Consumer Protection Division. Ms. Gray was tasked with reviewing documents that came from consumer files provided by CashCall during discovery. She went through each file on the computer, page by page, to search for specific letters that had been identified. October 31, 2011, Trial Transcript ("Tr. Vol. I"), p. 245. She characterized these letters as employment verification letter, breach letter, 48-hour notice letter, broken promise letter, arbitration letter, field visit letter, and final demand letter. Tr. Vol. I, p. 245. She explained her methodology in locating the letters and compiling total numbers of each type of letter found in each consumer's file. *See generally* Tr. Vol. I, pp. 245-253.

2. A total of 292 loans were made to West Virginia consumers and collected by CashCall, beginning in August 2006 up to and including March 2007. Joint Ex. 1. Three types of

[3] A detailed summary of the testimony of all of the witnesses presented by the State and CashCall, including transcript cites was attached as an Appendix to the "State's Proposed Memorandum Opinion and Order." The Court hereby incorporates by reference and adopts the Appendix, a copy of which is attached to the Order.

loans were made in West Virginia: (1) loans in the amount of $1,000 at 89% interest; (2) loans in the amount of $2,525 at 96 % interest; and (3) loans in the amount of $5,000 at 59% interest. Tr. Vol. III, p. 23; Joint Ex. 1. There were a total of 292 loans made to West Virginia consumers, consisting of 15 loans of $1,000; 214 loans of $2,525; and 63 loans of $5,000. *See* Joint Ex. 1.

3. The evidence shows that to date, West Virginia consumers made total payments of $1,201,366.12 to CashCall throughout the duration of the lending program. *See* Joint Ex. 1. The total amount of interest "agreed to be paid" by West Virginia consumers (as distinguished from the amount actually paid) is $2,511,421.99. *See* Joint Ex. 1.

4. The State next presented the testimony of Angela B. White, who was tasked with reviewing and compiling certain data from the service logs for West Virginia accounts produced by CashCall during discovery. Tr. Vol. I, p. 293. She said she was tasked with identifying the total number of all outbound calls made to West Virginia consumers by CashCall. The service logs for every consumer file produced by CashCall were reviewed. Tr. Vol. I, p. 295.

5. She did not personally review all service logs, but oversaw a process that involved eight or ten people, who reviewed the records by highlighting each instance in which outbound calls were made by CashCall. After this process was completed, the data was entered by four professional data entry people employed by the Attorney General's Office. Tr. Vol. I, p. 295. Although the persons working on this project were instructed to count every call regardless of whether contact was made with the consumer, if it could not be absolutely determined whether it was a phone call or not, it was not counted. Tr. Vol. I, p. 298. The data entry persons also made a second review before a questionable call was counted and entered into data. Tr. Vol. I, pp. 289-299. She said that they erred on the side of being conservative when counting the calls and,

if anything, the total counted "might be a little under" the actual number. Tr. Vol. I, pp. 298-299. She was also tasked with reviewing the service logs in an effort to determine any time there was mention of a notice of arbitration that was sent to consumers, any time consumers' references were contacted, and any time calls were made to consumers' place of employment. Tr. Vol. I, p. 304.

6. After the data was entered, she prepared a document called State's Summary Exhibit B ("Summary Ex. B") that contains such information as total number of calls made to each consumer, total number of days each consumer was called, the total number of calls made to each consumer per day, and the date of the first and last calls made to each consumer. In compiling total numbers of calls made per day, she explained that this was broken down into categories consisting of days when consumers received 20 or more calls, 15-19 calls, 10-14 calls, 5-9 calls, and 1-4 calls. Tr. Vol. I, p. 300.

7. Using the file of Brenda Baylous as an example, she explained that CashCall made 20 or more calls to her on two days; 15-19 calls to her on five days; 10-14 calls to her on 12 days; 5-9 calls to her on 71 days; and 1-4 calls to her on 143 days. Altogether CashCall made a total of 1, 071 calls to Ms. Baylous over a period of 233 days beginning September 22, 2006, through June 2, 2009. She explained that the same type of data was compiled for all of the West Virginia consumers from the documents that CashCall produced. Tr. Vol. I, p. 301-302.

8. She also found information in the service logs indicating that notices of arbitration were sent 262 times, consumers references were called 540 times, and calls were made to consumers' places of employment. At the conclusion of Ms. White's testimony, Summary Ex. B was admitted into evidence. Tr. Vol. I, p. 310.

Overview of CashCall's Witnesses[4]

9. Elissa Chavez is the director of fraud prevention and dispute resolution for CashCall. Ms. Chavez handles disputes, fraud claims, identity theft, customer resolution and complaints. She has worked for CashCall for almost six years. November 1, 2011, Trial Transcript ("Tr. Vol. II"), p. 5-6. She admitted that CashCall required consumers to agree to make payments by electronic funds transfers as a condition of obtaining the loan. She also said that CashCall sends a "welcome letter" and makes a welcome call to consumers to remind them about the date of their first electronic debit. She acknowledged that these "welcome" communications do not advise consumers that they can cancel the debit or how to do it or that their account may be debited subsequent times if the initial debit bounces. She also explained that the reason CashCall might make a large volume of calls to consumers, even 11 to 20 times per day, is to make contact with the consumer. She also asserted that an oral request from consumers to stop calls at work would be sufficient and that references would only be called if they are trying to make contact with the consumer. She was not able to point to any specific references to these practices in CashCall's policy manual as she did not have it with her.

9. Sean Bennett is employed as a "business analyst" for CashCall. He has worked at CashCall since December 2003 and his primary responsibilities have included supervision and management of collection employees, loss mitigation employees, skip tracing employees, and payment processing employees. Tr. Vol. II, p. 76. Mr. Bennett confirmed that if the initial account debit bounces, CashCall will make at least two subsequent attempts to debit the consumer's account during that month. He acknowledged that the subsequent debits are not disclosed in CashCall's loan contract or any other written or oral communications furnished to

[4] *See* footnote 3, *supra.*

consumers. CashCall's collection employees, including collection supervisors, are paid on an hourly basis but also receive an incentive based upon amounts collected.

10. CashCall honors verbal requests to stop further calls at work, but if the consumer asks not to be called on their cell phone during working hours, a written request is required. He also said CashCall's purpose in calling third parties is to establish contact with consumers. It is CashCall's policy to call references and other third parties even if it has accurate location information for consumers if it is necessary to make a direct contact with a consumer.

11. Although Mr. Bennett stated that CashCall has an elaborate formal training program for its employees, he admitted that he previously testified at a March 31, 2010, deposition taken by the State that CashCall had no formal training for every employee at that time. Although Mr. Bennett testified that CashCall made a training manual available to all employees, he admitted that he previously testified at the same deposition that he was unaware whether the training manual was made available to every employee at that time. Mr. Bennett also asserted that it was his understanding that CashCall failed to follow through with the eleven arbitration claims it had initiated because of the Attorney General's investigation.

12. Immediately following the conclusion of Mr. Bennett's testimony, CashCall indicated that it had planned to call CashCall's general counsel, Dan Baron, as a witness. However, Mr. Whitney proffered that the only purpose of his testimony in this phase of the proceedings would be to confirm that it was also his understanding, as was the case with Mr. Bennett, that CashCall "ultimately abandoned" the eleven arbitration proceedings "based on the pendency of the investigation by the Attorney General." Tr. Vol. II, p. 229.

Applicable Legal Standard in Determining Whether Debt Collection Practices Are Unlawful

13. Under W. Va. Code § 46A-2-122(d), a "'debt collector' means any person or organization engaging directly or indirectly in debt collection." Debt collection is "any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer." W. Va. Code § 46A-2-122(c). There is no dispute in this case that CashCall, as an entity collecting its own debts, meets the definition of a "debt collector" as defined by W. Va. Code § 46A-2-122(d) and W. Va. Code § 46A-6-104. Therefore, CashCall is subject to the debt collection provisions outlined in the WVCCPA, which is enforced by the Attorney General.

14. Before discussing the specifics of the State's causes of action, the Court finds it necessary to address the applicable legal standards in evaluating whether debt collection practices are unlawful. A substantial body of case law concerning abusive debt collection practices has been developed by federal courts in cases arising under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. The prohibited debt collection practices enumerated in the WVCCPA largely mirror and in many instances are identical to the provisions in the FDCPA. One important difference between the laws is that the FDCPA only covers outside collection agencies, including debt buyers, whereas the WVCCPA covers all debt collectors, including original creditors collecting their own debts. *See id.* § 1692a(6); W. Va. Code § 46A-2-122(d).

15. It is also important to note the West Virginia Legislature's intentions when enacting the WVCCPA, wherein it declared,

> It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. To this end, the article shall be liberally construed so that its beneficial purposes may be served.

See, W. Va. Code § 46A-6-101(1). It is with this proviso in mind that this Court reviewed the body of case law developed by federal courts in cases arising under the FDCPA in search of guidance in determining whether CashCall's practices were unlawful and, if so, in fashioning appropriate remedies, including restitution and civil penalties if warranted.

16. The FDCPA creates liability for "conduct the natural consequence of which is to harass, oppress or abuse any persons in connection with the collection of a debt. *Kerwin v. Remittance Assistance Corp.*, 559 F.Supp.2d 1117, 1123-1124 (D.Nev. 2008) (quoting 15 U.S.C. § 1692(d)). Continuing, the court held "An act's 'natural consequences' are evaluated according to their likely effect on the least sophisticated consumer." *Id.* (citing *Baker v. G.C. Services Corp*, 677 F.2d 775, 778 (9th Cir. 1982)) (emphasis added).

17. The least sophisticated consumer standard was best explained in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-1173 (11th Cir. 1985). In that case, the court was seeking to determine whether an allegedly misleading written collection communication violated the FDCPA. The court noted that the FTC Act "was enacted to protect unsophisticated consumers, not only 'reasonable consumers' who could otherwise protect themselves in the marketplace." *Jeter*, 760 F.2d at 1172. Continuing, the court explained

> That law [FDCPA] was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous.' And the 'fact that a false statement may be obviously false to those who are trained and experienced

> does not change its character, nor take away its power to deceive others less experienced.'

Jeter, 760 F.2d at 1172-1173 (citations omitted). In *Joseph v. J.J. MacIntyre Companies, LLC*, 238 F.Supp.2d 1158, 1168 (N.D.Cal. 2002), a case evaluating whether repeated telephone calls violated the FDCPA, the court noted "claims under the FDCPA are evaluated under a least sophisticated consumer standard," (citing *Jeter*, 760 F.2d at 1179 ("[W]e hold that claims § 1692d [including telephone harassment] should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse.")).

18. The Fourth Circuit Court of Appeals has adopted the least sophisticated consumer standard when evaluating whether conduct violates the FDCPA. In *United States v. National Financial Services, Inc.*, 98 F.3d 131, 136 (4th Cir., 1996), the court held that "evaluating debt collection practices with an eye to the 'least sophisticated consumer' comports with basic consumer protection principles." Continuing, the court explained,

> The basic purpose of the least sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer protection law.

Id. The Fourth Circuit noted that this principle was rooted in a 1937 United States Supreme Court case which held,

> [T]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious.

Id. (citing *Clomon v. Jackson*, 988 F.2d. 1314, 1318 (2nd Cir., 1993)); *see also Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116 (1937).

19. As explained herein above, the Legislature stated its intent that the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters when construing the WVCCPA. Accordingly, this Court finds that the question of whether CashCall's debt collection practices violate the WVCCPA will be evaluated according to their capacity to deceive or their likely effect on the least sophisticated consumer.

Discussion of Pertinent Evidence

20. The Court finds a remarkable consistency in the testimony provided by the State's ten witnesses concerning their experiences with CashCall. All of the witnesses who obtained loans from CashCall testified that they were required to agree to automatic debits from their accounts as a condition of receiving the loan.[5] All of the consumers who obtained loans from CashCall reported that they were harmed by the requirement of making payments by automatic debits. Each of them was charged overdraft fees by their banks when CashCall's debits failed to clear. Many of them contacted CashCall to ask that the debits be stopped, but did not succeed in doing so. Many of them reported that CashCall debited their account on dates other than the date agreed upon, usually an earlier date, which caused the debit to bounce. Many of them also reported that CashCall would try again to debit their account multiple times after the initial debit bounced, sometimes on the same day or within the first two to three days. The end result for each person was the involuntary closure of their account by their bank, closure of the account by

[5] JoAnn McKinney testified about CashCall's contacts with her concerning the loan obtained by her son, James Stollings. She did not obtain a loan from CashCall.

the consumer, or a permanent stop payment order from their bank prohibiting further debits by CashCall.

21. The consumers' accounts of alleged telephone harassment by CashCall were also remarkably similar. All of the consumers reported having received a high volume of telephone calls from CashCall, including large numbers of calls per day, high volumes of calls over a period of weeks and months, and multiple telephone calls at their places of employment which continued even after they asked CashCall to stop. Most of the consumers testified that CashCall had contacted other parties to leave messages for them to call CashCall, even though each one of them had the same mailing address and telephone numbers throughout their dealings with CashCall. Several consumers also testified that CashCall disclosed their alleged account delinquency when calling third-parties.

22. The consumers also testified that CashCall's repeated and continued calls to their places of employment interfered with their work, created friction with their employers, and caused them to suffer embarrassment and humiliation in front of their supervisors and co-employees. One consumer testified that she believed CashCall's calls caused her to be laid off before other employees, although she had a good employment record for many years. *See* Terrie McCann-Bushroe, Tr. Vol. I, pp. 64-65. Collectively, the consumers testified about having received many types of threats from CashCall over the telephone, including threats of arbitration proceedings, legal action, garnishment of wages, loss of home and other property, threats to contact their employer in person or over the phone, and threats to visit consumers at their places of employment or at their homes.

23. One consumer testified that CashCall faxed a letter to her place of employment at Cabell-Huntington Hospital threatening to visit her there and to charge her $55 to $150 for that visit and each subsequent visit. *See* Brenda Baylous, Tr. Vol. I, pp. 191-193. CashCall characterized the letter as a "fugitive letter" and denied sending it. While it is likely that the letter was not authorized by CashCall, it is obvious that the letter, whether authorized or not, was sent by a CashCall employee as it contained the correct name, address, and account number for the consumer. If the letter was not authorized, it stands as evidence of CashCall's lack of control over its collection employees.

24. The testimony of the State's witnesses concerning the volume of calls is consistent with the data produced by CashCall and compiled by the State in Summary Ex. A. Overall, the Court finds all of the State's consumer witnesses to be credible. In reviewing Summary Ex. A, the Court notes the following totals of significance: CashCall made more than 20 calls per day to a West Virginia consumer on 16 occasions; CashCall made 15-19 calls to a West Virginia consumer on 130 occasions; CashCall made 10-14 calls in a day to a West Virginia consumer on 910 occasions; CashCall made 5-8 calls in a day to a West Virginia consumer on 5,036 occasions; and CashCall made 1-4 calls in a day to a West Virginia consumer on 18,929 occasions. CashCall also made a total of 84,371 telephone calls to West Virginia consumers. The total number of calls figure is actually skewed downward because the figure includes persons who did not default on their loans and therefore received very few if any collection calls. For example, 102 persons received 50 or less calls; 52 of them received 10 or less calls.

25. In contrast, 16 persons received more than 1,000 calls, including Jay Heiss (2,445), Ricky Fox, Sr. (1,653), Brenda Baylous (1,071), Dwayne Thornton (1,445), and James Stollings (1,020). In addition, 40 persons received between 500 and 1,000 calls, including Bryant Creighton (999), Brenda Hall (955), Terrie McCann-Bushroe (704), Robert Cadle (580), and Denise Soccorsi (532). Also, 86 persons received between 200 and 500 calls, including Nancy Pickens (447). Summary Ex. B also indicates that CashCall sent 262 notices of arbitration, contacted consumers' references 542 times, and contacted consumers at work 172 times.[6]

26. The State's evidence of the volume and pattern of CashCall's calls is largely undisputed by CashCall and, in fact, is wholly supported by the documents CashCall produced during discovery. Although Ms. Chavez indicated that some of the outbound calls counted by the State may have been "welcome calls" or other non-collection calls, it is equally likely that the State failed to count other collection calls due to the occasional difficulty in deciphering CashCall's service logs. The Court finds that the number of calls as reported by the State in Summary Ex. B is substantially accurate to enable the Court to pass judgment on CashCall's collection practices.

27. Both of CashCall's witnesses testified that an oral request was sufficient to stop calls at work, but that position is contradicted by the credible evidence of the State's representative witnesses. If that was CashCall's formal policy, the Court finds that the policy was not followed by its collection employees or enforced by CashCall's management.

[6] The latter figure is likely far less than the actual times CashCall contacted consumers at work based upon the testimony of the nine consumers in Court.

28. The testimony also supports the contention that CashCall had a pattern of calling references and other third parties in an effort to "make contact" with consumers or to leave messages for them. CashCall's loan applications collected the names and contact information for numerous references from each consumer who applied for a loan. But the consumers did not authorize CashCall to contact the references in the event of a default. While consumers were led to believe that CashCall might contact their references in connection with their loan application, there is no evidence that CashCall ever contacted references for that purpose. Instead, it is clear that CashCall's intent was to contact references when consumers' accounts became delinquent or when they defaulted.

29. CashCall's pattern of calling references and other third parties to establish "contact" with a consumer is of concern to the Court. The FDCPA, which CashCall claims to train its employees on, prohibits a debt collector from calling third parties except to acquire "location information." *See* 15 U.S.C. § 1692b. But Mr. Bennett confirmed that CashCall called third parties regularly to establish "contact" even when it had location information.[7] *See generally* Sean Bennett, Tr. Vol. II, pp. 184-191. As an explanation, Mr. Bennett stated that if it could not force the consumer into a "direct" contact, CashCall made these calls to third parties to establish "contact." Tr. Vol. II, p. 189. This practice is a fundamental violation of the general prohibition against calling third parties in the FDCPA and the WVCCPA. *See* 15 U.S.C. § 1692c(b) ("Except as provided in § 1692b of this title . . . a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer . . . .");

W. Va. Code § 46A-2-126. CashCall's admitted practice serves to explain the relentless volume of calls that CashCall unleashed upon West Virginia consumers. It is clear that CashCall either misunderstood, misapplied, or deliberately violated the prohibition against calling third parties.

Fifth Cause of Action
(Conditioning Extension of Credit Upon Consumers' Agreement to Electronic Account Debits)

30. The State alleged in its fifth cause of action that CashCall required consumers to agree to make payments by electronic debits as a condition of obtaining the loan, in contravention of the policy established by the federal Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693, et seq. In doing so, the State alleged that CashCall engaged in unfair or deceptive practices in violation of the WVCCPA, W. Va. Code § 46A-6-104. Specifically, the EFTA contains the following express prohibition against compulsory use of electronic fund transfers,

> No person may—
> (1) condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers; or
> (2) require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of employment or receipt of a government benefit.

See EFTA § 1693k (emphasis added). The EFTA states in its Congressional findings and declaration of purpose that "the primary objective of this subchapter . . . is the provision of individual consumer rights" *See* 15 U.S.C. § 1693(b) (emphasis added). Further, the EFTA provides that "a violation of any requirement this chapter [EFTA] imposed" under the EFTA is

[7] All of the State's representative witnesses testified that their home and employment "location information" (i.e., their home and work telephone numbers, cell phone numbers, and addresses) remained the same during the entire time they were dealing with CashCall.

an unfair or deceptive act or practice as defined by the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. *See* 15 U.S.C. § 93o(c) (emphasis added).

31. In this case, the record is replete with evidence of harm caused by CashCall's policy of requiring consumers to agree to electronic debits of their accounts as a condition of getting the loan. Virtually every representative consumer witness encountered bounced debits from CashCall that resulted in hundreds of dollars in overdraft fees from their banks. In most cases, the consumers were forced to close their accounts if their banks had not already involuntarily done so. *See* Nancy Pickens, Tr. Vol. I, p. 16 (testifying that her account was so far overdrawn she could not deposit money to pay her bills); Lori Anello, Tr. Vol. I, pp. 80-82 (testifying that CashCall's debits bounced at least ten times causing her a $27.50 fee each time, CashCall would try again to debit her account within two to three days, and the bounced debits caused "charges and charges, and I just couldn't get out from under that,"); Brenda Hall, Tr. Vol. I, p. 103 (testifying that CashCall "would run the check back through several times" causing her additional fees before she had a chance to cover it; she called CashCall to tell them to stop, but it continued to run the checks through); Denise Soccorsi, Tr. Vol. I, pp. 120-123 (testifying that it "got out of control," her bank charged her $31 each time, CashCall's bounced debits caused so many overdraft fees that her bank would take her entire paycheck, and to this day she owes $1,200 in overdraft fees caused by CashCall); Bryant Creighton, Tr. Vol. I, pp. 141-143 (testifying that CashCall would debit his account two days before the agreed upon date, each bounced debit resulted in a $36 fee from his bank and a $15 fee from CashCall, and his bank closed his account); Dwayne Thornton, Tr. Vol. I, pp. 174-175 (testifying that CashCall refused to honor his request to stop the debits, which forced him to close his account); and Robert Cadle,

Tr. Vol. I, p. 213 (testifying that CashCall would try to debit his account two days before his paycheck went in and would hit his account multiple times, twice in one day on one occasion; he incurred about $200 in overdraft fees).

32. All of the State's representative witnesses testified that CashCall required them to agree to electronic debits to get the loan. CashCall's loan application required consumers to disclose the name of their bank, bank account number, and check routing number. CashCall's "welcome letter" advised "You will be making this payment by electronic funds transfer unless you elect to terminate the electronic funds transfer on your account." Elissa Chavez, Tr. Vol. II, p. 9. CashCall's standard loan contract required each consumer to authorize electronic debits from their account. Elissa Chavez, Tr. Vol. II, p. 41. Most importantly, CashCall admitted that consumers must agree to electronic fund transfers to get the loan. Elissa Chavez, Tr. Vol. II, p. 60.

33. A federal court in California recently upheld a claim in a class action suit against CashCall in which the plaintiffs alleged, as the State has done here, that CashCall wrongfully required consumers to agree to make payments by automatic debits as a condition of obtaining a loan. The court in *O'Donovan v. CashCall*, No. C 08-03174 MEJ, 2009 WL 1833990 (N.D.Cal. June 24, 2009), scrutinized the same provisions that were used by CashCall in its contracts with West Virginia consumers here. There, as here, CashCall asserted as its defense that plaintiffs failed to state a claim under the EFTA because its contract permitted a consumer "to cancel an EFT authorization at any time, including prior to the first scheduled payment." *Id.* at *3. Thus, CashCall argued that the extension of credit is not conditioned on the use of EFTs for payment. *Id.* Significantly, the court in *O'Donovan* held "the right to later cancel EFT payments does not

allow a lender who conditions the initial extension of credit on such payments to avoid liability." *Id.* Thus, the court found that the plaintiff's complaint stated a claim for relief under 15 U.S.C. § 1693(k).[8] *Id.*

34. Based upon all of the foregoing, this Court finds that CashCall did require consumers to agree to make payments by automatic debits as a condition of obtaining the loans. The Court also finds that the fact that consumers could cancel the debits at a later date does not relieve CashCall from liability for conditioning the initial extension of credit on making payments by electronic fund transfer. In fact, the testimony here indicated that CashCall refused or resisted efforts made by consumers to cancel the automatic debits. This Court also finds that CashCall, by requiring consumers to agree to electronic fund transfers as a condition of obtaining the loan, has engaged in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104 as alleged by the State in its fifth cause of action.

Sixth Cause of Action
(Threatening Garnishment of Wages
Without Informing the Consumer that
There Must be in Effect a
Judicial Order Permitting Such Garnishment)

35. In its sixth cause of action, the State alleges that CashCall made unlawful threats of garnishment of wages to coerce payment of debts. W. Va. Code § 46A-2-124 contains a broad prohibition against the use of any threat, coercion, or attempts to coerce in the collection of debts

[8]The court later entered an order granting class certification on the claim that CashCall unlawfully required consumers to agree to electronic funds transfers as a condition of obtaining the loan. The class is limited to loans originated in California. *See O'Donovan v. CashCall*, No. C 08-03174 MEJ, 2009 WL 1833990 (N.D.Cal. June 24, 2009).

and outlines certain conduct that is expressly prohibited but the statute is not limited to the delineated conduct.[9] The State specifically cites W. Va. Code § 46A-2-124(e)(2) which prohibits

> [t]he threat that nonpayment of an alleged claim will result in the: (2) Garnishment of any wages of any person or the taking of other action requiring judicial sanction, without informing the consumer that there must be in effect a judicial order permitting such garnishment or such other action before it can be taken.

(emphasis added.) The Court construes this claim to not only encompass unlawful threats of garnishment but also unlawful threats to seize or attach other property, both personal and real, that would require judicial action. The Court also construes this statute as intending to prohibit a debt collector from leading a consumer to believe, falsely, that wages can be garnished or that personal or real property can be seized or attached, without the necessity of the underlying creditor proving its claim in court.

36. The testimony of certain witnesses presented by the State, undisputed by CashCall, indicates that CashCall made the types of unlawful threats as alleged. *See* Nancy Pickens, Tr. Vol. I, p. 11 (testifying that when she called CashCall to ask what the arbitration letters meant, CashCall told her it meant that they could take her house and her car); Denise Soccorsi, Tr. Vol. I, p. 127 (testifying that she asked CashCall why it would send one of its representatives to her place of work in Morgantown, as it threatened to do; CashCall said, "Because we are going to garnish your wages . . . we were going to talk to your employer"); Bryant Keith Creighton, Tr. Vol. I, p. 147 (testifying that CashCall told him "they could take my home, they could take my car . . . take my bank account . . . they could take—anything that I own as a possession, they had

[9] Although the WVCCPA enumerates specific conduct that is prohibited, this and other provisions contain the phrase "[w]ithout limiting the general application of the foregoing." W. Va. Code § 46A-2-124. Thus, the conduct

a right to take it away from me"); and JoAnn McKinney, Tr. Vol. I, p. 239 (testifying that when attempting to reach her son, James Stollings, CashCall threatened about four or five times that it would come to her house "and take stuff out of [her] house because James had a loan").

37. Upon the basis of the undisputed testimony of these consumers, the Court finds that CashCall engaged in a pattern of making unlawful threats to garnish wages and seize personal or real property, in violation of W. Va. Code § 46A-2-124(e)(2) and W. Va. Code § 46A-6-104, as alleged by the State in its sixth cause of action.

Seventh Cause of Action
(Threatening to Take Action Prohibited by the WVCCPA and Other Laws Regulating the Debt Collector's Conduct)

38. In its seventh cause of action, the State alleges that CashCall engaged in other threats or coercion in violation of W. Va. Code § 46A-2-124 and W. Va. Code § 46A-6-104. The State specifically alleges that CashCall violated W. Va. Code § 46A-2-124(f), which prohibits "[t]he threat to take any action prohibited by this chapter or other law regulating the debt collector's conduct." This statute paints a broad brush and may encompass many of the threats that the State's witnesses testified to at trial. Evidence of CashCall's violations of this statute may also be found in some of the form letters used by CashCall and admitted into evidence without objection.

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enumerated is not intended to be all inclusive.

39. Garnishment of wages and seizure of personal or real property cannot occur without judicial sanction and due process for the consumer. Thus, a threat to do these things that cannot lawfully be done without first going through the court also violates W. Va. Code § 46A-2-124(f) and W. Va. Code § 46A-6-104.

40. The WVCCPA, particularly W. Va. Code § 46A-2-126, prohibits a debt collector from unreasonably publicizing information relating to any alleged indebtedness of a consumer.[10] It specifically prohibits disclosure, publication, or communication of a consumer's alleged indebtedness to an employer or his agent, or to relatives or family members not residing with the consumer, except through proper legal action, process or proceeding. *See* W. Va. Code § 46A-2-126(a) and (b). The Court heard much testimony that CashCall violated these provisions by contacting and leaving messages with third parties without any legal justification. *See* Nancy Pickens, Tr. Vol. I, p. 17 (testifying that CashCall left a message with her secretary at work saying that they were trying to collect a debt); Terrie McCann-Bushroe, Tr. Vol. I, pp. 62-63 (testifying that CashCall called her at work and left messages for her to "call CashCall"); Brenda Hall, Tr. Vol. I, p. 98 (testifying that CashCall continued to call her at work after she told them not to; she was forced to take the calls in a room where five or six people were present who could overhear her telling CashCall such things as "I can't pay it now" or "I will send it . . . get the money in the bank as soon as possible"); Denise Soccorsi, Tr. Vol. I, p. 127 (testifying that CashCall told her it was just about to send one of its representatives to her place of work in Morgantown to "talk to your employer"); Bryant Creighton, Tr. Vol. I, p. 146 (testifying that

[10] The unlawful publication of all alleged indebtedness to third parties is discussed more specifically below in the Court's consideration of the State's ninth cause of action.

CashCall called him repeatedly at work after he asked it not to, leaving written messages with other employees for him to call CashCall; he said CashCall's calls were causing his personal information to be "spread amongst employees, that I was behind . . . this loan payment, because everybody can walk by my desk and look at the note that another employee had written"); Dwayne Thornton, Tr. Vol. I, pp. 170-171, 172-174 (testifying that CashCall called him multiple times at work every day after he asked it not to leaving messages disclosing his indebtedness; he said people at work "knew everything. They knew more than I did [about CashCall] . . . he would come to work and there would be about three different little notes . . . everybody thought it was a joke;" CashCall also disclosed Mr. Thornton's indebtedness to his girlfriend and his uncle); Brenda Baylous, Tr. Vol. I, pp. 191-193 (testifying a letter was faxed to her place of work seemingly from a CashCall employee that disclosed her indebtedness to two persons who work under her supervision; the letter also threatened that someone was being sent to her place of employment and that she would be charged from $55 to $150 for the trip); Robert Cadle, Tr. Vol. I, p. 216, 220-221 (testifying that CashCall contacted his supervisor at work; CashCall also disclosed his alleged indebtedness to his first ex-wife and called a friend to relay a message that CashCall had called).

41. Based upon the testimony of these consumers, undisputed by CashCall, the Court finds that CashCall threatened to take and did take action prohibited by the WVCCPA and other laws regulating a debt collector's conduct in violation of W. Va. Code § 46A-2-124(f) and W. Va. Code § 46A-6-104 as alleged by the State in its seventh cause of action.

Eighth and Eleventh Causes of Action (Harassing Consumers Repeatedly or Continually by Telephone)

42. In its eighth and eleventh causes of action, the State alleges that CashCall engaged in unlawful oppression and abuse of consumers through repeated phone calls. W. Va. Code § 46A-2-125 generally prohibits a debt collector from unreasonably oppressing or abusing any person in connection with the collection of or attempt to collect an alleged debt. The State specifically alleges that CashCall violated W. Va. Code § 46A-2-125(d) that prohibits a debt collector from: "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number."

43. All of the State's representative consumer witnesses testified that CashCall contacted them repeatedly and continuously at home, at work, on their cell phones, and at times or places that CashCall knew, or should have known, were inconvenient. The Court notes with particular concern that CashCall continued to contact the consumers at work after they unequivocally asked CashCall to stop. *See* Nancy Pickens, Tr. Vol. I, p. 17 (testifying that CashCall only called her once at work after she asked it not to, but the one call was so upsetting that she sat and cried for 30 minutes while at work); Terrie McCann-Bushroe, Tr. Vol. I, pp. 63-64 (testifying that CashCall called her multiple times at work after she asked it to stop, the calls interfered with her work as she was a classroom instructor and was forced to leave the classroom to take the calls; she believed the calls caused her to lose her job); Brenda Hall, Tr. Vol. I, p. 98 (testifying that CashCall repeatedly called her at work after she asked it to stop because she worked in an open office where she was forced to take the calls in the presence of other persons which resulted in

disclosure of her indebtedness); Bryant Creighton, Tr. Vol. I, p. 146 (testifying CashCall contacted him repeatedly at work after he asked it not to because American Electric Power did not like its phone lines being tied up with personal business and because the calls caused disclosure of his indebtedness to his co-employees); Dwayne Thornton, Tr. Vol. I, p. 168, 171-172 (testifying CashCall called him repeatedly at work after he asked it not to and when it knew that any calls there would not be convenient because it was a facility that served individuals with mental disabilities or who were facing various crises; the calls were so voluminous that his indebtedness was universally disclosed throughout his office); Robert Cadle, Tr. Vol. I, p. 216 (testifying CashCall contacted him repeatedly at work, and contacted his supervisor after he asked it not to).

44. The total number of calls to consumers at all places, including their homes and places of employment, is so voluminous as to defy description and would be difficult to believe if not confirmed by the records produced by CashCall to the State during discovery. The Court first examines the total number of calls and the time period during which they were made to the ten representative consumers who testified in Court in the order of their appearance:

> Nancy Pickens, 447 calls from January 29, 2008 - June 3, 2009;
> Terrie McCann-Bushroe, 704 calls from December 11, 2006 - June 26, 2008;
> Lori Anello, 106 calls from February 1, 2007 - May 1, 2009;
> Brenda Hall, 955 calls from November 30, 2006 - June 2, 2009;
> Denise Soccorsi, 532 calls from November 13, 2006 - June 3, 2009;
> Bryant Creighton, 999 calls from January 17, 2007 - April 4, 2009;
> Dwayne Thornton, 1,445 calls from September 28, 2006 - June 1, 2009;
> Brenda Baylous, 1,071 calls from September 22, 2006 - June 2, 2009;
> Robert Cadle, 580 calls from January 15, 2007 - September 30, 2008; and
> JoAnn McKinney, 1,020 calls made to reach her son, James Stollings, from December 21, 2006 - December 2, 2008.

See State's Summary Ex. B.

45. The volume of calls made by CashCall to other consumers whose accounts became delinquent or who allegedly defaulted is equally alarming. As noted above, 16 consumers received more than 1,000 calls from CashCall, ranging from a low of 1,020 (James Stollings) to a high of 2,445 (Jay Heiss). In addition, 40 persons received between 500 and 1,000 calls, and 86 persons received between 200 and 500 calls. The State's Summary Ex. A also discloses that CashCall made at least 20 calls per day to a West Virginia consumer on 16 occasions, 15 to 19 calls on 130 occasions, 10-14 calls on 910 occasions, 5 to 8 calls on 5,036 occasions, and 1 to 4 calls in a day on 18,929 occasions.

46. During cross examination of the State's paralegal, Angela B. White, and through the direct testimony of its witness, Sean Bennett, CashCall tried to show that the State may have over counted the number of outbound telephone calls by including so-called "welcome calls," other non-collection calls, or by including other calls that were not connected due to technical difficulties. On the other hand, Ms. White indicated that the Attorney General erred on the side of not counting a call when it was questionable. The Court finds and concludes that the total number of calls made by CashCall to consumers as reported in Summary Ex. B are substantially accurate and that the number of non-collection calls that may have been counted by mistake are so *de minimis* that they would not affect the Court's conclusion about CashCall's telephone collection practices based upon the volume of calls.

47. The FDCPA provision governing telephone abuse and harassment, 15 U.S.C. § 1692d(5) is identical to the comparable provision in the WVCCPA, W. Va. Code § 46A-2-125(d). Significantly, both provisions require a finding that the telephone calls were made "with intent to annoy, abuse, oppress or threaten any person at the called number." *Id.* at § 125(b). The

decisions of federal courts evaluating whether telephone communications constitute violations of the FDCPA are particularly helpful to this Court in how they deal with the issue of intent.

48. Most recently, U.S. District Judge Irene C. Berger was asked to determine whether J. P. Morgan Chase Bank "acted with the requisite intent to annoy, abuse, oppress or threaten the person at the called number based upon having made more than 100 collection calls to the plaintiff during a particular period" *Elisabeth Duncan v. J.P. Morgan Chase Bank, N.A.*, No. 5:10-cv-01049, slip op. at 8 (S.D.W. Va., Nov. 4, 2011) (emphasis in original). In so doing, the court found,

> The plain language of the statute aptly sets forth that a statutory violation can be bourne from the mere volume of calls placed to a debtor. This is so, based on the statute's reference to calls which are repeated or continuous. Placed in the proper context, the volume of calls made to a debtor can be demonstrative of an intent to annoy, abuse or oppress, where, as in this case, those calls were repeated after Plaintiffs advised Defendant that they wished only to be contacted in writing, desired to have the autodialer to stop placing calls to their phones, or that future communications were to be with their attorney.

Id. (emphasis added). Continuing, the court noted that it is not always necessary to glean "intent" from the "continuous nature of the calls by highlighting a distinctive pattern, such as the number of calls placed in one day, or the time in which those calls were placed, these factors are not required in every case." *Id.* Thus, she concluded that the Plaintiff had made a requisite showing on the issue of the Defendant's intent for purposes of a motion for summary judgment given the number of calls alone "which were repeatedly placed to his telephone." *Id.* at 9.

49. Other courts have taken similar approaches over the years when evaluating whether the repeated telephone calls violate the FDCPA. *See, e.g., Krapf v. Nationwide Credit, Inc.*, No. SACV 09-00711 JVS (MLGx), 2010 WL 2025323, at *2-3 (C.D.Cal. May 21, 2010) (finding four to eight calls per day for two months stated a claim; it did not matter that the Plaintiff could not recall the precise dates of calls when the frequency and volume of the telephone calls can show the intent to annoy, abuse, and harass); *Gilroy v. Ameriquest Mortgage Company*, 632 F.Supp.2d 132, 135, 137 (D.N.H. 2009) (finding three calls per night for one year, a total of approximately 468 calls, stated a claim; when defendant made 200 calls after the consumer said he could not pay and asked that the calls stop, each of the 200 calls after that violated the FDCPA; intent may be inferred by the volume or content of calls); *Kerwin v. Remittance Assistance Corp.*, 559 F.Supp.2d 1117, 1124 (D.Nev. 2008) ("intent to annoy, abuse, or harass may be inferred from the frequency of phone calls, the substance of the phone calls, or the place to which phone calls are made."); *Sanchez v. Client Services, Inc.*, 520 F.Supp.2d 1149, 1160-1161 (N.D.Cal. 2007) (finding a total of fifty-four calls, including seventeen in one month and six calls in one day, stated a claim; the content or substance of the calls made are irrelevant to the issue of harassment); *Prewitt v. Wolpoff & Abramson, LLP*, No. 05-CV-725S (F), 2007 WL 841778, at *3 (W.D.N.Y. Mar. 19, 2007) (finding four calls per day during a three-month period, and one to two calls per day during a 200 day period state a claim); *Akalwadi v. Risk Management Alternatives, Inc.*, 336 F.Supp.2d 492, 505-506 (N.D. Md. 2004) (finding whether twenty-five calls in a two-month period state a claim is a question of fact for a jury; "whether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls."); *Joseph v. J.J. MacIntyre Companies, LLC*, 238 F.Supp.2d 1158, 1168-

1169 (N.D.Cal. 2002) (finding 200 calls during a 19-month period, including some days when there were multiple calls states a claim).

50. CashCall admitted that 10-20 calls per day, and 1,000 calls over several months, were not unusual or unreasonable. Based upon all of the foregoing, the Court finds that CashCall engaged in a pattern and practice of making repeated and continuous telephone calls or at times known to be inconvenient to consumers with the intent to annoy, abuse, oppress or threaten consumers, in violation of W. Va. Code § 46A-2-125(d), as alleged by the State in its eighth and eleventh causes of action.

Ninth and Twelfth Causes of Action
(Unreasonable Publication of Information Relating to Alleged Indebtedness of Consumers)

51. In its ninth and twelfth causes of action, the State alleges that CashCall unreasonably publicized information relating to alleged indebtedness of consumers or unjustifiably contacted third parties in violation of W. Va. Code § 46A-2-126. The latter provision makes it unlawful for a debt collector to disclose the alleged indebtedness of a consumer to any person except: (i) upon the express and unsolicited request of a relative or family member who resides with the consumer or (ii) through proper legal action, process or proceeding. The record herein is replete with undisputed testimony that CashCall unlawfully disclosed consumers' alleged indebtedness by repeatedly contacting consumers at work after they asked not to be contacted there, by repeatedly leaving messages for consumers to "call CashCall" at their places of employment, and by repeatedly calling references and other third parties without any legal justification and leaving messages for consumers to "call CashCall" (in some cases directly disclosing that the call was

about a debt). Much of this conduct has already been enumerated in the discussions above concerning the State's seventh and eighth causes of action.

52. To briefly recap, the following witnesses testified about conduct by CashCall that would violate W. Va. Code § 46A-2-126: Nancy Pickens testified that CashCall left a message with her secretary at work that they were calling to collect a debt from her, Tr. Vol. I, p. 17, and she also discovered that CashCall had contacted one of her neighbors and her mother about her account, Tr. Vol. I, p. 69; Lori Anello testified that CashCall's repeated calls to her at work forced her to discuss the account in an office that was not private and in the presence of others, Tr. Vol. I, pp. 85-85; Brenda Hall testified that CashCall's repeated calls to her at work after she asked not to be called there forced her to discuss her account in an office area where her conversation was overheard by others, Tr. Vol. I, p. 98; Bryant Creighton testified that CashCall called him repeatedly at work after he asked not to be called there and left messages to call CashCall, disclosing the debt to others who worked there, Tr. Vol. I, p. 146; Dwayne Thornton testified that CashCall's repeated calls to him at work after he asked not to be called there disclosed his indebtedness to virtually everyone who worked at his office, Tr. Vol. I, pp. 170-172; Brenda Baylous testified that a letter was faxed to her at her place of employment at a hospital expressly disclosing her indebtedness and threatening that someone would be sent to her place of employment to discuss the account was seen by two persons who work under her supervision, Tr. Vol. I, pp. 191-192; Robert Cadle testified that CashCall disclosed his indebtedness by calling his supervisor at work, his first ex-wife, and his friend, Tr. Vol. I, pp. 216, 220-221; JoAnn McKinney testified that CashCall disclosed the account of her son, James Stollings, by

repeatedly calling and threatening her about his account; although he resided with her she had no knowledge of the loan until CashCall called, Tr. Vol. I, pp. 236-238.

53. On the basis of the foregoing undisputed testimony, the Court finds that CashCall unreasonably and unlawfully publicized information relating to consumers' alleged indebtedness in violation of W. Va. Code § 46A-2-126, as alleged by the State in its ninth and eleventh causes of action.

Tenth Cause of Action
(Collecting, Attempting to Collect, or Representing that it May Collect a Debt Collector's Fee or Charge for Services Rendered)

54. In its tenth cause of action, the State alleges that CashCall collected, attempted to collect, or represented that it may collect a debt collector's fee or charge for services rendered. Whether a debt collector can charge a debt collector's fee to a consumer is a matter strictly governed by state law. While some states permit a collection fee to be added (usually requiring written authorization in the underlying contract), West Virginia does not. Specifically, it is unlawful in West Virginia for a debt collector to collect, attempt to collect, or even to represent that it can collect, a debt collector's fee or charge for services rendered. *See* W. Va. Code § 46A-2-127(g), W. Va. Code § 46A-2-128(c), and W. Va. Code § 46A-2-128(d).

55. There are two exceptions to the near total ban on fees. W. Va. Code § 46A-2-128(c) permits a debt collector to charge collection fees and attorney's fees when necessary "for the collection of any amount due upon delinquent educational loans made by any institution of higher education within this state," but only when such charges are authorized by the terms of the obligation. In addition, W. Va. Code § 46A-2-128(d) permits a debt collector to collect such fees or charges if it is "expressly authorized by the agreement creating the obligation and by

statute." (emphasis added). Thus, a fee for a dishonored check may be collected because it is authorized by a separate statute, W. Va. Code § 61-3-39e. A fee that is not authorized by statute cannot be collected even if it is included in the terms of the obligation.

56. When collecting debts in West Virginia, CashCall used a particular letter called "Field Call Notice Letter - 323" which was admitted into evidence at trial as an attachment to State's Summary Ex. A. The letter notifies the consumer (apparently falsely) that CashCall has sent a field representative to meet with the consumer at his or her home or place of employment due to alleged failure to return calls or respond to other communications. The letter also states: "The cost of this field visit may range from $55 to $150 depending on your location, and you may be charged for this and any other subsequent field visits." *See* Field Call Notice Letter -323. Although the State failed to produce any evidence that CashCall actually charged the fee threatened in the Field Call Notice Letter, the fee in question is an unlawful debt collection fee that could not be charged under any circumstances. Thus, CashCall violated W. Va. Code § 46A-2-127(g) by representing that such a fee could be charged, even if it had no intention of ever attempting to collect such a fee.

57. The State's evidence indicates that the Field Call Notice Letter was sent to at least four persons in September and November 2007, namely, Brian Blankenship, Ricky Fox, Sr., Jay Heiss, and Douglas Steele. Brenda Baylous also testified that a similar letter was faxed to her at her place of employment in about January 2008. Although the letter received by Brenda Baylous is not identical to the Field Call Notice Letter produced by CashCall, and CashCall disclaims the letter, the Court finds that the letter must have been sent by a CashCall employee as it contained the correct name, address, and account number for Ms. Baylous. The first paragraph of the

"Notice of Field Visit" received by Ms. Baylous is almost identical to CashCall's official Field Call Notice Letter - 323 and contains the same threat to charge her $55 to $150 for this and any other subsequent field visits. On this basis, the Court concludes that CashCall sent a debt collection communication threatening to charge unlawful collection fees to West Virginia consumers on at least five occasions.

58. Based upon the foregoing, the Court finds that CashCall represented that it could collect unlawful fees and charges, specifically charges for a threatened visit at their home or place of employment, in violation of W. Va. Code § 46A-2-127(g) and W. Va. Code § 46A-6-104.

Thirteenth Cause of Action
(False Threats of Legal Action)

59. In its thirteenth cause of action, the State alleges that CashCall made false threats of legal action in violation of W. Va. Code § 46A-2-124 and § 46A-6-104. The WVCCPA provides that a debt collector shall not employ the means "of any threat, coercion, or attempt to coerce" in the collection of alleged debts. The State specifically alleges that CashCall made certain threats of legal action that violate § 46A-2-124(f), which prohibits the threat to take any action prohibited by this chapter [WVCCPA] or other law regulating the debt collector's conduct. The State also alleges that CashCall's threats constituted unfair or deceptive acts or practices, as defined by § 46A-6-104. In light of the testimony and evidence presented at trial, the Court construes this cause of action so as to encompass threats that may constitute fraudulent, deceptive or misleading representations in violation of § 46A-2-127.

60. The Court heard testimony from several of the State's representative witnesses that CashCall threatened them with legal action, arbitration proceedings, non-judicial seizure of property, and other actions that it did not intend to take or that are prohibited by the WVCCPA. *See* Nancy Pickens, Tr. Vol. I, pp. 13-19 (testifying that CashCall sent two letters threatening arbitration); Lori Anello, Tr. Vol. I, p. 83 (testifying CashCall threatened to "take legal action" against her); Brenda Hall, Tr. Vol. I, p. 106 (testigying CashCall threatened "you will be receiving a letter from a lawyer"); Bryant Creighton, Tr. Vol. I, pp. 149-150 (testifying CashCall threatened it could take his home, his car, his bank accounts, anything he owned, and threatened him with arbitration); Dwayne Thornton, Tr. Vol. I, p. 177 (testifying CashCall threatened unless he paid they would take "legal action"); Brenda Baylous, Tr. Vol. I, p. 195 (testifying a letter she believed originated from CashCall was faxed to her at work threatening that someone was being sent to her place of employment and that she would be charged $55 to $150 for the trip); JoAnn McKinney, Tr. Vol. I, pp. 239-240 (testifying CashCall threatened to come to her house to take her belongings unless her son, James Stollings, paid his loan).

61. The State has argued that all of the threats of "legal action" were unlawful because CashCall did not intend legal action and, in fact, CashCall waived its right to take consumers to court because of a binding mandatory arbitration provision included in the contract. Although the loan contract afforded consumers an opportunity to "opt out" of the mandatory arbitration clause, CashCall admitted during discovery that not a single West Virginia consumer opted out of mandatory arbitration. CashCall has argued and its witnesses have asserted that when it threatened "legal action" orally or through its collection letters (see discussion below) it really meant "arbitration proceedings." But arbitration and court proceedings cannot possibly mean the

same thing. By including the mandatory arbitration provision in its contracts, CashCall has given up its right to litigate its claims against consumers in court. If the terms meant the same thing, then CashCall's arbitration clause would be meaningless.

62. The State also argues that CashCall repeatedly threatened to initiate arbitration proceedings when it had no intention of doing so. Angela B. White's analysis of the service logs produced by CashCall during discovery indicate that CashCall sent at least 262 written communications threatening arbitration or advising consumers that arbitration has already commenced. *See* Summary Ex. B. As it turns out, CashCall did initiate eleven arbitration proceedings against West Virginia consumers. The first three were initiated on May 30, 2007. The other arbitration proceedings were initiated in June, July, October, and the last one initiated on December 17, 2007. *See* Summary Ex. A. But CashCall abandoned all of the arbitration proceedings; thus, none of the proceedings ever resulted in awarding CashCall a claim against a consumer. However, Mr. Bennett did testify it was his "understanding" that CashCall failed to pursue the arbitration proceedings because of the Attorney General's investigation. Tr. Vol. II, p. 163.

63. The Court is not convinced of the reason given by CashCall for failing to follow through on its arbitration claims. The Attorney General's investigative subpoena was issued on August 30, 2007. Tr. Vol. I., p. 225. But CashCall commenced four arbitration proceedings after receiving the Attorney General's Subpoena (three in October and one in December 2007). *See* Summary Ex. A. Moreover, there is no evidence that CashCall notified the consumers that the arbitration proceedings would be dismissed.

64. CashCall responded to the Subpoena by letter dated October 22, 2007, and advised the Attorney General that "federal law preempts these provisions [the WVCCPA] and thus it is impossible for CashCall to violate them. Therefore, we respectfully submit that the Attorney General lacks probable cause to conduct this investigation and to exercise jurisdiction over CashCall." *See* Complaint, Ex. C, Letter from Eric N. Whitney at 11. Moreover, CashCall had every reason to believe that the Attorney General did not intend to pursue this matter further after receiving the letter from Whitney since it did not file the Complaint until more than one year later, on October 8, 2008. As stated above, CashCall's service logs indicate that CashCall sent at least 262 letters threatening to commence arbitration proceedings against consumers. *See* Summary Ex. B.

65. In addition to the testimony of the State's representative witnesses, CashCall made threats of legal action in various form letters that it sent to consumers. The form collection letters that CashCall produced during discovery indicate that CashCall used at least two letters that threatened legal action. *See* F.S. Final Attempt Letter - 316 ("[S]ince you have not given us any cooperation In our efforts to resolve your loan, it has now become necessary for us to review this account for litigation proceedings."); and Final Demand 48 Hour Letter - 562 ("[W]e have given you every opportunity to arrange for payment without the possibility of legal action. . . . If arrangements have not been made to pay all sums due within Forty-Eight (48) hours of this letter, we will review this account for litigation proceedings."). CashCall's records indicate that it sent the Final Demand 48 Hour letter out 60 times to 57 consumers and sent the Final Attempt Letter out 53 times to 12 consumers. *See* Attachments, State's Summary Ex. A.

66. Regardless of the real reason CashCall failed to complete the arbitration proceedings, it appears to the Court that CashCall used the threats of arbitration as a collection tactic to induce payments. Since CashCall had waived its right to take consumers to court, filed very few arbitration claims, and failed to complete any of them, the Court finds that CashCall made false threats of arbitration.

67. Federal courts have considered whether unintended threats to take legal action or other deceptive threats violate the FDCPA. Therein consumers typically alleged that the deceptive threats violate 15 U.S.C. § 1692e(5) (threat to take any action that cannot legally be taken or that is not intended to be taken) and/or 15 U.S.C. § 1692e(10) (the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer). These provisions closely mirror the conduct prohibited by the WVCCPA, W. Va. Code § 46A-2-124 (prohibition of threats, coercion, or attempts to coerce) and W. Va. Code § 46A-2-127 (prohibition against use of any fraudulent, deceptive or misleading representation or means to collect a debt or to obtain information concerning consumers). The decisions in these cases help to guide this Court in deciding whether CashCall has violated the WVCCPA.

68. In *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), the debt collector sent a letter to the consumer implying that legal action already had or would be taken when the evidence indicated that none was intended. *Id.* at 24. Although the language in the collection letter was vague, the court concluded,

> The clear import of the language, taken as a whole, is that some type of legal action has already been or is about to be initiated and can be averted from running its course only by payment. The only 'action' underway was the dispatching of the Notice itself, and the

> only prospective future 'action' for this indebtedness was an attempt at telephone contact (which in fact occurred).

Id. at 25-26. In *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411 (E.D.Va. 1997), the court considered whether a letter making an unintended threat to report an account to the credit bureau violated the FDCPA. In concluding that it did, the court noted, "The test is the capacity for the statement to mislead; evidence of actual deception is unnecessary." *Id.* at 416 (citing *U.S. v. National Financial Services, Inc.*, 98 F.3d 131, 139 (4th Cir. 1996)). In *National Financial Services*, the court found that a letter from a collection lawyer stating that he had "the authority to see that suit is filed against you in this matter" when such was not the case was a false representation or deceptive means to collect a debt in violation of § 1692e(10) of the FDCPA. The court also noted "Courts have consistently found that falsely representing that unpaid debts would be referred to an attorney for immediate legal action is a deceptive practice." *Id.* (citing *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985)). Significantly, the court in *National Financial Services* also noted,

> Turning to injury to the pubic, the government need not prove actual harm to consumers in order to assess penalty. Threats of legal action are likely to be intimidating to consumers, and cause distress and anxiety. Stress resulting from false threats of suit have been recognized as a compensable injury in private suits under the FDCPA. Consumers might elect to pay a debt that they do not owe in order to avoid the threatened lawsuit. The court concluded that the millions of notices sent out bearing the violative language caused significant injury to the public.

National Financial Services, 98 F.3d at 140 (citations omitted).

69. Many other courts have found that false threats of legal action violate the FDCPA. *See Baker v. G.C. Services Corp.*, 677 F.2d 775, 777-778 (9th Cir. 1982) (finding a debt collector's letter stating that it first attempts to settle matters "out of court before making any decision whether to refer them to an attorney for collection" when only further phone calls and letters were intended created the impression that legal action was a real possibility and the consumer could legitimately believe that further collection procedures meant court action); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62 (2nd Cir. 1993) (finding a letter advising consumer that a creditor has "instructed us to proceed with whatever legal means is necessary to enforce collections misled consumer that legal action was imminent when such was not the case violated the FDCPA); *Brown v. Card Service Center*, 464 F.3d 450, 453 (3rd Cir. 2006) (finding a collection letter advising consumer that failure to cooperate "could result in our forwarding this account to our attorney with directions to continue collection efforts" misled the consumer into thinking that legal action was imminent when legal action was rarely taken); and *Antkowiak v. Taxmasters*, 779 F.Supp.2d 434, 449 (E.D.Pa. 2011) (finding a letter threatening legal action from lawyer not licensed to practice law in Pennsylvania on behalf of creditor who rarely filed suit created false impression of litigation in violation of FDCPA). The courts in these cases based their determination that the written communications violated the FDCPA by evaluating whether the letters had the capacity to mislead or deceive the "least sophisticated consumer." *See, e.g.*, *Brown v. Card Service Center*, 464 F.3d at 454; *United States v. National Financial Services*, 98 F.3d at *136*; and *Jeter*, 760 F.2d at 1172-1173.

70. Based upon all of the foregoing, the Court finds that CashCall made false threats of legal action and other actions that were not intended or were prohibited by law in violation of W. Va. Code § 46A-2-124, W. Va. Code § 46A-2-127, and W. Va. Code § 46A-6-104 as alleged by the State in its thirteenth cause of action.

Fourteenth Cause of Action
(Wrongfully Requiring Consumers to
Use Payment Methods Requiring a Fee)

71. In its fourteenth cause of action, the State alleges that CashCall wrongfully required consumers to use payment methods requiring a fee in violation of W. Va. Code § 46A-2-128 and W. Va. Code § 46A-6-104. Several of the State's representative witnesses testified that CashCall required that they make payments by MoneyGram as the only permissible method after they stopped the electronic debits from their account. *See* Terrie McCann-Bushroe, Tr. Vol. I, p. 77 (testifying CashCall required her to make payments by MoneyGram for which she was charged a fee of $13 or $14 each time); Brenda Hall, Tr. Vol. I, pp. 105-112-113 (testifying CashCall required her to make payments by MoneyGram, which cost a fee of $6 to $8 each time—"that's the way they stated they wanted it done"); Robert Cadle, Tr. Vol. I, pp. 214-215 (testifying CashCall refused to accept his checks after he closed his account; "either they were going to debit my account or they were going to take a MoneyGram"). In addition to the testimony of the State's representative witnesses, CashCall employed at least three form collection letters that required consumers whose accounts were in default to make payments only by methods requiring a fee. CashCall's Breach Letter-560 and Broken Promise Notification-355 both require consumers to make payments by MoneyGram, money order, or certified check. CashCall's Final Demand 48 Hour Letter-562 required that consumers may only make payments

by a cashier's check payable to CashCall or a money transfer via MoneyGram. *See* Attachments, State's Summary Ex. A.

72. Because CashCall required consumers who had defaulted to make payments by methods that required a fee, particularly MoneyGram, those consumers who were likely already having financial difficulties were forced to incur additional expenses by having to travel to the nearest Wal-Mart and then by paying an additional fee for the MoneyGram payments. However, Sean Bennett testified that although MoneyGram was the preferred payment method it was not required by CashCall. Tr. Vol. II, p. 114. He also insisted that CashCall will accept a regular check. "It [MoneyGram] might be our preferred method of payment, but "CashCall posts any payment that comes in and will not reject any sort of payment received by the consumer." Tr. Vol. II, p. 112. If Mr. Bennett's testimony is truthful, then CashCall's payment acceptance policies are unlawful in two respects. First, there is strong evidence that CashCall required consumers that defaulted to make payments by MoneyGram. Such a requirement would be an unfair or deceptive act or practice under W. Va. Code § 46A-6-104. If it is true that CashCall would accept payments by any method, then CashCall misled consumers by leading them to believe only payments by MoneyGram would be accepted when such was not the case, in violation of W. Va. Code § 46A-2-127.

73. Upon the basis of the foregoing, the Court finds that CashCall engaged in an unfair or deceptive act or practice by requiring consumers who had defaulted on their account by representing that payments could only be made by methods requiring a fee, particularly MoneyGram, in violation of W. Va. Code § 46A-2-127 and W. Va. Code § 46A-6-104. Although CashCall's policy required consumers to make payments by methods that incurred a

fee, the fee was not a "debt collector's fee" as defined by W. Va. Code § 46A-2-128(c) because the fee was paid to a third party and not to CashCall. Hence, while CashCall's payment method policy violated other provisions of the WVCCPA, as noted by the Court, the MoneyGram fees incurred by consumers were not debt collection fees, unlike the NSF fee discussed herein below.

Fifteenth Cause of Action
(Charging Unlawful NSF Fees)

74. In its fifteenth cause of action, the State asserts that the $15 NSF fee CashCall charged for electronic debits that failed to clear due to insufficient funds was an unlawful debt collection fee and excess charge. The standard loan contract that all West Virginia consumers were required to sign contained the following provision, "I understand that I will be subject to a fee of $15 if any payment I make is returned for non-sufficient funds." Despite the inclusion of this provision in the contract, the Court questioned whether CashCall actually charged the fee when consumers' debits bounced. Mr. Bennett said it did. "They are charged a non-sufficient funds fee of $15" which is disclosed in the contract. Tr. Vol. II, p. 129. At least one consumer also confirmed this practice. *See* Bryant Creighton, Tr. Vol. I, p. 141 (testifying CashCall charged him a $15 fee each time his debit bounced). Mr. Bennett also explained that when a consumer's debit bounces, CashCall makes at least two more attempts to debit the account within the month, but "CashCall only charges an insufficient funds fee after the first returned transaction." Tr. Vol. II, p. 129.

75. As explained above in the discussion on the State's tenth cause of action, the WVCCPA prohibits all debt collection fees, except in the collection of delinquent educational loans made by institutions of higher education within the state "if included in the terms of the loan contract"

or fees that are allowed by other statutes. W. Va. Code § 61-3-39e provides that "the payee or holder of a check, draft or order which has been dishonored for insufficient funds" may impose or collect a fee of $25 on the consumer. (emphasis added). Thus, if a consumer made payment by mailing a paper check to CashCall and the check was dishonored for insufficient funds, CashCall would be authorized to charge the consumer a $25 dishonored check fee. That fee is allowed because it is expressly authorized by statute.

76. The question before the Court is whether CashCall can charge consumers a $15 fee each time an electronic funds transfer fails to clear for insufficient funds. Although the loan contract provides for such a fee, the fee is not lawful unless it is also authorized by statute. The State argues that the terms "check," "draft," "order," and "drawer" that appear in West Virginia's worthless check statute are "terms of art" that are defined in the Uniform Commercial Code. *See, e.g.*, "Drawer," W. Va. Code § 46-3-103(a)(2); "Order," W. Va. Code § 46-3-103(a)(6); "Check," W. Va. Code § 46-3-104(a)(f); and "Demand Draft," W. Va. Code § 46-3-104(k). The State argues that each of these terms of art refer only to a "negotiable instrument" which is a physical thing that one can possess, like a paper check, draft, or order. *See* W. Va. Code § 46-3-103 and § 46-3-104. In contrast, an electronic funds transfer is an entirely different form of payment and is not a check, draft, or order. *See* EFTA, 15 U.S.C. § 1693a(7) ("the term 'electronic funds transfer' means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument" (emphasis added)).

77. It is undisputed here that CashCall represented that it could charge a $15 insufficient funds fee each time the consumer's electronic funds transfer failed to clear. It is also admitted by CashCall that it did in fact charge this fee, though not necessarily every time to every consumer.

The Court agrees with the State that an electronic funds transfer is not a check, draft, or order as defined by the Uniform Commercial Code. Thus, the Court finds that the $25 fee provided by W. Va. Code § 61-3-39e may only be charged when a paper check, draft, or order is dishonored for insufficient funds. The Court further finds that this statute does not authorize a fee to be charged when an electronic funds transfer fails to clear for insufficient funds. CashCall has not cited any other statutes that would authorize such a fee to be charged. Since CashCall's $15 fee for electronic funds transfer that fail to clear is not authorized by statute, the Court concludes that it is an unlawful debt collection fee as defined by W. Va. Code § 46A-2-128(c) and an unlawful "excess charge" as defined by W. Va. Code § 46A-7-111(1).

78. Based upon the foregoing, the Court finds that CashCall has charged, attempted to charge, and represented that it can charge a $15 fee to consumers when an electronic funds transfer fails to clear their account in violation of W. Va. Code § 46A-2-127(g), W. Va. Code § 46A-2-128(c), W. Va. Code § 46A-2-128(d), W. Va. Code § 46A-7-111(1), and W. Va. Code § 46A-6-104.

Bona Fide Error Defense

79. Having found that CashCall has violated the WVCCPA as alleged by the State in its fifth through fifteenth causes of action, one question that remains is whether CashCall may assert a "bona fide error" defense to the violations. Specifically, the WVCCPA provides a defense as follows,

> If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under

> subsections (1), (2) and (4) of this section and the validity of the transaction is not affected.

See W. Va. Code § 46A-5-101(1). The FDCPA also affords a bona fide error defense to debt collectors if they can show "by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *See* 15 U.S.C. § 1692k(c).

80. Although the majority of federal circuit courts have held that the bona fide error defense to violations of the FDCPA is limited to unintentional clerical and factual errors only, some courts had previously extended the defense to mistakes of law. But the scope of the bona fide error defense to violations of the FDCPA has now been definitively settled by the United States Supreme Court. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605 (2010), the Court held that the bona fide error defense in the FDCPA is limited to unintentional clerical and factual errors only and "does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute." In keeping with the Legislature's intention that West Virginia courts be guided by the interpretation given by federal courts to the various federal statutes dealing with the same or similar matters, W. Va. Code § 46A-6-101(1), this Court holds that the bona fide error defense under the WVCCPA is similarly limited to unintentional clerical errors or mistakes of fact and does not extend to mistakes of law.

81. In the case at bar, it is clear that CashCall's violations of the WVCCPA are the result of intentional actions and are not the result of clerical errors or mistakes of law. In addition to finding that CashCall's acts were willful, this Court further finds that CashCall "has engaged in a course of repeated and willful violations" of the WVCCPA, as set forth in W. Va. Code § 46A-7-

111(2). Accordingly, this Court is authorized to assess a civil penalty against CashCall of up to $5,000 for each violation of the WVCCPA and does so as discussed further herein below.

Appropriate Relief for Consumers and the State

82. Having found that CashCall has violated the WVCCPA in all of the respects as alleged by the State in its Amended Complaint, the Court now considers what relief is appropriate to be granted to the State in order to effectuate the purpose of the WVCCPA to protect the public from an unfair, deceptive, and fraudulent acts or practices arising from consumer transactions. The WVCCPA provides that "the Attorney General may bring a civil action to restrain a person from violating this chapter and for other appropriate relief" *See* W. Va. Code § 46A-7-108 (emphasis added). The West Virginia Supreme Court of Appeals in the *State of West Virginia ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799 (W. Va. 1998), examined the Attorney General's authority to seek consumer restitution and other equitable remedies in its enforcement actions. Therein, the court held that the use of the phrase "other appropriate relief" in W. Va. Code § 46A-7-108 "indicates that the Legislature meant the full array of equitable relief to be available in suits brought by the Attorney General." 506 S.E.2d at 812-813 (emphasis added). Thus, the Legislature has authorized the Attorney General to seek and authorized this Court to grant the full array of equitable relief stemming from CashCall's violations of the WVCCPA, including but not limited to, consumer restitution, disgorgement, and debt relief.

83. The State also seeks its attorney's fees and costs for the prosecution of this enforcement action against CashCall. As to relief available under the WVCCPA, the Supreme Court of Appeals of West Virginia held that the use of the phrase "other appropriate relief" in W. Va. Code § 46A-7-108 "indicates that the Legislature means the full array of equitable relief to be

available in suits brought by the Attorney General." *State By and Through McGraw v. Imperial Marketing*, 203 W. Va. 203, 215-216, 506 S.E.2d 799, 811-812 (1998). In his concurring opinion in *Imperial Marketing*, Justice Starcher concluded that the Attorney General would "be entitled to collect the attorneys' fees and costs incurred for the work necessary in the filing and prosecution of [consumer protection] lawsuits." *Id.* at 219, 815, n. 6 (Starcher, J. concurring). Furthermore, the Supreme Court of Appeals of West Virginia has held that "there is authority *in equity* to award to the prevailing litigant his or her reasonable attorneys' fees as 'costs' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) (emphasis added). Based on the forgoing, the Court finds and concludes that the Attorney General should be awarded his costs, including reasonable attorney's fees for Phase II of the trial.

DECISION

Based upon all of the foregoing, the Court does hereby **ORDER** as follows:

(1) The State is awarded an injunction against CashCall as authorized by W. Va. Code § 46A-7-108 permanently prohibiting CashCall from violating the WVCCPA and specifically prohibiting CashCall from engaging in the debt collection conduct as alleged by the State in its fifth through fifteenth causes of action.

(2) The State is awarded a judgment against CashCall in the amount of $292,000 for engaging in unfair or deceptive acts or practices stemming from the policy of requiring consumers to consent to automatic debits as a condition of obtaining the loan, failing to disclose that accounts would be debited at least two more times shortly thereafter when

the regularly-scheduled debit fails to clear, failing to timely honor consumer's requests to stop a particular debit or to permanently stop debits, and for subjecting consumers to multiple overdraft fees from their banks frequently resulting in the involuntary closure of their accounts, as alleged by the State in its fifth cause of action. Such amount consists of a civil penalty of $1,000 for each of the 292 West Virginia consumers affected, as authorized by W. Va. Code § 46A-5-101.

(3) The State is awarded a judgment against CashCall in the amount of $1,000,000 for engaging in threatening, coercive, oppressive, abusive, harassing, fraudulent, deceptive, misleading, unfair, or unconscionable debt collection practices, as alleged collectively in the State's sixth through fifteenth causes of action.

(4) The State is awarded a judgment against CashCall in the amount of $1,000,000 as civil penalty for engaging in a course of repeated and willful violations of the WVCCPA in its debt collection practices, as authorized by W. Va. Code § 46A-7-111(2). Such money awarded as a civil penalty shall be placed in the State Treasury to be appropriated by the West Virginia Legislature.

(5) It is further **ORDERED** as authorized by W. Va. Code § 46A-5-105 and by the equitable powers of this Court that any debts still allegedly owed by any West Virginia consumers to CashCall are hereby **CANCELLED** and CashCall shall notify credit bureaus to delete all references to West Virginia accounts from the credit records of West Virginia consumers; provided, however, CashCall is not required to delete the accounts in those instances where it has only reported positive payment history. Further, inasmuch as the subject debts are disputed and the amounts allegedly owed are offset by CashCall's debt

collection violations, CashCall shall not file 1099(c) cancellation of debt forms with the Internal Revenue Service.

(6) It is further **ORDERED** that it is that the amounts awarded to the State in Items 2 and 3 above shall be used to make appropriate restitution to West Virginia consumers who, in the judgment of the Attorney General, have been subjected to unlawful debt collection or other unfair or deceptive acts or practices by CashCall. Any such amount of restitution monies owed to a consumer, but unable to be paid to such consumer, shall be held in a trust account, pending a later determination by this Court as to the proper distribution of such money. In order to enable the Attorney General to carry out this provision, the Court **ORDERS** that CashCall shall, within 30 days after entry of this Order, provide the following additional documents and information to the Attorney General:

a) A report that identifies each instance in which the account of a West Virginia consumer was subjected to an electronic funds transfer by CashCall, including debits that cleared as well as debits that failed to clear for insufficient funds or other reasons.

b) A report that identifies each instance in which a West Virginia consumer was charged a $15 non-sufficient funds fee for a debit that failed to clear, regardless of whether the fee was actually collected by CashCall.

c) A report that identifies each instance in which a West Virginia consumer made a payment to CashCall by MoneyGram or other methods that require a fee. The report shall include, if known by CashCall, the amount of the fee incurred by the consumer from making the payment.

d) Such reports shall identify all consumers and include, at a minimum, the date and amount of each debit or attempted debit, all NSF fees charged, and all MoneyGram or other such payments received by CashCall.

e) CashCall shall also provide the Attorney General with such other documents and information as shall reasonably be requested to assist in determining appropriate restitution to be paid to consumers who were aggrieved by the debt collection and other unfair or deceptive acts or practices.

(7) It is further **ORDERED** that the State is awarded a judgment against CashCall for its costs, including its reasonable attorney's fees, for the prosecution of Phase I of its enforcement action against CashCall. This amount shall be determined by the Court at a later date after entry of the final order concluding all phases of this trial.

The objections of any party aggrieved by this Order are noted and preserved. The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 10 day of September, 2012.

Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 10 DAY OF SEPTEMBER 2012
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA