14-894
No. ______

IN THE

Supreme Court of the United States

CASHCALL, INC., and J. PAUL REDDAM, IN HIS CAPACITY AS PRESIDENT AND CEO OF CASHCALL, INC.,

Petitioners,

v.

PATRICK MORRISEY, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Deposit Insurance Act permits state-chartered banks to lend money to consumers in other states at interest rates that are lawful in the state where the bank is located. 12 U.S.C. § 1831d(a). Any contrary rate limitation in the consumer's state is expressly preempted. *Id.*

In this case, a bank chartered in South Dakota originated loans to consumers across the nation, including in West Virginia, on terms that are lawful in South Dakota. It is undisputed that the bank itself set the terms for the loans, extended credit to the consumers, and disbursed the proceeds to them.

Petitioner CashCall, Inc., which is not a bank, marketed the loans to consumers on the bank's behalf. Pursuant to its marketing agreement with the bank, CashCall also subsequently purchased many of the loans from the bank and serviced them.

The West Virginia Attorney General sued CashCall, alleging violations of the West Virginia Consumer Credit and Protection Act, a statute that exempts from regulation any loan for which federal law preempts state interest rate limitations. In holding that West Virginia's rate limitations were not preempted, the lower courts found it dispositive that CashCall, and not the bank, held the "predominant economic interest" in the loans.

The Question Presented is whether the Federal Deposit Insurance Act preempts the application of state interest rate limitations to loans that were underwritten and originated by a state-chartered bank, when a non-bank acquires a predominant economic interest in the loans.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners CashCall, Inc. and J. Paul Reddam respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals for West Virginia in this case.

STATUTORY PROVISIONS INVOLVED

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, provides, in relevant part:

> (a) Interest rates
>
> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) Interest overcharge; forfeiture; interest payment recovery

If the rate prescribed in subsection (a) of this section exceeds the rate such State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section, the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from such State bank or such insured branch of a foreign bank taking, receiving, reserving, or charging such interest.

Section 85 of the National Bank Act, 12 U.S.C. § 85, provides:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in

> addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

The West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-102(38), provides:

> "Regulated consumer loan" means a consumer loan, including a loan made pursuant to a revolving loan account, in which the rate of the loan finance charge exceeds eighteen percent per year as determined according to the actuarial method, except where the loan qualifies for federal law preemption from state interest rate limitations, including federal law bank parity provisions, or where the lender is specifically permitted by state law other than article four of this chapter to make the loan at that rate without a requirement the lender hold a regulated consumer lender license.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals (Pet. App. 1a-57a) is unpublished. The state circuit court's phase-two trial opinion (Pet. App. 58a-97a) is unpublished.

JURISDICTION

The West Virginia Supreme Court of Appeals issued its judgment on May 30, 2014. Pet. App. 1a. It denied a timely request for rehearing on August 26, 2014. *Id.* 98a. On November 17, 2014, the Chief Justice extended the time to file this petition to and including December 24, 2014. *See* No. 14A512. On December 12, 2014, the Chief Justice further extended the time to file this petition to and including January 23, 2015. *See id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner CashCall, Inc. is a California-based consumer finance company. Pet. App. 2a. CashCall entered into a marketing agreement with First Bank and Trust ("FB&T"), a bank chartered in South Dakota that is supervised by the Federal Deposit Insurance Corporation. *See id.* 3a. As part of that agreement, CashCall assists FB&T in marketing loans to consumers. *Id.* 3a, 64a, 75a. If the loans are of sufficient quality to meet CashCall's standards, CashCall then purchases the loans originated by FB&T. *Id.* 3a. For loans that are purchased, FB&T keeps the origination fees, as well as any interest that accrues before CashCall purchases the loan, and CashCall assumes the right to repayment of the loan, as well as the responsibility to service the loan. *See id.* 3a n.3.

As part of its marketing program, CashCall marketed FB&T installment loans to consumers in West Virginia, under the bank's supervision. Prior to doing so, CashCall's general counsel, Dan Baren, communicated with West Virginia's Division of Banking to determine whether CashCall would need to obtain a license in order to market loans within the state. In an e-mail dated July 28, 2006, Baren asked:

> As I stated on the phone, my question was whether a California company would need to obtain a license from the Commissioner to take

> assignments and service unsecured consumer loans that were originated by a financial institution which itself was exempt from the licensing requirement.
>
> I would like to conclude that licensing would not be required because the loans being assigned were not 'regulated consumer loans' as that term is defined in Section 46A-1-102.
>
> Please let me know your position on this matter. Thank you very much.

Pet. App. 42a. This inquiry referred to West Virginia Code § 46A-1-102(38), which defines the term "regulated consumer loans" and excludes from regulation "any loan" that "qualifies for a federal law preemption from state interest rate limitations."

Baren received a favorable response that same day. Kathy Lawson, the head legal counsel of the Division of Banking, assured Baren that "[w]e have further discussed the situation you describe and have come to the same conclusion you presented in your message below. Licensing is not required because the loans being assigned were not 'regulated consumer loans' as defined in 46A-1-102." A.R. 5462 (partial excerpt appears at Pet. App. 42a).

Having received assurances from the state, CashCall marketed loans for FB&T to consumers in West Virginia, and then purchased those loans that conformed to its underwriting guidelines. All told, CashCall purchased FB&T loans to 292 West Virginia residents, all for amounts of $5000 or less. Pet. App. 3a. After a substantial number of borrowers eventually defaulted on their loans, CashCall attempted to collect the debts. *Id.*

In 2007, the West Virginia Attorney General's office demanded that CashCall cease marketing loans in West Virginia and make restitution to the defaulting consumers. *Id.* at 3a-4a. The demand alleged that CashCall's activities violated the West Virginia Consumer Credit and Protection Act (WVCCPA). CashCall responded that the WVCCPA's usury provisions were preempted by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d, because the installment loans were made by FB&T under a Federal Deposit Insurance Approved program. *Id.* 4a. It therefore argued that, as the Division of Banking had advised, the FB&T loans were not "regulated consumer loans."

2. The Attorney General sued CashCall in West Virginia circuit court, alleging that CashCall had issued loans without a license, that it had violated state usury laws, and that it had engaged in unlawful debt collection practices. *Id.* 5a. The Attorney General labeled CashCall's relationship with FB&T a "rent-a-bank" scheme, alleging that CashCall's marketing agreement was merely a sham to permit CashCall to avail itself of preemption rules that protect state-chartered banks. *Id.*[1]

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[1] CashCall sought to remove the action to federal court, arguing that because FB&T originated the loans, respondent's claim was completely preempted. The federal district court granted respondent's motion to remand the case, reasoning that

CashCall again raised its preemption defense. "Both parties agreed that if the circuit court found FB&T to be the true lender, then the State's claims that CashCall was making loans without a license and making usurious loans would be preempted by federal law." *Id.* 16a. Thus, a central issue at trial was whether federal law regards FB&T, or instead CashCall, as the lender.

The state called a single trial witness: Margot Saunders, a purported expert on lending issues. Saunders testified that regulators regard third-party lending programs with suspicion, often referring to them as "rent-a-bank" or "rent-a-charter" arrangements. Pet. App. 69a. She further "testified that regulators challenged such arrangements by contending that the non-bank entity was the true lender rather than the bank," and that they attempted to prove the identity of the "true lender" by focusing on the entity that bore the predominant economic risk of the loan. *Id.* 70a.

Saunders testified that CashCall, and not FB&T, bore the predominant economic risk of the consumer loans in this case because CashCall would purchase

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the claim was not completely preempted because the complaint only made allegations against CashCall, a non-bank entity, and thus did not impair the bank's ability to make loans or otherwise exercise its powers under the Federal Deposit Insurance Act. *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 786-87 (S.D.W. Va. 2009). Because it ruled that it did not have subject matter jurisdiction, the district court had no occasion to consider the separate questions of express or implied preemption.

every loan that complied with its underwriting criteria for one hundred cents on the dollar, and would then bear all the risk of nonpayment. *Id.* 71a. Furthermore, CashCall had agreed to indemnify the bank, and its owner and CEO had provided a personal guarantee for CashCall's obligations to the bank. *Id.*

CashCall's general counsel, Dan Baren, also testified. He described the genesis of CashCall's relationship with FB&T. Specifically, he explained that FB&T had approached CashCall because the bank was seeking to start consumer lending, and was also seeking to partner with an entity that could assist it in marketing its loans nationwide. Pet. App. 75a. The bank required assistance because it lacked the capacity to market the loans, and to service them after origination. *Id.* On the other side of the equation, CashCall was headquartered in California and the majority of its business was concentrated there, so it was eager to diversify. *Id.* 74a-75a. Negotiating at arms' length, CashCall and FB&T thus entered into an arrangement whereby FB&T would originate loans nationwide, and CashCall would take on the marketing and servicing responsibilities.

Baren further explained that initial underwriting decisions were all made by FB&T through a website owned by the bank on the bank's systems. *Id.* 7a. CashCall had no direct input into the underwriting process, but it was only obligated to purchase loans that were consistent with its own underwriting criteria. *Id.* Because FB&T wished to sell its loans to CashCall, it adopted consistent underwriting criteria of its own. *Id.*

Baren also testified that while CashCall bore the economic risk from the loan, *e.g.*, the risk of default by the borrowers, the bank remained subject to all of the regulatory risk—including from its supervisor, the FDIC—as well as all of the reputational risk associated with the loans. *Id.* 76a-77a.

The trial court "agree[d] with the State that CashCall was the de facto lender and thus, is subject to West Virginia's usury and lending laws." *Id.* 63a.[2] The court held that "[b]ased upon the review of how rent-a-bank cases have been approached by other courts and regulators, the Court concludes that the predominant economic interest standard is the proper standard to determine who the true lender is in the present case." *Id.* 85a-86a. Citing cases finding that the federal banking laws did not result in complete preemption of (and therefore federal subject matter jurisdiction over) state usury claims, *id.* 86a-88a, the court concluded that the claims against CashCall were likewise not preempted. The court decided that CashCall was the true lender, that it was not an affiliate of the bank, that the purpose of the lending program was to permit CashCall to use the bank's charter to evade state usury laws, and that the program violated West Virginia law. *See id.* 90a-92a.

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[2] The state circuit court held a two-phase bench trial. The first phase addressed the state's unfair debt collection claims (counts five through fifteen of its amended petition), which are not at issue here. The second phase addressed the state's unlawful lending and usury claims (counts two through four).

The trial court thus granted the following relief: It enjoined CashCall from violating the WVCCPA; found that all contracts between CashCall and West Virginia consumers were void and cancelled any debts still owed to CashCall; imposed a civil penalty of $730,000 for making loans without a license; imposed a civil penalty of $730,000 for engaging in unfair and deceptive acts and for making and collecting usurious loans; and imposed a punitive damages award of $10,045,687.96—an amount equal to quadruple the total interest that the West Virginia consumers (292 in all)had agreed to pay on their loans. *See id.* 95a-97a.[3]

3. CashCall appealed from the circuit court's orders, and the West Virginia Supreme Court of Appeals affirmed. CashCall argued that the trial court erred by applying a "predominant economic interest" test to decide that CashCall was the "de facto lender." Pet. App. 34a. In support, CashCall cited *Discover Bank v. Vaden*, 489 F.3d 594, 601-03 (4th Cir. 2007), *rev'd on other grounds*, 556 U.S. 49 (2009), and *Krispin v. May Department Stores Co.*, 218 F.3d 919, 923 (8th

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[3] The phase-one trial order imposed an injunction requiring CashCall to refrain from violating the WVCCPA, and a declaratory judgment holding that CashCall's contracts with West Virginia consumers are invalid. The order further required CashCall to pay $1,292,000 in restitution to the 292 consumers for whom it held a loan. It further required CashCall to pay $1,000,000 to the state as a civil penalty. *See* Pet. App. 13a-15a.

Both orders also required CashCall to pay the state's attorney's fees and costs. In a subsequent order, the trial court assessed those to be $446,180 and $9789.94, respectively.

Cir. 2000), which held that the true lender is the entity that (1) sets the terms and conditions of a loan, and (2) actually extends credit to the consumer. *See* Pet. App. 34a-35a. Under that test, CashCall argued, FB&T is the lender, so West Virginia's interest rate rules are preempted and the loans are exempt state licensing and usury laws. *Id.* 34a.

The Supreme Court of Appeals rejected CashCall's argument, citing *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897 (W. Va. 1974), which held that the applicability of usury statutes should turn on the substance, and not merely the form, of transactions. Pet. App. 35a. The court thus held that the "predominant economic interest" test, which requires courts to look beyond the contracts, is the more appropriate test to determine the identity of a "true lender" in an alleged rent-a-bank case. *Id.* 35a-36a. The court attempted to distinguish *Vaden* and *Krispin* on the ground that in those cases "the non-bank entity was a corporate affiliate of the bank," while "CashCall and FB&T were completely separate entities." *Id.* 37a.

CashCall filed a timely petition for rehearing, which was denied. Pet. App. 98a.

4. This Petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to address a critically important and frequently recurring issue of federal banking law that has divided the lower courts. When it enacted Section 27 of the FDIA, Congress sought to facilitate interstate lending by state-chartered banks. It therefore expressly permitted such banks to export the interest rates permitted in their home jurisdictions to other states. Congress gave that provision teeth by expressly preempting contrary usury laws.

Plaintiffs and some regulators in states with strict usury laws dislike Congress's design and have been searching for a way to challenge it. Consequently, these plaintiffs have sought to recharacterize loan programs as belonging to third parties that provide marketing and/or servicing assistance, instead of the banks themselves. Utilizing the pejorative "rent-a-bank" label, these plaintiffs have invented legal tests that permit courts to ignore the contractual relationships at issue in these transactions, and to thwart Congress's efforts to facilitate lending by state-chartered banks.

The "predominant economic interest" test employed by the courts below is precisely such an invention. It is undisputed that FB&T sets the terms for the loans and actually extends credit to the consumers. When originated, the loans plainly fall within Section 27, and thus outside the scope of the WVCCPA. In fact, the state has not disputed that FB&T can make these very loans to West Virginia consumers without implicating the state's usury and licensing laws. Pet. App. 65a. But the lower courts held that because CashCall contracted to buy those loans so that it can service them, FB&T's crucial role in the transaction is irrelevant. That result is wrong, and the issue warrants this Court's review.

Other courts have rejected the "predominant economic interest" test in favor of a more straightforward, objective, and predictable inquiry that turns on which entity actually set the terms for a loan and then extended credit to the consumer. That is the approach taken by the Fourth and Eighth Circuits, as well as numerous federal district courts. This Court should grant certiorari to resolve the conflict, the persistence of which introduces uncertainty into the market and chills lending activity in conflict with Cognress's intent.

I. The West Virginia Supreme Court Of Appeals Erroneously Decided An Important Issue Of Federal Law.

Certiorari is warranted because the decision below incorrectly decided an important issue of federal banking law. Congress enacted Section 27 of the FDIA in 1980 as a reaction to the credit crunch of the 1970s. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826-28 (1st Cir. 1992) (summarizing legislative history). As relevant here, the statute facilitates lending by state-chartered banks, and places those banks on an equal footing with national banks. *See id.* It accomplishes those purposes by authorizing state-chartered banks to export their interest rates to other states when they made loans across state lines—a power that national banks already enjoyed. *Id.* To ensure that the consumer's state does not impose its usury laws upon a regulated bank, the statute expressly preempts those laws. *See* 12 U.S.C. § 1831d(a). In lieu of state-law regulation of interest rates, federal law, including regulations by the FDIC and a separate cause of action for persons charged more than the rate permitted by Section 27, ensures fairness to borrowers. *See id.* § 1831d(b).

The text of the statute makes its purpose and operation clear. It provides that "[i]n order to prevent discrimination against State-chartered insured depository institutions . . . such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made . . . the rate allowed by the laws of the State, territory, or district where the bank is located . . . ." 18 U.S.C. § 1831d(a). The key question is when and by whom a loan is "made."

The answer is straightforward: a loan is "made" when it is originated, and it is made by the entity that originated it, *i.e.*, the entity that approved the loan, disbursed the proceeds to the borrower, and extended the credit by communicating the approval to the borrower. That position is not only consistent with the plain meaning of the word "made"[4]; it has also long been embraced by the relevant federal agencies, which take the position that a loan is made where approval, disbursal, and extension of credit occur. *See* FDIC General Counsel's Opinion No. 11, *Interest Charges by Interstate Banks*, 63 Fed. Reg. 27,282-01, 27,285 (May 18, 1998); Office of the Comptroller of the Currency, Interpretive Letter No. 822 (Feb. 17, 1998).

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[4] *See, e.g.*, "Make," OED Online (2014), http://www.oed.com/view/Entry/112645?rskey=yFSYSP&result=4 (defining "make" as, inter alia, "[t]o enter into, conclude (a settlement, contract, bargain)," "[t]o create," and "[t]o draw up (a list, a document, etc.)").

On the other hand, the "predominant economic interest" standard advanced by the courts below has no basis in the statutory text whatsoever. The state courts attempted to justify this standard by resort to state precedent from four decades ago holding that in order to determine whether a transaction is usurious, courts must examine its substance, not its form. *See* Pet. App. 35a, 85a (citing *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897 (W. Va. 1974). But that case did not interpret Section 27, or indeed any federal statute. Instead, the issue was whether a pricing term in the credit sale of a mobile home was functionally identical to "interest" on a loan, and thus capable of being usurious under state law. *See Carper*, 207 S.E.2d at 495. It is telling that the lower courts could not find any better authority for their interpretation of the federal statute.

In any event, petitioners' interpretation of the statute does not ask courts to ignore the substance of the relevant transactions. Respondent's argument to the contrary appears to be that in order for a loan transaction to have "substance," the originator must retain the economic risk of the loan. But that is simply not true: sales of loans after origination are commonplace—indeed, they are the norm—and there is no reason that a sale for full value (like the sales in this case) has less "substance" than a sale at either a discount or a premium. In fact, the evidence in this case—which was never disputed or denied by the state—showed that both parties were able to benefit from the arrangement: FB&T was able to reach a broader customer base without taking on the added expenses of marketing and servicing the loans; and

CashCall was able to diversify its loan portfolio so that its risk was not overwhelmingly concentrated in California. Moreover, the loans were not shams: the borrowers actually received the money, and efforts were made to collect on loans that were delinquent or in default. There is nothing "insubstantial" about any of that.

If anything, it is respondent's position that elevates form over substance, if the proper focus is the underlying transaction with the consumer. In this case, the state has never disputed that FB&T is permitted to make loans—at any interest rate allowed by South Dakota law—to West Virginia consumers. *See* Pet. App. 65a. Indeed, all of the loans that FB&T actually originated fall within that category of permitted loans. But respondent argues, and the lower court agreed, that because a non-bank third party acquired a predominant economic interest in the loans, the substance of the bank's transaction with the consumer is essentially irrelevant.

Petitioners' interpretation of the statute also better serves Congress's purpose in enacting Section 27, which was to facilitate lending by state-chartered banks. Because sales of loans after origination are so common in today's market, many loans are designed from the outset to satisfy servicers' underwriting criteria in order to facilitate a sale. And of course, many servicers are not banks. If the "predominant economic interest" standard holds sway, then state-chartered banks will find it very difficult to sell their loans, because those loans may instantly become usurious upon sale. If the banks know that they cannot sell the loans, then they will have no incentive to lend in the first instance, which would hinder, rather than facilitate, lending by chartered banks. Even if none of this is certain, the risk that a sold loan will be cancelled, and the purchaser will incur punitive sanctions like the ones levied against CashCall in this case, will chill purchasing activity, and therefore lending. On the other hand, if the identity of the originator is dispositive as to the identity of the lender, then banks can sell their loans, and purchasers can be confident that the purchase will not expose them to usury claims. That will facilitate lending.

This Court has not yet authoritatively interpreted Section 27. But it has made relevant statements when describing Section 85 of the National Bank Act, 12 U.S.C. § 85, which provides essentially the same protection to federally chartered banks as Section 27 does to state-chartered banks. In *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), this Court held that Section 85 permits national banks to export their interest rates to other states. The Court reasoned that Congress was aware of the market for interstate loans when it enacted the statute, and that Congress sought to protect national banks engaged in that market from regulation by neighboring states. *See* 439 U.S. at 314-15.

The Court's opinion ended with the following paragraph:

> Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair

> the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates. *Cf.* Cong. Globe, 38th Cong., 1st Sess., 2123 (1864). . . . [T]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19 (footnote omitted).

The Court's reasoning in *Marquette* serves as a potent critique of the lower court's decision in this case. Here, the lower court essentially held that if it did not apply the "predominant economic interest" test, it would never be able to catch usurious "rent-a-bank" schemes. In other words, the court worked backward from the state's policy objective to find a test that would permit it to limit the effect of the federal statute. *See* Pet. App. 37a. But the federal banking statutes are not designed to tiptoe around state usury laws; they are designed to preempt them. As this Court more recently explained, "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003) (quotation marks omitted). To the extent that the lower court disapproved of that result, its complaint—like the complaint of the petitioners in *Marquette*—is best addressed to Congress.

Of course, that assumes that the Court takes the state's concerns about usury at face value—which it should not. Under petitioners' test, preemption does not apply unless a state-chartered bank, insured by the FDIC and regulated under both federal and state law, originates the loans. If the bank participates in an unlawful scheme, then the appropriate regulators can sanction it. All of respondent's legitimate consumer-protection objectives can be achieved that way. But here, what respondent wishes to do is not regulate the banks, but instead to deter them from participating in lawful business arrangements by threatening the banks' partners with state law damages claims.

Finally, a test that focuses on which entity approved the loan, extended the credit, and disbursed the funds is far superior if the goal is to create a predictable and stable business environment. Banks and their partners need clear, easily administrable rules—not *ad hoc* standards that produce unpredictable results—in order to operate. The lower court's "predominant economic interest" test is vague at best. It is entirely unclear when or how an economic interest becomes "predominant," and it is therefore impossible to tell when a state court will conclude that a bank has ceased to be the "true lender" of a loan that it originated.

In fact, that concern was borne out in this very case: CashCall contacted West Virginia regulators to obtain their advice before it attempted to market loans to West Virginia consumers. In its request for information, CashCall explained that it would be taking an assignment of the loans and servicing the loans, which had been originated by a state-chartered bank. The regulators responded right away, stating that "[l]icensing is not required because the loans being assigned were not 'regulated consumer loans' as defined in 46A-1-102." Pet. App. 42a. That response confirmed CashCall's understanding of the law, and it made perfect sense. Had the regulators been true to their word, this case would never have arisen. It is only because the regulators subsequently applied the "predominant economic interest" test that CashCall found itself whipsawed by their inconsistency and unable to ensure its compliance with state law.

This issue is sufficiently important that this Court should grant certiorari to resolve it. Without clarity as to the meaning of Section 27, state-chartered banks are at a loss to determine what sorts of partnerships they can strike with third parties, and what sorts of loan products they can offer to consumers. The decision below injects unnecessary legal uncertainty into the marketplace, and thwarts Congress's intent in enacting Section 27.

II. The Decision Below Conflicts With The Precedents Of Numerous Federal Courts.

The use by the West Virginia Supreme Court of Appeals of the "predominant economic interest" test also deepens a conflict about the appropriate way to gauge whether a loan falls within the scope of federal preemption. Certiorari is warranted to address the conflict, which burdens interstate lenders with a patchwork of inconsistent rules.

1. As the court below acknowledged, it employed a different test to determine the identity of a "true lender" than the Fourth and Eighth Circuits have applied. In *Discover Bank v. Vaden*, 489 F.3d 594, 597 (4th Cir. 2007), *rev'd on other grounds* 556 U.S. 49 (2009), Discover Financial Services, Inc. (described in the *Vaden* opinion as DSF), the servicing affiliate of Discover Bank (a chartered bank), brought a state law lawsuit against a credit card customer who had refused to pay her bill. The card itself had been issued by Discover Bank. *Id.* "According to the servicing agreement between DFS and Discover Bank, DFS performs such functions as marketing and servicing Discover Bank loan products and collecting on accounts pursuant to instructions from Discover Bank." *Id.* The customer brought state law counterclaims, including usury claims. *Id.* Discover Bank sought to remove those counterclaims to federal court, where it filed a motion to compel arbitration of them. *Id.* at 598.

In deciding that the federal courts had subject matter jurisdiction, the district court, and later the court of appeals, held that the counterclaims were completely preempted by Section 27 of the FDIA. The court of appeals explained that "Vaden would have us simply accept DFS as the lender, and thus real party in interest, and deny Discover Bank's role as originator of her Cardmember account. The facts, however, show that Discover Bank was the lender here and therefore the real party in interest." 489 F.3d at 602.

The Fourth Circuit found the "Cardmember agreements" to be "of particular significance." *Id.* They "conclusively demonstrate[d] that Discover Bank was the entity that extended Vaden credit and set the interest and fees of which Vaden complains." *Id.* The agreements also gave the bank the power to levy finance charges and late fees. And the agreement between Discover Bank and DFS likewise acknowledged that Discover Bank was the lender, even though DFS was responsible for mailing bills to cardmembers and bringing collection actions in court. *See id.*[5]

The Eighth Circuit employed a similar analysis in *Krispin v. May Department Stores Co.*, 218 F.3d 919 (8th Cir. 2000). In that case, a store in Missouri issued credit cards to its customers, and subsequently

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[5] This Court reversed *Vaden* on a different ground. *See Vaden v. Discover Bank*, 556 U.S. 49 (2009). Discover had brought a state court action to enforce a debt and then sought to remove the defendant's counterclaims to federal court for the purposes of pursuing arbitration. The Fourth Circuit had held that complete preemption applied because all of the counterclaims were completely preempted. *See id.* at 56. In reversing, this Court held that in order to determine whether a case is subject to federal question jurisdiction on the basis of complete preemption, a court cannot merely examine the counterclaims, but must examine the initial claims as well. *Id.* at 67. Because the initial claim in *Vaden* was under state law and was not amenable to federal adjudication, this Court held that complete preemption did not apply. *See id.* at 66. The Court did not discuss the Fourth Circuit's holding that the true lender is the entity that extends credit to the borrower and sets the terms of the loan.

transferred those agreements to a federally chartered bank that it had created in Arizona. *Id.* at 921-22. The terms of credit subsequently changed to permit late fee charges in excess of those permitted by Missouri law, and customers brought class action lawsuits against the store in state court. *Id.* at 922. The store removed the actions to federal court on complete preemption grounds under the National Bank Act. The district court accepted jurisdiction and granted summary judgment to the defendants. *Id.*

The Eighth Circuit affirmed. It reasoned that "the question of complete preemption in this case turns on whether appellants' suit against the store actually amounted, at least in part, to a state law usury claim against the bank." *Id.* at 923. Even though the plaintiffs' complaints "focused exclusively on the store, the only entity with which they had ever entered into credit agreements," and even though "the store remained substantially involved in the collection process because it purchased the bank's receivables on a daily basis," the court of appeals held that the bank was the lender for purposes of federal preemption because it was merely in the role of an assignee of receivables. *Id.*

The court explained that "[t]he bank, a wholly-owned subsidiary of the store, with which it is required to maintain arms'-length transactions, was established specifically for the purpose of taking over the store's credit card operations." *Id.* The bank was therefore the real party in interest vis-à-vis those accounts. "Moreover, the store's purchase of the bank's receivables does not diminish the fact that it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees." *Id.* at 924. The court thus held that it made sense "to look at the originating entity (the bank), and not the ongoing assignee (the store), in determining whether" preemption applies. *Id.*

Under the foregoing analysis, the loans in this case clearly are attributable to FB&T, and not CashCall. FB&T set the terms of the loans, and it extended the credit to consumers. That CashCall subsequently acquired an economic interest in the loans—or even that the bank designed the loans to fit CashCall's underwriting criteria—is irrelevant because "[t]he non-usurious character of a note should not change when the note changes hands." *Krispin*, 218 F.3d at 924 (quoting *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 147-49 (5th Cir. Unit B 1981)).

The lower court attempted to distinguish *Vaden* and *Krispin* by noting that in each of those cases, the bank and the non-bank entity were affiliated, while CashCall and FB&T are not. But the courts of appeals in *Vaden* and *Krispin* placed no emphasis on that fact. If anything, the lack of affiliation in this case favors CashCall because affiliated companies have far greater incentive and ability to collude in order to avoid regulation. For example, in *Krispin*, the store itself issued credit to customers—then transferred the credit to a bank that was its wholly owned subsidiary, from which it purchased all of the receivables on a daily basis. In other words, the store did not merely rent a bank; it bought one, and then used that bank to shield its credit card program from usury laws. But the Eighth Circuit had no trouble concluding that the bank, and not the store, was the true lender. *See* 218 F.3d at 924. Similarly, in *Vaden*, the servicing affiliate and the bank had common ownership—thus heightening the risk that the bank was being used to shield the servicing entity from usury laws. But the Fourth Circuit found the bank to be the true lender because it extended credit and set the terms of the loans. *See* 489 F.3d at 602.

In this case, by contrast, FB&T and CashCall had an arm's-length relationship in which each assumed different responsibilities over the life of the loan: FB&T originated the loans, and CashCall later acquired and serviced them. Neither CashCall nor its owner had any power to induce FB&T to extend credit, or to specify the terms upon which it would be extended. Under *Vaden* and *Krispin*, FB&T is unquestionably the true lender.

The Fourth and Eighth Circuits are not alone in relying on the identity of the originator to determine the true lender for purposes of federal preemption. In *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359 (D. Utah 2014), a consumer finance company offered to finance purchases by customers buying goods on a website. *Id.* at 1360. The company would take credit information from the customers and relay the qualifying buyers to a state-chartered bank in Utah, which then extended the credit consistent with Utah law. *Id.* at 1360-61. Consumers in California, claiming that the interest rates charged on the loans were usurious under California law, brought suit against the finance company, which argued preemption. *Id.* at 1361-62.

The district court agreed with the defendant. It held that "[e]ven accepting" as true the allegation that "the structure in use . . . reveals that [Bill Me Later] and not the state-chartered bank is the 'true lender' and thus that the whole scheme is an obvious effort to circumvent state usury laws . . . the court would still be required to dismiss these claims as preempted by Section 27." *Id.* at 1367. That was so, the court reasoned, because:

> WebBank's conceded role in originating the loan subjects the program and [Bill Me Later] to regulatory scrutiny and accountability under the FDIA—including the FDIC's detailed and mandatory examination and supervision, which are part and parcel of the interest rate authority granted in Section 27—and therefore a full panoply of loan regulation and consumer protection. Far from evading regulation, application of the FDIA results in extensive FDIC supervision of the loan program and examination for compliance with all applicable federal and state laws.

Id. at 1368. And it was that federal regulation—and not state usury law—that was the appropriate mechanism to challenge the validity of any loan by a chartered bank.

In *Hudson v. Ace Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060, at *4 (S.D. Ind. May 30, 2002)—a case applying Section 85 of the National Bank Act, 12 U.S.C. § 85, which is substantively identical to Section 27 of the FDIA except that it protects national banks as opposed to state-chartered banks—the plaintiff argued that the originator's role in servicing the loan "was so insignificant that the court should regard" the non-bank entity "as the true lender—even though [the bank] issued her loan." Because the case was before the court on a motion to dismiss, it accepted the factual premises of this argument as true. *See id.* But the court rejected these arguments, holding that while they "may provide a reasonable foundation for closer federal regulation of national banks that engage in such transactions," they do not "offer a basis for giving [the plaintiff] any relief." *Id.* The fact that a chartered bank "made the loan" was "dispositive," even though the bank then "sold a participation interest" to a non-bank entity. *Id.* at *7. And that "arrangement is lawful under § 85 even if the purpose of the arrangement was to avoid application of state usury laws." *Id.* at *4.

Under the rules applied in these cases, the result in this case would have been different.

2. On the other hand, the decision below finds some support in *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), *vacated as moot* 446 F.3d 1358 (11th Cir. 2006). There, the court held that a Georgia statute making it unlawful for an in-state non-bank entity to hold a "predominant economic interest" in payday loan revenue—defined as more than fifty percent of the revenue. *Id.* at 1298. The court held that the state statute was not preempted by Section 27. *See id.* at 1308. The Georgia Court of Appeals reached a similar result in *Georgia Cash America, Inc. v. Greene*,

734 S.E.2d 67, 72-73 (Ga. Ct. App. 2012), where it held that even as to loans made before the statute was passed, an in-state non-bank entity could be liable under state usury laws if it was "the lender in fact."

Similarly, in *People ex rel. Herrera v. Check 'N Go of California, Inc.*, No. C 07-02789 JSW, 2007 WL 2406888, at *4 (N.D. Cal. Aug. 20, 2007), the district court held that because the plaintiff's complaint stated allegations principally against non-bank entities, Section 27 did not preempt it.

A number of courts have reached the same result as the federal district court in this case on a related but distinct question: whether Section 27 results in "complete preemption" and thus confers federal subject matter jurisdiction over cases alleging violations of state usury laws. *See, e.g.*, *Thomas v. U.S. Bank Nat'l Ass'n ND*, 575 F.3d 794, 797 (8th Cir. 2009); *Community State Bank v. Knox*, 850 F. Supp. 2d 586, 601 (M.D.N.C. 2012); *Griner v. Synovus Bank*, 818 F. Supp. 2d 1338, 1346 (N.D. Ga. 2011); *Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1194-95 (N.D. Okla. 2004). *See also Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282, 1284-85 (D. Colo. 2002) (similar holding for the National Bank Act); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 713 n.2 (E.D.N.C. 2002) (citing previous unpublished order denying complete preemption under National Bank Act); *Brown v. ACE Cash Express, Inc.*, 01CV2674 (D. Md. Nov. 14, 2001) (unpublished); *Long* *v. ACE Cash Express, Inc.*, No. 3:00CV1306, 2001 WL 34106904, at *1 (M.D. Fla. June 18, 2001).[6]

3. This case is an ideal vehicle to address the split because the rules advanced by the parties in this case reflect the conflict in the lower courts. This Court can cleanly resolve the conflict by choosing one of the parties' rules—a choice that will also resolve the licensing and usury claims in this case.

This case is also an ideal vehicle because the fact pattern here is typical in this area of the law, and the facts were fully developed at trial. Here, as in dozens of other cases, a bank and a servicer entered into a mutually beneficial collaboration whereby the bank originates loans for the purpose of selling them to the servicer. The bank profits from origination fees, and the servicer profits from payments on the loans. This sort of arrangement is struck every day—and overwhelmingly, the servicer takes on the risks associated with the loans. The details may vary slightly—for example, one case may involve installment loans while another involves payday loans—but these distinctions do not alter the economic realities of these arrangements. The facts here will therefore enable the Court to resolve the legal issues.

Finally, this Court should resolve the Question Presented as soon as possible. As explained in Part I, *supra*, uncertainty in this area of the law chills beneficial business activity. In the wake of the lower

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[6] Some of these cases involve allegations against non-bank entities; others are directed solely at banks.

courts' ruling in this case—and in light of the existing split—state-chartered banks and their potential partners cannot be sure how other courts will decide whether state usury laws are preempted when loans are marketed and/or serviced by non-bank entities. And because the potential penalties are so punitive, any uncertainty will deter participation in the market. Moreover, as the state explained in the proceedings below, any paucity of reported decisions on this question is not because the issue arises infrequently—instead, it is "because in almost every instance the payday lender or non-bank entity surrendered and settled the case." *See* State's Response to CashCall's Petition for Appeal and Brief at 25-26, *CashCall, Inc. v. Morrisey,* No. 12-1274 (W. Va). States are thus exploiting the ongoing uncertainty regarding the scope of federal preemption to extract penalties from petitioners and similarly situated businesses.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 23, 2015

APPENDIX A

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

No. 12-1274 (Kanawha County 08-C-1964)

CashCall, Inc., and J. Paul Reddam, in his capacity as President and CEO of CashCall, Inc.,

Defendants Below, Petitioners,

v.

Patrick Morrisey, Attorney General,

Plaintiff Below, Respondent.

MEMORANDUM DECISION

Petitioners CashCall, Inc. and J. Paul Reddam (collectively referred to as "CashCall"), by counsel Charles L. Woody and Bruce M. Jacobs, appeal three orders entered by the Circuit Court of Kanawha County in favor of Respondent Patrick Morrisey, West Virginia's Attorney General,[1] following a two-phase trial regarding CashCall's violations of the West Virginia Consumer Credit Protection Act

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[1] This case was originally filed by Darrell V. McGraw, Jr., the former Attorney General of West Virginia.

("WVCCPA"), West Virginia Code §§ 46A-1-101 to 46A-8-102. The first order, entered September 10, 2012, addressed the State's abusive debt collection claims against CashCall. The second order, also entered September 10, 2012, addressed the State's usurious lending claims against CashCall. The third order, entered March 18, 2013, addressed the circuit court's award of attorney's fees as costs in favor of the State. In total, the circuit court ordered CashCall to pay more than $13.8 million in penalties and restitution, and $446,180.00 in fees and costs. The Attorney General, by counsel Norman Googel and Douglas L. Davis, filed a response to which CashCall filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the trial court's orders is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner CashCall, Inc. is a California-based consumer finance company. Petitioner J. Paul Reddam is the President and Chief Executive Officer of CashCall, Inc.[2] At issue in this case is CashCall's

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[2] On October 17, 2011, the circuit court entered a pretrial order that granted in part and denied in part Petitioner J. Paul Reddam's motion to dismiss. The court found that there were no

marketing agreements with the First Bank and Trust of Millbank, South Dakota ("FB&T"). FB&T was chartered in South Dakota and is supervised and insured by the Federal Deposit Insurance Corporation ("FDIC"). FB&T makes small unsecured loans at high interest rates to consumers in various states. Under CashCall's marketing agreements with FB&T, CashCall purchased FB&T's loans within three days of each loan's origination date.[3] Between August of 2006 and February of 2007, CashCall purchased loans made by FB&T to 292 West Virginia residents. Of those loans, ten were for $1,075.00 at an eighty-nine percent annual interest rate; 214 were for $2,600.00 at a ninety-six percent annual interest rate; and the remaining sixty-three loans were for $5,000.00 at a fifty-nine percent annual interest rate. Eventually, 212 of CashCall's 292 West Virginia consumers defaulted on these loans.

In 2007, the Attorney General opened a formal investigation into CashCall's business practices in response to consumer complaints of debt collection abuse. On June 7, 2007, the Attorney General sent CashCall's general counsel, Dan Baren, a letter demanding that CashCall permanently cease its

allegations in the State's complaint (except paragraph 13) referencing Mr. Reddam, and that the State did not seek any relief against Mr. Reddam. As such, the circuit court determined that it would not impose any liability against Mr. Reddam, but ordered him to remain a party to the action.

[3] FB&T retained the origination fee and all interest accrued prior to the date of CashCall's purchase of a loan.

lending program in West Virginia and make restitution to the aggrieved consumers. The State based this demand on its findings that CashCall's agreement with FB&T was essentially a sham that claimed federal preemption as a means of evading West Virginia's licensing and usury laws, and that CashCall's debt collection practices violated the WVCCPA.

CashCall responded to the Attorney General's demand by letter dated June 15, 2007. CashCall claimed that the WVCCPA was preempted by federal law because the loans marketed and serviced by CashCall were properly made under a Federal Deposit Insurance Approved ("FDIA") bank installment loan program. Nevertheless, that same year, CashCall ceased purchasing loans made by FB&T to West Virginia residents.

On August 30, 2007, the Attorney General issued an investigative subpoena, pursuant to West Virginia Code § 46A-7-104(1), that directed CashCall to produce records for all of its lending and debt collection activities in West Virginia. CashCall refused to answer the subpoena based, among other things, on its claim of complete federal preemption. Following considerable litigation regarding the subpoena, CashCall provided various business records including the names and contact information for its West Virginia customers. However, CashCall provided those records primarily in paper format, even though the Attorney General asked for the documents in a searchable electronic format, and CashCall routinely maintained the documents in a searchable electronic format.

On October 8, 2008, the State filed a "Complaint for Injunction, Consumer Restitution, Civil Penalties and Other Appropriate Relief" in the circuit court against CashCall alleging usurious lending and abusive debt collection practices. The Attorney General claimed that CashCall participated in what is commonly called a "rent-a-bank" scheme designed to avoid a state's usury and consumer protection laws by claiming federal preemption under Section 27 of the Federal Deposit Insurance Act ("FDIA").[4] In response, CashCall removed the action to the United States District Court for the Southern District of West Virginia on the ground that the State's claims were preempted given that FB&T originated the loans to the 292 West Virginia consumers.

In *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781 (S.D. W.Va. 2009), the district court found that the FDIA did not apply to non-bank entities such as CashCall. The district court also ruled that it did not have subject matter jurisdiction over the matter because the Attorney General had raised only state law claims against CashCall that neither invoked, nor were preempted by, the FDIA. The district court noted that "[i]f CashCall is found to be a de facto lender, then CashCall may be liable under West Virginia usury laws." *Id.* at 787. The district court then

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[4] Section 27 of the FDIA, 12 U.S.C. § 1831(d), allows a state-chartered bank to charge whatever interest rates are permitted by its home state and does not require that such a lender obtain a lender license from any state other than its home state.

dismissed CashCall's action and granted the Attorney General's motion to remand the case to the Circuit Court of Kanawha County.

Following the remand, the Attorney General filed an amended petition against CashCall that included fifteen causes of action. The first cause of action concerned CashCall's failure to comply with the Attorney General's subpoena.[5] The State's second through fourth claims alleged unlawful lending and usury. Claims five through fifteen alleged unlawful debt collection practices. Thereafter, the circuit court bifurcated the claims for trial. The "phase one" trial addressed the State's unfair debt collection claims and took place on October 31 and November 1, 2011. The "phase two" trial addressed the State's unlawful lending and usury claims and was held on January 3, 2012. Both trials were bench trials.

Phase One Trial: Unfair Debt Collection Claims

During the phase one trial regarding CashCall's alleged unfair collection claims, the State called twelve witnesses. The first of these witnesses had not obtained a loan purchased by CashCall, but her son had. Therefore, this first witness testified about abusive calls she received from CashCall regarding her son's loan. The next nine witnesses had obtained and then defaulted on loans originated by FB&T and purchased by CashCall. All nine testified to CashCall's abusive debt collection practices, which included

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[5] This first cause of action was dismissed prior to the phase one trial.

CashCall's repeated threats to do "whatever it takes to get our money" including visiting consumers' homes and places of employment; charging fees for field visits; contacting the consumers' employers; disclosing debts to third parties; and initiating arbitration, legal action, wage garnishment, and/or attachment of personal and real property. The State's last two witnesses, Rachel Gray and Angela White, where both long-time paralegals in the Attorney General's Consumer Protection Division. Both testified about their analysis of the records CashCall had produced during discovery and their preparation of the State's summary trial exhibits.

Paralegal Rachel Gray testified about her preparation of "State Summary Exhibit A" ("Exhibit A") regarding letters CashCall had sent to West Virginia consumers. Ms. Gray testified that she searched CashCall's West Virginia's consumers' files page-by-page to determine which of its form letters CashCall had sent to each consumer. Those form letters included an employment verification letter, a breach letter, a forty-eight-hour notice letter, a broken promise letter, an arbitration letter, a field visit letter, and a final demand letter. Ms. Gray testified that she compiled the total number of each type of letter found in each of the 292 West Virginia consumers' files into Exhibit A.

Paralegal Angela White testified regarding her preparation of "State Summary Exhibit B" ("Exhibit B") that summarized the number of phone calls CashCall made to each West Virginia consumer. Ms. White stated that she did not personally review all of the relevant phone logs, but oversaw the eight to ten people who did. Ms. White also testified that four professional data entry personnel entered the data into a comprehensive chart, and that the data entry staff made a second review before a questionable call was counted. After the data was entered, Ms. White prepared Exhibit B which listed the following: the number of calls made by CashCall to each West Virginia consumer, the number of days each consumer was called, the number of calls made to each consumer per day, and the date of the first and last calls to each consumer. The number of calls was also broken down into the number of days that a consumer received twenty or more calls in a day; the number of days that a consumer received fifteen to nineteen calls in a day; the number of days that a consumer received ten to fourteen calls in a day; the number of days that a consumer received five to nine calls in a day; and finally, the number of days that a consumer received one to four calls in a day.

According to Exhibit B, CashCall made a total of 84,371 calls to its 292 West Virginia consumers. Sixteen of those consumers each received more than 1,000 calls from CashCall; forty received between 500 and 1,000 calls; and eighty-six received between 200 and 500 calls. Exhibit B also lists the number of times CashCall called one of the 292 consumers' references (542 times), the number of times CashCall contacted a consumer at work (172 times); and the number of consumers who unlawfully received a notice of arbitration from CashCall (262).

CashCall called only two witnesses during its case-in-chief. The first was Elissa Chavez, CashCall's Director of Fraud Prevention and Dispute Resolution. Ms. Chavez testified, among other things, that CashCall required consumers to make payments by automatic electronic debit (also known as electronic fund transfer) from the consumers' bank accounts. CashCall's second witness, Sean Bennett, was employed as a "business analyst" for CashCall. He testified that CashCall regularly called third parties to "make contact" even when CashCall had the consumers' correct contact information.

Phase One Order: Judgment against CashCall for violations of the WVCCPA

In its phase one order, the circuit court found that the State's witnesses were credible, the State's evidence was largely undisputed by CashCall, and the State's legal allegations were supported by the record.

As for the State's fifth cause of action, the circuit court found that, in order to obtain a loan, CashCall required each consumer to agree to make payments via automatic electronic debits from the consumer's bank account. The circuit court determined that this requirement stood in contravention of the policy established by the federal Electronic Transfer Act, 15 U.S.C. § 1693k, and therefore was an unfair and deceptive act or practice pursuant to 15 U.S.C. § 1693o(c). The circuit court further found that although CashCall told consumers that they could cancel the electronic debits at a later date, CashCall refused or resisted efforts made by consumers to cancel such debits. The circuit court also found that all of the nine defaulting consumer witnesses were harmed by the overdraft fees and involuntary closure of bank accounts caused by the wrongful electronic debits. In light of these findings, the circuit court concluded that requiring consumers to agree to electronic debits as a condition of obtaining a loan was an unfair or deceptive act or practice in violation of West Virginia Code § 46A-6-104.

In regard to the sixth cause of action, the court found that, based on the undisputed testimony of the State's representative consumer witnesses, CashCall engaged in a pattern of making unlawful threats to garnish wages and seize personal or real property in violation of West Virginia Code § 46A-2-124(e)(2)[6] and § 46A-6-104.[7]

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[6] West Virginia Code § 46A-2-124(e)(2) provides as follows:

> No debt collector shall collect or attempt to collect any money alleged to be due and owing by means of any threat, coercion or attempt to coerce. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section . . . (e) The 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.

[7] West Virginia Code § 46A-6-104 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

Regarding the seventh cause of action, the circuit court found that, based on the undisputed testimony of the State's witnesses, CashCall violated West Virginia Code § 46A-2-124(f)[8] and § 46A-6-104 by threatening to take, and by taking, actions prohibited by the WVCCPA and other laws regulating a debt collector's conduct.

As for the eighth and eleventh causes of action, the circuit court found that CashCall engaged in a pattern and practice of making repeated and continuous telephone calls, and making such calls at times it knew were inconvenient, with the intent of annoying, abusing, oppressing, or threatening consumers in violation of West Virginia Code § 46A-2-125(d).[9]

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[8] West Virginia Code § 46A-2-124(f) provides as follows:

> No debt collector shall collect or attempt to collect any money alleged to be due and owing by means of any threat, coercion or attempt to coerce. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section . . . (f) The threat to take any action prohibited by this chapter or other law regulating the debt collector's conduct.

[9] West Virginia Code § 46A-2-125(d) provides as follows:

> No debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section . . . (d) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual

With regard to the ninth and twelfth causes of action, the circuit court found that the record was replete with undisputed testimony that CashCall unreasonably and unlawfully publicized information relating to consumers' alleged indebtedness to employers, relatives, and others in violation of West Virginia Code § 46A-2-126.[10]

Regarding the tenth cause of action, the circuit court found that CashCall unlawfully told consumers that it could collect fees and charges, such as charges for a threatened visit to a consumer's home or place of employment, in violation of West Virginia Code § 46A-2-127(g)[11] and § 46A-6-104.

As for the thirteenth cause of action, the circuit court found that CashCall made false threats of legal action to consumers including threats to initiate

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times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number.

[10] West Virginia Code § 46A-2-126 provides generally that "[n]o debt collector shall unreasonably publicize information relating to any alleged indebtedness or consumer."

[11] West Virginia Code § 46A-2-127 provides generally that "[n]o debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers." Subsection (g) further provides that "[a]ny representation that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation[,]" violates this section.

arbitration and threats of nonjudicial seizure of property that were not intended under the law or were specifically prohibited by the law, in violation of West Virginia Code § 46A-2-124, § 46A-2-127, and § 46A-6-104.

With regard to the fourteenth cause of action, the circuit court found that CashCall engaged in unfair and deceptive acts or practices by representing to defaulting consumers that they were required to use a payment method that required a fee, such as a "MoneyGram," in violation of West Virginia Code § 46A-2-127 and § 46A-6-104.

Finally, with regard to the fifteenth cause of action, the circuit court found that CashCall's representation to consumers that it could charge a $15.00 non-sufficient fund ("NSF") fee to consumers when an electronic debit failed, and its charging of the $15.00 NSF fee, violated West Virginia Code § 46A-2-127(g), § 46A-2-128(c), § 46A-2-128(d), § 46A-6-104, and § 46A-7-111(1).

Based on these violations, the circuit court awarded the following to the Attorney General:

an injunction permanently prohibiting CashCall from violating the WVCCPA;

a $292,000.00 judgment to make restitution to the 292 West Virginia consumers ($1,000 for each consumer) for CashCall's unfair or deceptive acts outlined in Count Five of the Amended Complaint;[12]

a $1,000,000.00 judgment against CashCall to make restitution to the 292 consumers for CashCall's unlawful debt collection practices outlined in Counts Six through Fifteen of the Amended Complaint;[13]

a $1,000,000.00 judgment against CashCall as a civil penalty to be appropriated by the Legislature for repeated and willful violations of the WVCCPA as authorized by West Virginia Code § 46A-7-111(2); and

"costs, including reasonable attorney's fees" to be determined by the circuit court following the conclusion of the phase two portion of the case.

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[12] Those wrongful acts included (a) requiring consumers to consent to automatic debits as a condition of obtaining a loan, (b) failing to disclose that accounts would be debited at least twice more if the first debit attempt failed; (c) failing to timely honor consumers' requests to stop or permanently stop debits, and (d) subjecting consumers to multiple overdraft fees.

[13] To enable the Attorney General to determine the amount of the restitution award to award to each of the 292 consumers, the circuit court ordered post-trial discovery that required CashCall to provide the Attorney General with reports showing each instance (1) where CashCall made or attempted to make an automatic electronic debit from a consumer's account; (2) where a consumer was charged a $15.00 NSF fee for a debit that failed to clear; and (3) where a consumer made a payment to CashCall by automatic electronic debit or other method—such as a MoneyGram—that required a fee.

The circuit court also found that all loan contracts entered between CashCall and the West Virginia consumers were void and that any debts still owing were cancelled.

Phase Two Trial: Unlawful Lending and Usury

During the phase two trial, the State produced evidence regarding its claims that CashCall made loans without a license from the Division of Banking (the State's second cause of action), was making usurious loans (the State's third cause of action), and violated the West Virginia Credit Services Organization Act, West Virginia Code § 46A-6C-2(a) (the State's fourth cause of action).[14]

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[14] The West Virginia Credit Services Organization Act lists those who must register as credit services organization. Specifically, West Virginia Code § 46A-6C-2(a) defines a "credit services organization" as follows:

> A person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services:
>
> (1) Improving a buyer's credit record, history or rating;
>
> (2) Obtaining an extension of credit for a buyer; or
>
> (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.

The circuit court found that it was not necessary to decide whether CashCall was violating the West Virginia Credit Services Organization Act because CashCall was found to be the de facto lender of the loans in this case. Nevertheless, the circuit court found that CashCall would not have been exempt from the Credit Services Organization Act.

Most of the testimony during the phase two trial regarded whether CashCall or FB&T was the true lender of the loans to the West Virginia consumers. Both parties agreed that if the circuit court found FB&T to be the true lender, then the State's claims that CashCall was making loans without a license and making usurious loans would be preempted by federal law.

The State's only witness in support of its claim that CashCall was the true lender was Attorney Margot Saunders, a long-time employee of the National Consumer Law Center. The Attorney General disclosed Ms. Saunders as an expert witness prior to trial. However, the circuit court held in abeyance its ruling regarding whether Ms. Saunders qualified as an expert pending its entry of the phase two order.

During its case-in-chief, CashCall offered the testimony of only one witness, its general counsel, Dan Baren, who testified that he was in charge of CashCall's regulatory matters and litigation, and had negotiated most, if not all, of the major contracts between CashCall and its financing partners such as FB&T. Among other things, Mr. Baron testified that Petitioner J. Paul Reddam was obligated to personally guarantee all of CashCall's obligations to FB&T under the parties' agreements.

Phase Two Order: Judgment against CashCall for violations of the WVCCPA

In the phase two order, entered September 10, 2012, the circuit court found that, based upon its review of Margot Saunders's testimony and her professional experience, she was "qualified to testify as an expert witness on the subject of consumer lending." The court further found that

> Ms. Saunders's expertise in the field of predatory lending, particularly her analysis of contracts and relationships between lenders and brokers, *qualifies her to testify about the contracts and agreements between CashCall and [FB&T]* and to assist the Court in determining those parts of the Agreement that show which party bore the economic risk as between CashCall and [FB&T] in regards to the subject consumer loans.

(Emphasis added.)

With regard to the agreements between FB&T and CashCall, the circuit court found that numerous provisions of CashCall's agreements with FB&T placed the entire monetary burden and risk of the loan program on CashCall, and not on FB&T. The court also found that CashCall paid FB&T more for each loan than the amount actually financed by FB&T. The court further found that

> [p]resumably, CashCall agreed to such terms on the belief that its business scheme would successfully evade state usury laws and it could reap the benefits of the excessive interest rates charged on each loan. Furthermore, CashCall had to procure the personal guarantee of its sole owner and stockholder, J. Paul Reddam, to personally guarantee all of CashCall's financial obligations to the [FB&T], including the amounts of the loans prior to "purchase" by CashCall. Also, CashCall had to

> indemnify [FB&T] against all losses arising out of the Agreement, including claims asserted by borrowers. CashCall was under a contractual obligation to purchase the loans originated and funded by [FB&T] only if CashCall's underwriting guidelines were followed when approving the loan. [Finally, for] financial reporting purposes, CashCall treated such loans as if they were funded by CashCall.

Based on these findings, the circuit court concluded that CashCall, and not FB&T, was the de facto or true lender of the loans to the West Virginia consumers. Having made this baseline determination, the circuit court then ruled, as follows, on the State's unlawful lending and usury claims:

> CashCall was not the agent of FB&T, but was an independent contractor.
>
> The purpose of the lending program was to allow CashCall to hide behind the FB&T's South Dakota charter and FB&T's resulting right to export interest rates under federal banking law, as a means for CashCall to deliver its loan product to states like West Virginia, who have lender licensing and usury laws.
>
> The maximum allowable interest rate under West Virginia law for the loans in question was eighteen percent. Therefore, the loans made by CashCall to West Virginia consumers greatly exceeded the maximum allowable interest rates under West Virginia law and were, therefore, usurious.

CashCall made loans in West Virginia, directly or indirectly, without obtaining a business registration certificate from the West Virginia Tax Department, in violation of West Virginia Code § 46A-7-115.

CashCall has engaged in unfair or deceptive acts or practices in violation of West Virginia Code § 46A-6-104 because it made and collected usurious loans and excess charges without a license.

CashCall repeatedly and willfully violated West Virginia Code § 46A-7-115 (making loans in West Virginia without a license) and § 46A-6-104 (unfair or deceptive acts or practices) and therefore warranted a civil penalty of up to $5,000 for each violation, as set forth inWest Virginia Code § 46A-7-111(2).

Based on these findings, the circuit court

permanently enjoined CashCall from violating the WVCCPA;

imposed a civil penalty against CashCall for making loans without a license in the amount of $730,000 to be appropriated by the Legislature;

imposed a civil penalty against CashCall for engaging in unfair/deceptive acts and for making/collecting usurious loans in the amount of $730,000 to be appropriated by the Legislature;

awarded a $10,045,687.96 judgment against CashCall (four times the amount of interest the 292 consumers agreed to pay on their loan) to be distributed to the consumers by the Attorney General;

found that all loan contracts entered between CashCall and West Virginia consumers were void and any debts still owing were cancelled; and

awarded "costs, including its reasonable attorney's fees."

CashCall filed this appeal of the circuit court's phase one and phase two orders on October 10, 2012.[15]

Post-Trial Award of Attorney's Fees

Following the filing of this appeal, the Attorney General filed an "Application For Fees and Expenses" with the circuit court on November 9, 2012, that sought an award of attorney's fees for the 1,175.9 hours that Assistant Attorney General Norman Googel worked on the case, and for the 282 hours Assistant Attorney General Doug Davis worked on the case, plus expenses. On December 18, 2012, CashCall filed a written response in which it argued that the requested fees were unreasonable and unsupported by the evidence. CashCall also preserved the arguments set forth in its appellate brief regarding attorney's fees to avoid any inference of waiver regarding these arguments.

On December 21, 2012, the circuit court conducted an evidentiary hearing on the State's motion for attorney's fees. The State's witnesses included Mr.

[15] On October 12, 2012, the circuit court denied CashCall's motion to stay the phase one and phase two orders.

Googel, Mr. Davis, and Attorney Bren Pomponio, who testified as an expert witness on the reasonable and customary fees awarded to lawyers in consumer law cases in West Virginia.

On January 11, 2013, CashCall filed its appellate brief and appendix record with this Court. In its brief, CashCall argued that the circuit court erred by awarding the State its attorney's fees as costs in the absence of express statutory or constitutional authority.[16]

Thereafter, CashCall submitted a memorandum of law to the circuit court that proposed a $64,950.00 award of attorney's fees for Mr. Davis's work on the case. The offer was based upon Mr. Davis's experience and the time sheets he had maintained throughout the pendency of the case. However, CashCall asked the circuit court to deny the State's motion for an award of attorney's fees for Mr. Googel's work because he had failed to keep contemporaneous time records during the case. CashCall further argued that the non-contemporaneous time estimations Mr. Googel had created after the circuit court had entered its phase one and phase two orders were inaccurate and unreliable.

On March 18, 2013, the circuit court entered its "Final Order Awarding Fees and Costs" that awarded

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[16] Although the circuit court had not yet awarded the amount of attorney's fees CashCall would be required to pay to the Attorney General, the circuit court awarded "costs, including its reasonable attorney's fees" in both the phase one and phase two orders.

the State a total of $446,180 in attorney's fees ($349,825 for Mr. Googel and $96,355 for Mr. Davis), plus $9,789.94 in expenses. The award was based on a $350 per hour rate for each attorney. The circuit court acknowledged that Mr. Googel did not keep contemporaneous time records and, therefore, discounted the hours he claimed by fifteen percent. The court also found that, although CashCall had not engaged in conduct amounting to bad faith, it had engaged in vexatious and oppressive conduct particularly in refusing to produce discovery materials in electronic form. However, the circuit court stayed its "Final Order Awarding Fees and Costs" until such time as this Court issues its opinion in the instant appeal.

On April 17, 2013, CashCall filed a motion with this Court to supplement the appendix record and to submit supplemental briefing regarding the circuit court's award of attorney's fees. On July 18, 2013, the Court granted the motion. Thereafter, both parties filed supplemental briefs and CashCall supplemented the record.

CashCall now appeals all three of the circuit court's orders in this case. On appeal, CashCall raises multiple assignments of error. The first three of these assignments of error address the circuit court's September 10, 2012, phase one order regarding the Attorney General's claims of unfair debt collection. The next six assignments of error (numbers four through nine) address the circuit court's September 10, 2012, phase two trial order regarding the Attorney General's claims of unlawful lending and usury.

Finally, the last five assignments of error (numbers ten through fourteen) address the circuit court's March 18, 2013, order awarding attorney's fees as costs in favor of the Attorney General.

Discussion

A. Assignments of error relating to the phase one trial

We begin our analysis by addressing petitioner's three assignments of error relating to the phase one trial and the Attorney General's claims of unfair debt collection.

> In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance,* 207 W.Va. 640, 535 S.E.2d 484 (2000).

CashCall first argues that the circuit court erred in awarding relief to consumers because the Attorney General has no authority under the WVCCPA to bring an action or pursue damages on behalf of consumers. CashCall highlights that in the phase one order, the circuit court awarded restitution and penalty damages to the State to be distributed to the West Virginia consumers pursuant to Article 5 of the WVCCPA. West

Virginia Code § 46A-5-101(l) provides that a "consumer" may bring an action for civil liabilities and penalties. Further West Virginia Code § 46A-1-102(12) defines a "consumer" as "a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan, or debt . . . [.]" Therefore, CashCall claims that the Attorney General has no statutory authority under Article 5 to bring an action or to pursue damages on behalf of a "consumer" because the State is not a natural person.

West Virginia Code § 46A-7-108 provides that "[t]he attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief." This Court in *State By and Through McGraw v. Imperial Marketing,* 203 W.Va. 203, 506 S.E.2d 799 (1998), examined the Attorney General's authority to seek consumer restitution and other equitable remedies in its enforcement actions and held that "the phrase 'other appropriate relief' in W.Va. Code, 46A-7-108 [1974], 'indicates that the legislature meant the full array of equitable relief to be available in suits brought by the Attorney General.' " *Id.* at 215-16, 506 S.E.2d at 811-12. Therefore, a circuit court may, under § 46A-7-108, award the State a full array of equitable relief.

The WVCCPA also authorizes the Attorney General to bring a civil action against a creditor "for making or collecting charges in excess of those permitted by this chapter." W.Va. Code § 46A-7-111(1). Therefore, a circuit court may order a full refund of such excess charges. However, where the excess charge was imposed in a deliberate violation of, or in reckless disregard for, the WVCCPA, or where a creditor refused to refund an excess charge within a reasonable time after demand by the consumer or the Attorney General, the circuit court may order the creditor to pay to the consumer up to ten times the amount of the excess charge. *Id.* Further, West Virginia Code § 46A-7-111(2)provides that the Attorney General may recover a civil penalty of up to $5,000.00 for each violation of the WVCCPA where "the defendant has engaged in a course of repeated and willful violations of this chapter." "[T]his Court has defined that term [willful] to mean conduct that is intentional . . . : 'Intending the result which actually comes to pass; design; intentional; not incidental or involuntary.'" *State ex rel. Koontz v. Smith,* 134 W.Va. 876, 882, 62 S.E.2d 548, 551(1950) (citing *Black's Law Dictionary* (3rd ed. 1948))." *State v. Saunders,* 219 W.Va. 570, 575, 638 S.E.2d 173, 178 (2006) (internal citations omitted).

Further, West Virginia Code § 46A-5-105 provides that "the court may cancel the debt when the debt is not secured by a security interest" in those instances where the "creditor has willfully violated the provisions of this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice." Thus, the public policy embodied in West Virginia Code § 46A-5-105 authorizes the court to cancel the debt in enforcement actions under its power to grant equitable relief.

In light of these statutory provisions and our holding in *Imperial Marketing,* we find that the circuit court did not err by granting monetary relief to the State that is to be distributed by the Attorney General to individual consumers. Nor did the circuit court err in cancelling the 292 consumers' unsecured debts to CashCall. The civil penalties authorized by West Virginia Code § 46A-7-111 and paid to the State do not inure to the State alone. Although such a civil penalty must first be paid to the State, a governmental entity may distribute funds obtained as civil penalties as compensation for pecuniary loss to injured persons. *See, e.g., U.S. Dept. of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, Inc.,* 64 F.3d 920, 928 (4th Cir. 1995). Thus, under its equitable powers, the circuit court may authorize the State to distribute a civil penalty to aggrieved consumers.

CashCall's second assignment of error is that the circuit court erred in basing its award of damages on the State's summary exhibits because they were "unauthenticated" and contained "unreliable and inadmissible evidence."

We have said, "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syllabus point 4, *State v. Rodoussakis,* 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 11, *State v. White,* 228 W.Va. 530, 722 S.E.2d 566 (2011).

We first note that at the start of the phase one trial, the Attorney General and CashCall stipulated that their Joint Exhibit Number One was an accurate summary of CashCall's 292 West Virginia consumers' accounts. That exhibit provided the following information for each West Virginia consumer: the amount financed, the finance charge, the principle paid, the interest paid, the total fees paid, the "overall" paid, the number of payments made, the date of the note, the date of last payment, the total number of payments necessary to fulfill the loan, and the loan's current status. Hence, CashCall made no objection below regarding the information contained in Joint Exhibit Number One.

We also note that CashCall's decision to produce its customer records primarily in a paper-copy format, as opposed to the requested easily-searchable electronic format, necessitated, in part, the summary exhibits of which CashCall now complains.

With regard to Exhibit A (listing the types of letters sent by CashCall to West Virginia consumers) and Exhibit B (summarizing the number of phone calls made by CashCall to West Virginia consumers), CashCall's counsel stated during the phase one trial that he had reviewed both exhibits by focusing on those consumers who were identified by the State as trial witnesses. CashCall's counsel then said "there are certain aspects that appear to be pretty close, although they are not perfect, but perfection is not required to be sure. Other aspects of it are quite imperfect, but we're happy to discuss that further." However, it appears that the only time CashCall discussed these alleged imperfections further was during its cross-examination of Ms. Gray, who prepared Exhibit A, and Ms. White, who prepared Exhibit B. Importantly, during those cross-examinations, CashCall had the opportunity to enter any and all relevant evidence regarding alleged discrepancies between its records and the information found in Exhibits A and B.

During its cross-examination of Ms. Gray, CashCall pointed to only three errors in Exhibit A. Those errors were immediately corrected by agreement of the parties in the presence of the court. Once those corrections were made, CashCall made no further objection to the circuit court with regard to Exhibit A.

During its cross-examination of Ms. White regarding her preparation of Exhibit B, CashCall clarified that Exhibit B included (1) calls made by CashCall, but not received by a consumer (such as when a call resulted in a busy signal), and (2) calls that were not collection calls, such as CashCall's standard pre-loan employment verification call. These issues were the only issues raised by CashCall during its cross-examination of Ms. White regarding Exhibit B. However, at the end of testimony on October 31, 2011, CashCall's counsel indicated that "on the volume of calls issues . . . we do plan to go back and create something . . . that would be more accurate as an account. . . ." However, CashCall never produced its own summary to rebut Exhibit B, even though the circuit court gave it the opportunity to do so. Importantly, in the order on appeal, the circuit court found Exhibit B to be "substantially accurate" and therefore sufficient to enable it to make the following findings of fact regarding CashCall's collection practices:

> 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[hibit] A. Overall, the [c]ourt finds all of the State's consumer witnesses to be credible . . . .
>
> . . . .
>
> 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[hibit] B is substantially accurate to enable the [c]ourt to pass judgment on CashCall's collection practices.

On this record, we cannot say that the circuit court abused its discretion in admitting Exhibits A and B into evidence or in relying on them in making its findings.

CashCall's third assignment of error is that the circuit court erred in finding that the State's consumer witnesses were representative of all 292 West Virginia consumers. CashCall claims the State's witnesses had "vastly different experiences" and that "none of the ten witnesses presented testimony justifying [a] claim for unfair collection practices[.]" Conversely, the circuit court, in its phase one order, described the testimony of the State's representative witnesses as remarkably consistent in regard to CashCall's unfair debt collection practices. For example, the circuit court found as follows:

> 20. The [c]ourt 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. [ ] 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 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. . . . 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.

With regard to CashCall's claim that the circuit court erred in extrapolating the experience of the Attorney General's representative consumer witnesses to the pool of all 292 West Virginia consumers, CashCall fails to cite to the location in the approximately 6,000 page record on appeal where it objected to the State's use of representative witnesses.[17] Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure provides, in part, as follows:

> The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

We have said,

> It is counsel's obligation to present this Court with specific references to the designated record that is relied upon by the parties . . . In this context, counsel must observe the

[17] During the phase one trial CashCall's counsel did object to the fact that the State's witnesses at trial were, with one exception, not the same consumers identified in the State's complaint against CashCall. CashCall also objected to what it claimed was insufficient notice of the names of the witnesses. However, the circuit court did not rule on these objections.

> admonition of the Fourth Circuit that " '[j]udges are not like pigs, hunting for truffles buried in briefs' [or somewhere in the lower court's files]. . . . We would in general admonish all counsel that they, as officers of this Court, have a duty to uphold faithfully the rules of this Court." *Teague v. Bakker,* 35 F.3d 978, 985 n. 5 (4th Cir. 1994), quoting *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991).

State v. Honaker, 193 W.Va. 51, 56 n. 4, 454 S.E.2d 96, 101 a 4 (1994). In failing to object, CashCall has waived this issue on appeal. That said, the circuit court had before it Joint Exhibit Number One and Exhibits A and B which provided detailed information regarding CashCall's relationship with each of the 292 West Virginia consumers. Thus, the circuit court had the ability to review these documents, with CashCall's arguments in mind, to determine whether the testimony of the State's witnesses was, in fact, representative of the 292 West Virginia consumers. On this record, we cannot say that the circuit court erred in relying upon the testimony of the State's representative consumer witnesses.

B. Assignments of error relating to the phase two trial

We continue our analysis by addressing CashCall's next six assignments of error (numbers four through nine) relating to the Attorney General's claims of unlawful lending and usury.

CashCall's fourth assignment of error is that the circuit court erred by applying a "predominant economic interest" test to determine whether CashCall or FB&T was the true lender of the loans made to the West Virginia consumers. That test examines which party-as between a bank, such as FB&T, and a non-bank entity, such as CashCall-has the predominant economic interest in loans made by the bank. CashCall argues that the circuit court should have applied instead what it calls the "federal law test" found at West Virginia Code § 46A-1-102(38).[18] That section, which defines the term "regulated consumer loan," exempts from regulation any consumer loan that "qualifies for federal law preemption from state interest rate limitations." CashCall contends that if the circuit court had applied the "federal law test," it would have found that FB&T was the true lender because FB&T's consumer loans qualified for federal law preemption from state interest rate limitations.

In support of its argument, CashCall highlights that the Fourth Circuit Court of Appeals applied the

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[18] West Virginia Code § 46A-1-102(38) provides as follows: "'Regulated consumer loan' means a consumer loan, including a loan made pursuant to a revolving loan account, in which the rate of the loan finance charge exceeds eighteen percent per year as determined according to the actuarial method, except where the loan qualifies for federal law preemption from state interest rate limitations, including federal law bank parity provisions, or where the lender is specifically permitted by state law other than article four of this chapter to make the loan at that rate without a requirement the lender hold a regulated consumer lender license."

criteria found in the "federal law test" in *Discover Bank v. Vaden* and found that a true lender is (1) the entity in charge of setting the terms and conditions of a loan, and (2) the entity who actually extended the credit. 489 F.3d 594, 601-03 (4th Cir. 2007), *rev 'd on other grounds,* 556 U.S. 49 (2009). *See also Krispin v. May Dep't Stores Co.,* 218 F.3d 919, 923 (8th Cir. 2000). CashCall therefore claims that, in accordance with *Vaden,* FB&T was the true lender of the loans in this case because FB&T set the terms and conditions of the loans to the West Virginia consumers and actually extended credit to those consumers.

This Court provided a roadmap for resolving usury questions in *Carper v. Kanawha Banking & Trust Co.,* 157 W.Va. 477, 207 S.E.2d 897 (1974). In Syllabus Point 4 of *Carper,* the Court said as follows:

> The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact. *Crim v. Post,* 41 W.Va. 397, 23 S.E. 613 (1895).

Id. at 478, 207 S.E.2d 897, 207 S.E.2d 901. In the phase two order, the circuit court cited to *Carper.* The circuit court then cited to cases in which federal courts applied the "predominant economic interest" test in rent-a-bank cases such as this, where a state usury case against a non-bank entity is removed to federal court on federal preemption grounds. *See Goleta Nat.*

Bank v. Lingerfelt, 211 F. Supp. 2d 711 (E.D.N.C. 2002); *Colorado ex rel. Salazar v. Ace Cash Exp., Inc.,* 188 F. Supp. 2d 1282 (D. Colo. 2002); *Flowers v. EZPawn Oklahoma, Inc.,* 307 F. Supp. 2d 1191 (N.D. Okla. 2004). In these cases, most of which involve payday lenders, the federal courts found no federal preemption and remanded the case back to the state court. However, the circuit court noted that, on remand, most cases settled and, therefore, were not adjudicated on the merits.[19]

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[19] State courts have also applied the "predominant economic interest" test in deciding cases on the merits. For example, in *Spitzer v. County Bank of Rehoboth Beach,* 45 A.D.3d 1136, 846 N.Y.S.2d 436 (N.Y.App.Div.2007), New York's Attorney General brought an enforcement action against payday lenders who had entered into rent-a-bank arrangements. In *Spitzer*, the Attorney General alleged that the payday lenders were the true lenders and that their agreements with a rent-a-bank were a scheme to circumvent New York's usury laws. The *Spitzer* court noted that the payday lenders purchased ninety-five percent of each of the bank's loans, assumed all risks of the loans, and indemnified the bank against any loss arising from a loan transaction. The *Spitzer* court then found that a totality of the circumstances must be used to determine the identity of the "true lender," with the key factor being who had the predominant economic interest in the transactions. *Id.* at 438-39. Ultimately, the bank and the payday lender in *Spitzer* entered into a $5.2 million settlement agreement with New York's Attorney General. *See also Andrews v. Cramer,* 256 Ill.App.3d 766, 195 Ill.Dec. 825, 629 N.E.2d 133, 136 (Ill.App.1993) ("The question [of whether a loan is usurious] is determined by considering the nature and substance of the transaction, rather than its form, to guard against a lender violating the statute through the use of ingenious schemes and devices."); *Ghirardo v. Antonioli,* 8 Cal.4th 791, 35 Cal.Rptr.2d

Based on this line of cases, the circuit court concluded that the "predominant economic interest" test was the proper standard to determine the true lender in this case.

We agree with the circuit court's decision. The "federal law test" advocated by CashCall examines only the superficial appearance of CashCall's business model. Further, if we were to apply the "federal law test" as CashCall advocates, we would always find that a rent-a-bank was the true lender of loans such as those at issue in this case. Therefore, in light of our holding in *Carper,* and the cases cited above, we find that the circuit court did not err in applying the "predominant interest test" as a means of examining the substance, and not just the form, of CashCall and FB&T's marketing agreements. As for the two cases on which CashCall relies, *Vaden* and *Krispen,* they are easily distinguishable from the instant case because, in both cases, the non-bank entity was a corporate affiliate of the bank. In contrast, CashCall and FB&T are completely separate entities, or, as the circuit court noted, "independent contractors to each other in performing their respective obligations [under the

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418, 883 P.2d 960, 965 (Cal.1994) (citations omitted) (stating that the trier of fact must look to the substance of the transaction, rather than its form, and must determine whether such form was mere sham and subterfuge to cover up usurious transactions); *Williams v. Powell,* 216, 214 Ga.App. 216, 447 S.E.2d 45, 48 (Ga.App.1994) ("[T]he courts will permit no scheme or device, by whatever name, to hide . . . any contrivance to evade the usury laws. . ..").

agreement]." In fact, both the federal court in its remand order, and the circuit court in the order on appeal, rejected CashCall's arguments based on *Vaden* and *Krispen.*

CashCall's fifth assignment of error is that the trial court erred in relying on the opinions expressed by the State's expert witness, attorney Margot Saunders of the National Consumer Law Center. CashCall claims that Ms. Saunders usurped the role of the court by testifying as to the nature of the relevant law and how the court should apply that law. CashCall also claims that the circuit court erred in allowing Ms. Saunders to testify about the parties' marketing agreements because she was not directly qualified as an expert on that issue.

We have said,

> """"Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, *Overton v. Fields*, 145 W.Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, *Hall v. Nello Teer Co.,* 157 W.Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12, *Board of Education v. Zando, Martin & Milstead,* 182 W.Va. 597, 390 S.E.2d 796 (1990).' Syl. pt. 3, *Wilt v. Buracker,* 191 W.Va. 39, 443 S.E.2d 196 (1993)." Syllabus Point 5, *Mayhorn v. Logan Medical Foundation,* 193 W.Va. 42, 454 S.E.2d 87 (1994).

Syl. Pt. 2, *Riser v. Caudill,* 210 W.Va. 191, 193, 557 S.E.2d 245, 247 (2001). Further, "Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion . . . ." Syl. Pt. 6, in part, *Mayhorn v. Logan Med. Found.,* 193 W.Va. 42, 454 S.E.2d 87 (1994). Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Based on the uncontested facts in the record, the circuit court made numerous findings with regard to its qualification of Ms. Saunders as an expert in consumer lending. For example, the circuit court found that Ms. Saunders has twenty years of experience as an attorney with the National Consumer Law Center; has been qualified as an expert in the fields of predatory lending, credit reporting, debt collecting, electronic commerce and benefits transfer, preservation of home ownership, credit math, electronic transaction issues, utility costs for low income households, and other consumer credit issues; has provided written and oral testimony to Congress; and has served as an expert witness in twenty-nine cases involving mortgage lending, consumer credit, and predatory lending. On this record, we cannot say that the circuit court erred in qualifying Ms. Saunders as an expert in consumer lending.

We next turn to CashCall's claim that the circuit court erred in allowing Ms. Saunders to testify about CashCall and FB&T's marketing agreements because the court allegedly did not directly qualify her as an expert on that issue. Although the circuit court did not specifically state that Ms. Saunders was an "expert" with regard to agreements such as the one between CashCall and FB&T, it specifically found that"Ms. Saunders' expertise in the field of predatory lending, particularly her analysis of contracts and relationships between lenders and brokers, *qualifies her to testify about the contracts and agreements between CashCall and [FB&T]* and to assist the Court in determining those parts of the Agreement that show which party bore the economic risk as between CashCall and [FB&T] in regards to the subject consumer loans." (Emphasis added.) Therefore, we find that the circuit court did not err in allowing Ms. Saunders to opine about a topic it specifically found her qualified to address.

All of that having been said, in the phase two order, the circuit court stated that even if it had concluded that Ms. Saunders was not qualified to offer an expert opinion on the subject of consumer lending and the relationship between CashCall and FB&T, it would have concluded that the agreements between CashCall and FB&T fully supported its finding that CashCall was the true lender of the subject loans. Therefore, we find CashCall's fifth assignment of error to be devoid of merit.

CashCall's sixth assignment of error is that the circuit court erred in applying a "state test" (the "predominant economic interest" test) in deciding a question regarding federal preemption. CashCall claims that the only test capable of determining this federal question is the "federal law test."

First, the federal question posed by petitioner—whether federal law preempted the issues in this case—was answered by the federal district court in the negative. The circuit court implicitly adopted the federal district court's conclusion. Second, we addressed CashCall's allegation regarding the circuit court's use of the "predominant economic interest" test in its fourth assignment of error above and found it wanting.[20] Hence, we find CashCall's sixth assignment of error to be without merit.

CashCall's seventh assignment of error is that the circuit court erred by imposing punitive penalties against CashCall even though CashCall did not willfully violate the WVCCPA. CashCall highlights that West Virginia Code § 46A-7-111 provides that the attorney general may bring an action to recover a civil penalty only for *willful* violations of this chapter. CashCall claims that its actions were not willful because it had the good faith belief that its activities complied with West Virginia law. CashCall's "good faith belief" is based on an e-mail it received in 2006 from a staff lawyer employed by the Division of

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[20] Ironically, what petitioner nominates as the "federal law test" is found in state law at West Virginia Code § 46A-1-102(38), and what it calls a "state test," the predominant economic interest test, has been applied, as noted above, by federal courts.

Banking that stated CashCall did not require a lending license "because the loans being assigned were not 'regulated customer loans' as defined by [West Virginia Code] § 46A-1-102" and thus were not subject to West Virginia law.

The subject e-mail was sent to CashCall in response to an e-mail sent by CashCall's counsel, Dan Baren, on July 28, 2006. In his e-mail, Mr. Baren wrote the following:

> Hi -Thanks for taking time to address this issue.
>
> As I stated on the phone, my question was whether a California company would need to obtain a license from the Commissioner to take assignments and service unsecured consumer loans that were originated by a financial institution which itself was exempt from the licensing requirement.
>
> I would like to conclude that licensing would not be required because the loans being assigned were not 'regulated consumer loans' as that term is defined in Section 46A-1-102.
>
> Please let me know your position on this matter. Thank you very much.

Clearly, the staff attorney's response that "[l]icensing is not required because the loans being assigned were not 'regulated consumer loans' as defined in 46A-1-102[,]" was based on the implication in Mr. Baren's e-mail that the "financial institution" (i.e., FB&T) was the lender of the loans in question. However, CashCall was, in fact, the true lender of the loans in question. Therefore, CashCall cannot rely on the e-mail as a defense. Further, CashCall fails to cite to any evidence in the record on appeal that the staff attorney who sent the responsive e-mail had any authority to bind the State with her response.

The circuit court's award of punitive damages was based on its lengthy and detailed findings regarding CashCall's repeated violations of the WVCCPA. These findings are amply supported by the record on appeal. Accordingly, we find that the circuit court did not err in concluding that CashCall's violations of the WVCCPA were willful, or in imposing punitive penalties against CashCall for those willful violations.

CashCall next claims that the circuit court's award of punitive penalties violates CashCall's fundamental due process right to notice of conduct subject to punishment because it could not have known in 2006 and 2007, when it purchased loans made by FB&T to West Virginia consumers, that the circuit court would reject the statutorily-adopted "federal law test" and instead apply a "predominant economic interest" test.

This Court decided *Carper v. Kanawha Banking & Trust Co.* in 1974, long before CashCall began purchasing FB&T's loans to West Virginians in 2006. In that seminal case, we said that the "search for usury shall not stop at the mere form of the bargains and contracts relative to such loan." Therefore, CashCall was clearly on notice that this Court would examine an agreement, such as the agreements between CashCall and FB&T, for its substance and not merely for its form. Therefore, we find CashCall's lack of notice claim to be without merit.

Finally, CashCall argues that, even if the award of punitive damages did not violate its due process rights, the Attorney General was estopped from seeking a penalty against CashCall because CashCall relied to its detriment on that statement in the Division of Banking's e-mail. However, as we said previously, this argument is without merit because the e-mail from the employee at the Division of Banking did not bind the State and, importantly, was based on CashCall's misleading assertions that FB&T was the true lender of the loans mentioned in the e-mail.

CashCall's eighth assignment of error is that the circuit court erred by awarding the State a $10,045,687.96 civil penalty[21] pursuant to West Virginia Code § 47-6-6, because only a borrower or debtor may bring a claim under West Virginia Code § 47-6-6. That section provides as follows:

> All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is permitted by law shall be void as to all interest . . . and *the borrower or debtor* may, in addition, recover from the original lender or creditor or other holder not in due course an amount equal to four times all interest agreed to be paid . . . . Every usurious contract and

[21] $10,045,687.96 is four times the amount of all of the interest agreed to be paid by all of the 292 West Virginia consumers.

> assurance shall be presumed to have been willfully made by the lender or creditor, but a bona fide error, innocently made, which causes such contract or assurance to be usurious shall not constitute a violation of this section if the lender or creditor shall rectify the error within fifteen days after receiving notice thereof.

(Emphasis added.) CashCall highlights that the "Attorney General's powers are limited to those specifically conferred by statute." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.* ., 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995). Therefore, CashCall argues that, because the Attorney General is not a borrower or a debtor pursuant to West Virginia Code § 47-6-6, he lacks authority to seek or be awarded damages on behalf of the 292 West Virginia consumers. Put more simply, CashCall argues that the Attorney General was not authorized to seek, and the trial court was not authorized to award, a penalty for usury to the State under West Virginia Code § 47-6-6.

We reject this argument because CashCall has mischaracterized the circuit court's ruling. The circuit court did not issue the ruling pursuant to West Virginia Code § 47-6-6. Instead, it relied upon the public policy established by West Virginia Code § 47-6-6-that the penalty for usury should be four times the amount of interest agreed to be paid-to determine the amount of the civil penalty. Therefore, West Virginia Code § 47-6-6 merely served as a guide to determine the appropriate amount of the restitution award for this violation. In actuality, the award was authorized as an excess charge under West Virginia Code § 46A-7-

111, which provides that when a circuit court finds that an excess charge has been made, it must order a full refund of the excess charge to consumers. Further, pursuant to West Virginia Code § 46A-7-111, where an excess charge was recklessly or deliberately made, a circuit court may award a civil penalty of up to *ten times* the excess charge:

> (1) After demand, the attorney general may bring a civil action against a creditor for making or collecting charges in excess of those permitted by this chapter. *If it is found that an excess charge has been made, the court shall order the respondent to refund to the consumer the amount of the excess charge. If a creditor has made an excess charge in a deliberate violation of or in reckless disregard for this chapter, or if a creditor has refused to refund an excess charge within a reasonable time after demand by the consumer or the attorney general, the court may also order the respondent to pay to the consumer a civil penalty in an amount determined by the court not in excess of the greater of either the amount of the sales finance charge or loan finance charge or ten times the amount of the excess charge.* Refunds and penalties to which the consumer is entitled pursuant to this subsection may be set off against the consumer's obligation. . . . If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error, no liability to pay a penalty shall be imposed under this subsection.

(Emphasis added.) An unlawful or excessive interest charge or fee constitutes an "excess charge" as defined by West Virginia Code § 46-7-111(1).

Courts have broad powers to fashion equitable relief. *Porter v. Warner Holding Co.,* 328 U.S. 395 (1946). Moreover, a court's equitable powers assume an even broader, more flexible character when the public interest is involved in a proceeding in order to secure complete justice. *Id.* at 398 (emphasis added). As the *Porter* court explained:

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

Id. Likewise, a West Virginia trial court is empowered by the principles of equity to grant equitable relief to consumers as a means of securing complete justice and accomplishing the manifest public protection purposes of the WVCCPA. Therefore, we find that the circuit court did not err by awarding a civil penalty to be distributed by the Attorney General to individual consumers aggrieved by CashCall's usury.

CashCall's ninth assignment of error is that the circuit court erred by awarding the Attorney General a $730,000.00 civil penalty under West Virginia Code

§ 46A-6-104. Specifically, CashCall argues that Article 6 does not apply to consumer lending given that it makes unlawful only unfair and deceptive acts taken "in the conduct of any trade or commerce." "Trade or commerce" is defined as the "advertising, offering for sale, sale or distribution of any goods or services. . . ." W.Va. Code § 46A-6-102(6). Therefore, because consumer lending is neither a "good" nor a "service," CashCall contends that § 46A-6-104 does not apply in this case.

CashCall raises this assignment of error for the first time on appeal. "Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Whitlow v. Bd. of Educ. of Kanawha Cnty.,* 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993). *See also Louk v. Cormier,* 218 W.Va. 81, 622 S.E.2d 788 (2005); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell,* 228 W.Va. 252, 719 S.E.2d 722 (2011).

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made. . . . Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues [before this Court]. Finally, there is also a need to have the issue refined, developed,

> and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id. at 264-65, 719 S.E.2d at 734-35. Therefore, for the foregoing reasons, we decline to address this assignment of error.

C. Assignments of error relating to the award of attorney's fees as costs

We conclude our analysis by addressing CashCall's five remaining assignments of error (numbers ten through fourteen) relating to the circuit court's award of attorney's fees to the State. With regard to an award of attorney's fees, we have said

> "[t]he decision to award or not to award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." *Beto v. Stewart,* 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003). *See also Sanson v. Brandywine Homes, Inc.,* 215 W.Va. 307, 310, 599 S.E.2d 730, 733 (2004) ("We . . . apply the abuse of discretion standard of review to an award of attorney's fees."); Syl. pt. 2, *Daily Gazette Co., Inc. v. West Virginia Dev. Office,* 206 W.Va. 51, 521 S.E.2d 543 (1999) (" " "[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.' Syllabus point 3, [in part,] *Bond v. Bond,* 144 W.Va. 478, 109

> S.E.2d 16 (1959)." Syl. pt. 2, [in part,] *Cummings v. Cummings,* 170 W.Va. 712, 296 S.E.2d 542 (1982) [(per curiam)].' Syllabus point 4, in part, *Ball v. Wills,* 190 W.Va. 517, 438 S.E.2d 860 (1993).").

Corp. of Harpers Ferry v. Taylor, 227 W.Va. 501, 504, 711 S.E.2d 571, 574 (2011).

CashCall's tenth assignment of error is that the circuit court erred in awarding the State reasonable attorney's fees as costs absent express statutory or constitutional authority for such an award. CashCall also argues that attorney's fees may not be awarded to the State as costs.

We disagree. The circuit court had express statutory authority to award attorney's fees as costs to the State for its successful prosecution of this enforcement action against CashCall. As we noted above, West Virginia Code § 46A-7-108 provides that the Attorney General may bring an action both to restrain an entity from violating the WVCCPA and to obtain "other appropriate relief" which, pursuant to *Imperial Marketing,* is the full array of equitable relief including an award of attorney's fees as costs. 203 W.Va. at 213-14, 506 S.E.2d at 812-13. Further, West Virginia Code § 59-2-18 provides that when the State is granted equitable relief, the "fees of attorneys and other officers for services, and allowances for attendance" shall be taxed as part of the costs.

That said, even if the circuit court had not had express statutory authorization to award attorney's fees as costs, the circuit court would still have had legal authority to do so pursuant to Syllabus Point 3 of *Sally-Mike Properties v. Yokum,* 179 W.Va. 48, 365 S.E.2d 246 (1986), which provides as follows: "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Here, CashCall's actions—such as its refusal to produce the names and contact information for its West Virginia customers and its refusal to produce requested documents in an electronically searchable format—were vexatious and oppressive. Therefore, the circuit court clearly had legal authority to grant the State its attorney's fees as costs both for CashCall's violations of the WVCCPA, and for CashCall's vexatious and oppressive conduct. As such, we find that the circuit court did not abuse its discretion in awarding the State its reasonable attorney's fees as costs.

CashCall's eleventh assignment of error is that the circuit court erred in awarding attorney's fees to the State because, pursuant to *Hechler v. Casey,* 175 W.Va. 434, 333 S.E.2d 799 (1985), the State may not recover attorney's fees where the Attorney General represents the State. In *Hechler,* the Secretary of State filed a petition for a writ of prohibition with this Court. The Court subsequently granted the writ. The State then sought attorney's fees for its work on the case. We found that "the Constitution of this State restricts the compensation of the Attorney General . . . to a strict salary basis and bars the officers from supplementing or increasing their legislatively provided compensation by their receipt of fees or any other form of compensation." *Id.*, 333 S.E.2d at 816. Thus, CashCall contends that the West Virginia Constitution prohibits the circuit court from awarding attorney's fees to the State in this case. However, CashCall fails to note that we also said in *Hechler*that this Court could not award attorney's fees to the Attorney General for its work on behalf of the State *absent statutory authorization for such an award*. As we noted above, in the instant case, West Virginia Code § 46A-7-108 and § 59-2-18 provide statutory authorization for an award of attorney's fees as costs in a case seeking to enforce the WVCCPA. Therefore, *Hechler* does not preclude the award of attorney's fees as costs in this case.

CashCall's twelfth assignment of error is that the circuit court abused its discretion in relying on Assistant Attorney General Norman Googel's non-contemporaneous time estimates in determining his fees for the time he allegedly expended on this case. CashCall highlights that Mr. Googel's fifty-two "block billing" entries account for eighty-two percent of his claimed 1,175.9 hours of work on the case. CashCall complains that these block entries describe as many as thirty days of work in very few words. Therefore, CashCall contends that Mr. Googel's reconstructed time estimates lacked the accuracy and detail necessary to serve as a reliable predicate for an award of attorney's fees.

The record on appeal shows that Mr. Googel testified at length about the substantial time he spent, and the detailed method he used, to reconstruct time-sheets for this case. Mr. Googel also testified that he likely worked many more hours on the case than he could recall or substantiate. Further, Mr. Davis and the State's expert witness, attorney Bren Pomponio, testified that they believed Mr. Googel's time entry estimates were low in light of the duration and complexity of the case. Importantly, in its March 18, 2013, order, the circuit court noted its concern with the manner in which Mr. Googel's time estimates were reconstructed. The circuit court also found that "block billing" is not favored by the courts. The circuit court then found that Mr. Googel's estimated hours were reasonable in light of the court's knowledge of the history of the case. Nevertheless, the circuit court discounted Mr. Google's hours by fifteen percent for his failure to keep contemporaneous records. In support of its fifteen percent reduction of Mr. Googel's hours, the circuit court cited to several cases where federal courts had reduced attorney's fees' awards to states that prevailed on enforcement actions because the state failed to produce contemporaneous or adequate time-keeping records. *See New York v. Microsoft Corp.*, 297 F. Supp. 2d 15 (D.D.C. 2003) (15% reduction); *Michigan v. E.P.A.*, 254 F.3d 1087 (D.C. Cir. 2001) (10% reduction); *Kennecott Corp. v. E.P.A.*, 804 F.2d 763 (D.C. Cir. 1986) (15% reduction). On this record, we cannot say that the circuit court abused its discretion in relying, in part, on Mr. Googel's time entry estimates to determine the award of attorney's fees for his work on this case.

CashCall's thirteenth assignment of error is that the circuit court erred in relying on Bren Pomponio's opinion regarding the reasonableness of the *number of hours* claimed by Mr. Googel and Mr. Davis in this case because Mr. Pomponio was not qualified by the circuit court as an expert on the reasonableness of the number of hours worked in such a case. CashCall argues that Mr. Pomponio's testimony violated Rule 702 of the West Virginia Rules of Evidence which contemplates that a witness who offers expert testimony on an issue must be qualified as an expert on that issue. CashCall contends that the circuit court erred in considering any opinion offered by Mr. Pomponio on the reasonableness of the number of hours billed by Mr. Google and Mr. Davis.

In the order on appeal, the circuit court clearly stated that, although Mr. Pomponio's opinions on reasonable and customary fees and on the reasonableness of hours worked were "helpful," they were not determinative of the court's resolution of those issues. Rather, the circuit court found that the number of hours sought by the State was reasonable based on its application of the twelve-factor test in Syllabus Point 4 of *Aetna Casualty & Surety Co. v. Pitrolo,* 176 W.Va. 190, 342 S.E.2d 156 (1986).[22] In

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[22] The twelve *Aetna* factors are as follows:

> Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is

applying the *Aetna* factors, the circuit court found significant the novel and complex issues in this case; the fact that CashCall attempted to remove the case to federal court; the fact that Mr. Googel could have commanded a higher rate; and the fact that the State did not seek fees for the work done on the case by its paralegals or for assistant attorneys general who worked on the case other than Mr. Googel and Mr. Davis. Therefore, because the circuit court did not base its findings regarding the reasonableness number of hours billed on Mr. Pomponio's testimony, the circuit court neither violated Rule 702 nor abused its discretion in finding that the number of hours billed by Mr. Googel and Mr. Davis was reasonable.

CashCall's fourteenth and final assignment of error is that the circuit court abused its discretion in finding $350.00 to be a reasonable hourly rate for both Mr. Googel and Mr. Davis. First, CashCall contends that Mr. Davis should not have been paid as much as Mr. Googel because Mr. Google had practiced law for thirty-two years, including eighteen years with the Attorney General's Consumer Protection Division, while Mr. Davis had practiced law for only twenty-two

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> fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Aetna, 176 W.Va. at 191-92, 342 S.E.2d at 157.

years, and had worked at Consumer Protection for only sixteen years. Second, Mr. Googel was the lead attorney on the case. Third, CashCall argues that both attorneys' hourly rate should have been lower at the start of the case in 2007 than it was when the case concluded in 2012, because both attorneys had less experience in 2007 than they did in 2012.

The circuit court found that the $350.00 hourly rate was warranted because both Mr. Googel and Mr. Davis had many years of experience, both were skilled practitioners, and both had obtained an exceptional outcome in a case involving novel and complex issues. We find that the evidence in the record on appeal supports this finding. For example, Mr. Pomponio opined that the $350.00 rate sought by the Attorney General for both attorneys was reasonable, and reasonably could have been higher. Mr. Pomponio also gave numerous examples of similar attorney's fees awards in similar cases. Mr. Googel testified that a circuit court had previously awarded him $350.00 per hour in another matter involving similar issues. Mr. Davis testified he anticipated being awarded $550.00 per hour in an antitrust matter pending in California. Both attorneys testified they believed the rates were reasonable and warranted. Importantly, CashCall failed to introduce any evidence tending to show that the $350.00 hourly rate was unreasonable. Therefore, we find that the circuit court did not abuse its discretion in concluding that the $350.00 hourly rate for both Mr. Googel and Mr. Davis was warranted.

As for CashCall's claim that the hourly rates for Mr. Googel and Mr. Davis should have been lower at the inception of the case than at the end, we find that the circuit court appropriately awarded fees at current market rates for the pendency of the case given that, while this case was litigated, the State's expenses continued to accrue. As the United States Supreme Court has said,

> ". . . When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later. . . . Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. . . ."

Missouri v. Jenkins by Agyei, 491 U.S. 274, 282 (1989). Based on this reasoning, we find that the circuit court did not err in awarding the same hourly rate for the pendency of this case.

Accordingly, for the foregoing reasons, we affirm all three of the circuit court's extraordinarily thorough and remarkably well-reasoned orders.

Affirmed.

Issued: May 30, 2014
CONCURRED IN BY:

Chief Justice ROBIN JEAN DAVIS
Justice BRENT D. BENJAMIN
Justice MARGARET L. WORKMAN
Justice MENIS E. KETCHUM
Justice ALLEN H. LOUGHRY II.

APPENDIX B

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 II OF TRIAL: THE STATE'S USURY AND LENDING CLAIMS[1]

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.

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[1] The Court will enter a separate final order on Phase I of the trial regarding the State's debt collection claims against CashCall.

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 usury and lending 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").[2] 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. *See* Amended Complaint. Based on its conclusions, the State demanded that CashCall cease the continued collection of its loans and make appropriate restitution to aggrieved consumers. CashCall declined to do so.[3]

5. On October 8, 2008, the State commenced the above-styled civil action by filing a "Complaint for

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[2] 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.

[3] CashCall made and/or collected the loans in West Virginia, as alleged by the State, 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.

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; *See* Discussion, *infra*.

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 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 alleged violations of the West Virginia Consumer Credit Protection Act by CashCall and (2) Phase II on the alleged violations of West Virginia usury and lending laws by CashCall. This Final Order only addresses Phase II of the trial.

DISCUSSION

1. CashCall is a California corporation whose principal business office is located in Anaheim, California. CashCall also maintains a facility in Las Vegas, Nevada.

2. The Bank was and is a South Dakota state-chartered bank insured and regulated by the FDIC, at all times pertinent times herein. Pursuant to § 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d, as a state-chartered bank, the Bank may charge interest rates permitted in South Dakota on loans made outside of South Dakota, even if such interest rates are illegal in the state where the loans are made.

3. The marketing, making, and collection of consumer loans is subject to the provisions of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-1-101, et seq., which is enforced by the Attorney General pursuant to W. Va. Code § 46A-7-101, et seq.

4. CashCall and the Bank are completely separate entities. *See* First Amended and Restated Consumer

Loan Marketing, Organization, and Sale Agreement, Section 11.8, p. 24, State's Ex. 8. Specifically, the parties' agreement states that the "Bank and CashCall agree they are independent contractors to each other in performing their respective obligations [under the agreement]." *Id.*

5. The West Virginia Legislature created the Lending and Credit Rate Board ("Lending Board") and authorized the Lending Board to prescribe maximum interest rates and charges on loans, credit sales or transactions. W. Va. Code § 47A-1-1, et seq. The maximum interest rate that could be charged to West Virginia consumers on the type of loans at issue is eighteen percent (18%) per annum. Ex. A, Amended Complaint.

6. The State argues that CashCall is the de facto lender of the loans made to West Virginia consumers and that the collective agreements between it and the Bank are nothing more than sham agreements intended to usurp state usury and lending laws by making an improper assertion of federal preemption. Specifically, the State argues that CashCall, as the de facto lender, violated the State's usury and lending laws by making usurious loans with interest rates far exceeding those allowed by West Virginia law. Based upon the testimony presented and the evidence offered, specifically that of the four agreements between CashCall and the Bank, the Court agrees with the State that CashCall was the de facto lender and thus, is subject to West Virginia's usury and lending laws.

7. The four agreements between CashCall and the Bank allocate the risk and define the lending program at issue in this action. State's Ex. 5, 6, 7 and 8 (collectively "Agreement"). The Agreement was admitted by stipulation. Transcript of January 3, 2012, Trial ("Tr. Vol. III"), pp. 40-42.

8. The Agreement established a business model under which CashCall's role was purportedly limited to marketing and servicing the loans, whereas, the Bank's roles was to underwrite and fund the loans. Agreement, Sections 3.1-3.2, pp. 4-6. Because the Agreement characterizes the Bank as the lender, CashCall argues that the interest rates on the subject loans were governed by the law of the Bank's home state, South Dakota, which has no usury laws, not the laws of West Virginia which caps interest rates for the type of loans at issue at 18%.

9. Under the lending program established by the Agreement, a total of 292 loans were made to West Virginia consumers, beginning in August 2006 up to and including March 2007. Joint Ex. 1. Three types of 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.

10. 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. l.

11.The State does not dispute 'that a national or state-chartered bank may charge whatever interest rates are permitted by its home state and that it would not be required to obtain a lender license from any state other than its home state. *See* § 27 of the FDIA, 12 U.S.C. § 1831d.

Testimony of the State's Expert Witness: Margot Saunders

12. The State called Margot Freeman Saunders as its first and only witness in support of its second through fourth causes of actions ("Phase II of trial"). The State had previously disclosed Ms. Saunders as its expert witness in this case in accordance with the Scheduling Order entered by the Court.

13. Ms. Saunders is a lawyer who currently resides in Charleston, West Virginia, and has been employed by the National Consumer Law Center ("NCLC") from 1991 through the present. Ms. Saunders indicated her expertise includes policy analysis and advocacy in the areas of predatory lending, credit reporting, debt collecting, electronic commerce and benefits transfer, preservation of home ownership, credit math, electronic transaction issues, utility costs for low-income households, and other consumer credit issues. State's Ex. 1, Tr. Vol. III, p. 18 (Ms. Saunder's resume). She has provided written and oral testimony as a witness to Congressional Committees regarding policy issues affecting low-

income consumers on at least nineteen occasions. These Committees include the Subcommittee on Financial Institutions and Consumer Credit, House Financial Services Committee, House Ways and Means Committee, Senate Finance Committee, Senate Banking Committee, House Subcommittee on Financial Institutions and Consumer Credit, Senate Committee on Banking, Housing and Urban Affairs, and many others. State's Ex. 1, Tr. Vol. III.[4]

14. As of October 2011, Ms. Saunders provided an expert report, was deposed, and/or provided testimony in court as an expert witness in twenty nine cases involving such subjects as mortgage lending, consumer credit, and predatory lending. *See* State's Ex. 1, Tr. Vol. III. Ms. Saunders was qualified to testify as an expert witness in a predatory mortgage lending case by the Honorable Arthur Recht, Circuit Court of Ohio County, in *Lourie Brown and Monique Brown v, Quicken Loans, Inc., et al.*, Civil Action No. 08-C-36. Tr. Vol. III, p. 8-9. She was also qualified to testify as an expert witness on the subject of predatory lending by the United States Bankruptcy Court in Delaware. *See In re: American Home Mortgage Holdings, Inc., et al.*, U.S. Bankruptcy Court for the District of

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[4] Ms. Saunders has also served as a presenter and trainer on policy issues relating to such topics as low-income consumers, electronic commerce, predatory mortgage lending, payday lending, interest calculation methods, and other credit issues sponsored by a variety of private associations and government agencies. *See* State's Ex. I, Tr. Vol. III.

Delaware, Case No. 07-11047. State's Ex. 1, Tr. Vol. III, p.9.

15. On cross-examination, Ms. Saunders testified that as part of her analysis in predatory lending cases she regularly examines contracts between the lender and brokers and that the brokers in those cases operate much like CashCall. She testified that she was "quite familiar with interpreting bank contracts . . . and with its agents." Tr. Vol. III, p. 59. Ms. Saunders also testified that she has reviewed contracts between a bank and a purported agent relating to their marketing or assistance in solicitation of loans to the bank. *Id.* For example, Ms. Saunders explained that it is a "standard part of [her] review in mortgage cases to analyze contracts between the lender and brokers to determine such issues as who has the underwriting requirements, who has what obligations to analyze the borrower's income and ability to repay, and who determines the ultimate decision of whether the loan will be made." *Id.* Such analyses are very similar to what she was asked to do as an expert witness in this case.

16. Pending the issuance of this Order, the Court held in abeyance its ruling on the qualifications of Ms. Saunders to testify as an expert witness. Upon review of Ms. Saunders' testimony and in light of her professional experience, as set forth in State's Exhibit 1, the Court now finds that Ms. Saunders is qualified to testify as an expert witness on the subject of consumer lending. The Court further finds that Ms. Saunder's expertise in the field of predatory lending, particularly her analysis of contracts and relationships

between lenders and brokers, qualifies her to testify about the contracts and agreements between CashCall and the Bank and to assist the Court in determining those parts of the Agreement that show which party bore the economic risk as between CashCall and the Bank in regards to the subject consumer loans. Such testimony, as well as the Agreement between CashCall and the Bank, assisted the Court in deciding the ultimate question of which party to the Agreement was the true lender in the loans to West Virginia consumers.

17. Based upon the documents produced by CashCall during discovery, Ms. Saunders was asked to describe the loan amounts offered to West Virginia consumers. She testified that the program offered loans in the amounts of $1,075, at 89% interest; $2,600, at 96% interest; and $5,075, at 59% interest. Tr. Vol. III, p. 23; State's Ex. 2.[5] Ms. Saunders was asked to perform an analysis of what the interest rates charged to West Virginia consumers would have been if the loans had been governed by West Virginia law, with an interest rate of 18%, in comparison to the rates actually charged to consumers. Using a loan of $2600.00 as an illustrative example, Ms. Saunders explained that at an interest rate of 18%, the consumer would make 42 payments of $81.47 per

[5] As previously stated, according to the parties' Joint Exhibit 1,"agreed to and submitted by the parties after the close of evidence, the program offered loans in the amounts of $1,000.00; $2,525.00; and $5,000.000.

month, with total interest payments of $896.62. In contrast, a consumer who borrowed $2,600.00 at the 96% interest rate would make 42 payments of $216.55, with total interest payments of $6,494.92. State's Ex. 3, Tr. Vol. III; Tr. Vol. III, p. 33.

18. Ms. Saunders also offered an opinion as to how CashCall's business model worked. According to Ms. Saunders, CashCall entered into a contract with a state-chartered bank to use the bank's charter to make loans in states like West Virginia that have usury laws. Under such arrangement, the non-bank entity, in this case CashCall, asserts that it may charge whatever interest rate is allowed by the state-chartered bank's home state under the protection of § 27 of the FDIA. Tr. Vol. III, p. 34. Since the Bank is based in South Dakota, which has no usury laws, there is no limit to the amount of interest that West Virginia consumers could allegedly be charged on the subject loans.

19. Ms. Saunders also testified that the business model in question here, which has been characterized as "rent-a-bank" or "rent-a-charter," has been under considerable challenge for many years by state regulators and private parties. Tr. Vol. III, p. 36. Ms. Saunders testified that regulators challenged such arrangements by contending that the non-bank entity was the true lender rather than the bank. *Id.* When asked specifically how regulators approach this type of business model, Ms. Saunders explained:

> There would generally be a discussion of whether function follows the form or form follows function. In other words, just because

> the name of the bank was on the loan, did that indicate that the back was actually the lender? And the analysis often boiled down to which party, the bank or the non-bank lender, had the predominant economic risk in relation to the loans.

Tr. Vol. III, p. 37.

20. Ms. Saunders was also asked to analyze the lending program's underwriting guidelines in connection with her testimony in this case. She testified that she could not find many differences of any significance between CashCall's underwriting guidelines and the Bank's underwriting guidelines. Tr. Vol. III, p. 38. The document containing the underwriting guidelines of CashCall and the Bank analyzed by Ms. Saunders was admitted into evidence as State's Exhibit 4. Tr. Vol. III, p. 40.

21. Ms. Saunders was also asked in connection with her testimony to analyze the Agreements between the Bank and CashCall and to state in her opinion which party bore the economic risk in relation to the loans made to consumers. Tr. Vol. III, p. 47. She testified that she created a table or chart that summarizes the parts of all the agreements that she found relevant to the question of which party bore the economic risk of the loans. Ms. Saunders highlighted the following terms in her testimony: CashCall has the duties of preparing all the advertising materials, soliciting consumers, taking all the applications, verifying the identity of the applicants, providing on the Bank's behalf all completed adverse action notices,

and maintaining all of these applications. Tr. Vol. III, p. 50.

22. Ms. Saunders also testified that CashCall was obligated to deposit with the Bank $1.5 million, or the sum of the loans made in the highest yielding two days in the previous thirty days; CashCall's owner, J. Paul Reddam, in addition, was required to give a personal guarantee of all CashCall's monetary obligations to the Bank under the lending program; the Bank sold all loans to CashCall without recourse; and CashCall was obligated to indemnify the Bank against CashCall's mistakes and the Bank's losses, including all claims that materials or other aspects of the program violate any rule and claims by borrowers. Tr. Vol. III, p. 51; *See* ¶ 50, infra. The chart containing Ms. Saunders' summary of the terms from the agreements that are relevant to which party bore the predominant economic risk of the loans was admitted into evidence as State's Exhibit 9. Tr. Vol. III, p. 54.

23. Based upon her review and analysis of the agreements between CashCall and the Bank, Ms. Saunders testified that in her opinion "[i]t appeared that CashCall bore the entire economic risk from these loans." Tr. Vol. III, p. 55.

24. During cross-examination by CashCall's counsel, Ms. Saunders was asked whether she had identified any evidence to demonstrate that it was CashCall and not the Bank that actually made the decision to extend credit. She said she had. Based upon a review of the depositions of J. Paul Reddam (CashCall's owner) and Elissa Chavez (CashCall's director of fraud prevention and dispute resolution),

the contracts themselves and the marketing guidelines, she looked for evidence that the Bank had independently made underwriting decisions. She found "different indicia that the Bank really didn't make its own underwriting decisions and instead it was CashCall." Tr. Vol. III, p. 61-62.

25. Ms. Saunders testified that she had consulted with the FDIC in connection with her testimony in this case and that representatives of the FDIC had pointed out two FDIC actions involving CashCall in which it had disallowed this and similar lending programs for unfair trade practices. Tr. Vol. III, p. 64.[6] Ms. Saunders explained that the FDIC's action concerning First Bank of Delaware (the other bank that partnered with CashCall) and CompuCredit outlined the aspects of the bank's third-party lending program "that it deemed problematic and characterized under the unfair trade practices section of its Order." Tr. Vol. III, p. 70. Ms. Saunders explained that the FDIC document identified all of the "third-party lending programs" of concern involving the bank on Exhibit A,

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[6] See In the Matter of First Bank of Delaware, and CompuCredit Corporation, Notice of Charges for an Order to Cease and Desist and for Restitution, Federal Deposit Insurance Corporation, FDIC-07-256b, June 15, 2008, available at http://www.FDIC.gov/news/press/2008/FBDNoticeofCharges.pdf; See also In the Matter of First Bank of Delaware, Stipulation and Consent to the Issuance of an Order to Cease and Desist, Order for Restitution, and Order to Pay, October 3, 2008, available at http://www.FDIC.gov/bank/individual/enforcement/2008-10-20.pdf.

one of which was the bank's arrangements with CashCall. Tr. Vol. III, pp. 72-73; Defendant's Ex. l.

26. CashCall's counsel pressed Ms. Saunders to concede that the FDIC's concerns were only directed at the bank and not CashCall, but she disagreed: "I think that the FDIC's goal here was to shut down the bank's third-party arrangements with CompuCredit and other entities, including CashCall . . . . . That's how I read that, and that's what I was told by . . . an employee of the FDIC, what was happening here." Tr. Vol. III at 76. Furthermore, Ms. Saunders testified that "the FDIC thought the bank [First Bank of Delaware] had reputational risks" as distinguished from economic risks in the individual loan transactions. Tr. Vol. III, p. 77.

27. Ms. Saunders also answered affirmatively when the Court observed that "the Bank in question here in the CashCall case had no economic risks as to the individual loans. It was all being indemnified and held harmless by CashCall?" Tr. Vol. III, pp. 77-78. She explained:

> That's correct. The FDIC shut down the arrangement [third-party arrangements between banks and non-bank entities like CashCall] because of the reputational risk to the banks and because the FDIC was getting quite a bit of heat from members of Congress and consumer groups over allowing these products—practice. . . . And what the FDIC did beginning in 2006 was stop these actions by individual compliance reviews so that the . . . FDIC actions were not public. In fact, I

> cited in my report the one evidence that we were able to find publicly of these FDIC shut downs that was reported in the Securities, Securities and Exchange Reports.

Tr. Vol. III, pp. 78-79.

Testimony of Dan Baron—CashCall's General Counsel

28. In Phase II of the trial, on the State's usury and lending claims against CashCall, CashCall presented only one witness, Dan Baron, CashCall's general counsel. Mr. Baron has been employed by CashCall since its inception in 2003. He testified that he is in charge of all regulatory matters, all of the litigation that comes in, and has negotiated most, if not all, of the major contracts between CashCall and its financing partners. He also said that he negotiated the agreements between CashCall and the two banks involved in the lending program at issue here. Tr. Vol. III, pp. 94-95.

29. CashCall's headquarters are currently located in Anaheim, California, and CashCall also has a servicing office in Las Vegas, Nevada. CashCall currently employs a little over 1,000 persons. Tr. Vol. III, pp. 97-98. CashCall currently is a direct lender in California only. CashCall secured its first lending license in California in 2003 and has fourteen consumer lending licenses that would allow it to make direct loans in thirteen other states. Tr. Vol. III, pp. 98-99.

30. Mr. Baron testified that CashCall extended its operations beyond California at the urging of its different financing partners. "They didn't like the fact

that there was a huge concentration in borrowers, and they wanted us to diversify our service portfolio if we wanted more money from them, basically." Tr. Vol. III, p. 102. By that time CashCall had secured lending licenses in three or four other states, and it was lending there, but he recounted the difficulties and length of time it took to get state lending licenses. Tr. Vol. III, pp. 102-103.Mr. Baron also testified that CashCall developed all the materials from scratch in connection with its direct lending program prior to entering into any third-party arrangements with banks. Tr. Vol. III, pp. 100-101.

31. Mr. Baron testified that around the time CashCall was diversifying it was approached by First Bank & Trust. They expressed interest in having CashCall market loans for them on a nationwide basis. According to Mr. Baron, CashCall's objective was to expand its loan program nationally, but primarily on the servicing side. The Bank's goal was to start consumer lending, but the Bank could not do that because it did not have the capacity to market or the ability and manpower to service the loans once they were originated. Tr. Vol. III, pp. 103-105.

32. During negotiations to establish the agreements with the Bank, Mr. Baron stated that the Bank was very concerned about how CashCall would be servicing the loans and wanted to make sure that CashCall would not do anything to "embarrass them or jeopardize their charter." Tr. Vol. III, p. 109. Mr. Baron testified that CashCall had the abilities to market and service a high volume of loans because it had been operating on its own with the systems it had

created. "It had 100,000 outstanding loans in California at that point." Tr. Vol. Ill, p. 106.

33. In regards to how the online application process operated for West Virginia consumers, Mr. Baron testified that when a loan applicant clicked on "West Virginia," they would be directed to a website owned by the Bank on the Bank's system. Tr. Vol. III, p. 115.Once the applicant "passed their initial automated underwriting," a system that Mr. Baron stated was developed and controlled by the Bank, the file would get referred to the Bank where it would be manually underwritten by a Bank underwriter. Mr. Baron testified that all loans were reviewed and approved by a Bank underwriter on Bank property who worked for the Bank with no input whatsoever from CashCall. Tr. Vol. III, pp. 115-116.However, Mr. Baron agreed that CashCall was not obligated to buy loans that deviated from the parties' agreed upon underwriting criteria set forth in the Agreement. Although Mr. Baron stated the Bank could alter the underwriting criteria, he admitted that CashCall was only obligated to purchase loans that met the criteria agreed to by CashCall and the Bank under the program guidelines. Tr. Vol. III, p. 119.

34. When asked his opinion on which party bore the economic risk of the loans under the agreements with the Bank, Mr. Baron explained: "We [CashCall] bore the economic risk. But the Bank was still on the hook for the underlying loan. . . . If there were Regulation Z problems, truth in lending problems, FTC issues, unfair and deceptive practices, the Bank was the entity that was going to get hit, and the Bank

was the one who was going to lose its Charter in the event that there was something amiss." Tr. Vol. III, p. 134. He further testified that CashCall did purchase all of the West Virginia loans as required by the Agreement for "a hundred cents on the dollar." Tr. Vol. III, pp. 171-172. When asked about the specific provisions of the Agreement between CashCall and the Bank during cross-examination, Mr. Baron explained that the actual practice of how things sometimes operated deviated from the literal wording or meaning of the Agreement. *See generally* Tr. Vol. III, pp. 165-221.

35. Mr. Baron also admitted that the lending program with the Bank employed the accounting system that "CashCall had built from scratch." CashCall's accounting system tracked loan progress, the number of loans at various stages, the number of loans funded, and the loan amounts. Tr. Vol. III, pp. 179-180. CashCall's accounting system was used "because the Bank didn't want to start from scratch and have to spend God knows how much money or have us spend God knows how much money to reinvent the wheel. It saw our system and said, 'You know what? The system you have here would work for us.'" Tr. Vol. III, p. 180.

36. In response to questions about the various provisions in the Agreement that required CashCall to pay large sums of money to the Bank, Mr. Baron explained this was because:

> They didn't want to execute a contract and then have CashCall decide to go in a different direction . . . they're putting their charter at

> risk. They wanted to make sure that CashCall was invested, that CashCall was committed and that CashCall was going to do the right thing . . . the Bank expended a lot of money and a lot of time and subjected its charter to potential reputational risk as well as other regulatory issues. They wanted to make sure that they were adequately compensated and that CashCall wasn't going to be a flake about this.

Tr. Vol. III, p. 184.

37. Mr. Baron did acknowledge that J. Paul Reddam was obligated to personally guarantee all of CashCall's obligations to the Bank under the subject lending program and that he was required to do so in CashCall's other financing agreements. He estimated Mr. Reddam's net worth was about $25-$30 million at the time of CashCall's agreement with the Bank. Tr. Vol. III, pp. 192-193. He further acknowledged that no state banks are currently partnering with CashCall or any companies like CashCall to do marketing and loan purchases in the United States. Tr. Vol. III, p. 186. However, Mr. Baron testified that it had nothing to do with that FDIC order [referring to CompuCredit]. It was over the crisis in Wall Street at that particular point. *Id.*

38. To the extent that Mr. Baron's testimony is inconsistent with the Court's finding that CashCall bore the entire economic risk of the loan program and thus, was the de facto lender, hiding behind the Bank's charter, the Court finds such testimony not credible. In making such determination, the Court notes the

fact that CashCall was required to purchase and did in fact purchase all of the loans which met the program guidelines agreed to by CashCall for "one hundred cents on the dollar" within three business days of the origination date, as Mr. Baron testified.

The Agreement between CashCall and the Bank[7]

39. Even if the Court were to find and conclude that Ms. Saunders is not qualified to testify and offer an expert opinion on the subject of consumer lending and specifically, on the relationship between CashCall and the Bank, the Court finds and concludes that the Agreement between CashCall and the Bank, as well as, the practical application and implementation of the business arrangement between the Bank and CashCall, fully support the Court's finding that CashCall is the de facto lender of the subject loans, as it clearly bore the economic risk of the loans. *See* Discussion, *infra*.

40. The First Amended and Restated agreement confirms that the entire financial burden and risk of the loans to West Virginia consumers under the program was placed upon CashCall. Such conclusion is supported by at least twenty four provisions in the First Amended and Restated Agreement, including the following:

a. CashCall's sole owner and stockholder, J. Paul Reddam, is the "Guarantor" of all of CashCall's

[7] State's Exhibits 5-8, the four contracts between CashCall and the Bank.

monetary obligations to the Bank. *See* Article I, Section 1.1, Definitions, p. 2.

b. CashCall is obligated to purchase, <u>and did purchase</u>, all loans from the Bank within three (3) days after the loan was allegedly originated and funded by the Bank. The purchase price for each loan to be paid by CashCall was required to be equal to the outstanding balance due on each loan, including <u>all principal, interest, origination fees, and other charges or sums owed by the borrower</u>. *See* Article VI, Section 6.1, p. 9.

c. CashCall is responsible for the marketing and solicitation of the loans <u>at its own expense</u> through use of the approved Advertising and Program Materials prepared by CashCall. *See* Article III, Section 3.1(b),p. 4.

d. CashCall shall pay bank the Bank's reasonable attorneys' fees associated with the Bank's compliance review of the Advertising Materials and Program Materials prepared by CashCall. *See* Article III, Section 3.1(k), p. 5.

e. CashCall shall maintain at its expense employee dishonesty coverage and the general comprehensive liability policy, each with a financially sound and reputable insurer reasonably acceptable to Bank, with coverage of not less than $3 million and $1 million, respectively, together with commercial umbrella coverage with a general aggregate limit of not less than $3 million. *See* Article III, Section 3.1(n), p. 6.

f. CashCall is obligated to pay all reasonable attorney fees associated with review of the Program Materials prepared by CashCall for compliance with applicable Rules, subject to an annual cap of $30,000. *See* Article IV, Section 4.1, p. 7.

g. CashCall shall develop and maintain, <u>at its own cost and expense, a comprehensive accounting and loan tracking system</u> to accurately and immediately reflect all Applications, Loans, and related information regarding the Program to satisfy the information requirements of Bank, Regulatory Authorities, and Bank's internal and external auditors, as such information requirements have been disclosed to CashCall. *See* Article VI, Section 4.2, p. 8.

h. CashCall is obligated to pay the Bank a non-refundable Program Implementation Fee of the greater of $50,000 or the sum of all itemized costs incurred by the Bank prior to the Commencement Date, including but not limited to reasonable legal costs, equipment costs, due diligence costs, and facility costs (the "Bank Implementation Fee"). The Bank Implementation Fee is due upon executions of the Agreement and shall not exceed $100,000. *See* Article VII, Section 7.1, p. 10.

i. CashCall is obligated to pay the Bank fees characterized as "Minimum Bank Revenue" in accordance with the following schedule during the term of the Program: $30,000 per month for months 1-3; $60,000 per month for months 4-6; $125,000 per month for months 7-12; and $200,000 per month for months 13-18. *See* Article VII, Section 7.3, p. 10.

j. CashCall is obligated to reimburse the Bank for all of its Operational Costs for the Program in excess of 15% of the Net Revenue earned by the Bank. *See* Article VII, Section 7.4, pp. 11-12.

k. Upon execution of the Agreement with the Bank, CashCall must deposit a Settlement Reserve with the Bank in the sum of $500,000 and, thereafter, CashCall must maintain a balance in the Settlement Reserve equal to the sum of the total dollar amount of Loans originated by the Bank but yet to be purchased by CashCall ("loans on book") or $500,000, whichever is greater. CashCall must calculate and replenish the Settlement Reserve on a daily basis. *See* Article IX, Section 9.1(a), pp. 13-14.

l. CashCall must further maintain an additional deposit with the Bank denominated as a "Cash Reserve" in the amount of $1 million. The funds in the Cash Reserve shall be held in a non-interest bearing deposit account and shall be maintained in the name of CashCall, but shall be subject to the sole control of the Bank until such time as any amounts remaining in the account are returned by Bank to CashCall upon termination of the Agreement. CashCall also grants the Bank a security interest and right of offset in the Cash Reserve and all funds held therein and also all other amounts due and owing from Bank to CashCall as security for all of CashCall's obligations owed to the Bank under this Agreement. *See* Article IX, p. 9.1(b), pp. 14-15.

m. CashCall must procure the personal guarantee of Guarantor (Reddam) of all its obligations to Bank, and must compel Guarantor to provide a signed personal financial statement to Bank prior to execution of the agreement and annually thereafter. *See* Article IX, Section 9.2, p. 15.

n. CashCall is obligated to <u>indemnify and hold harmless the Bank against all "losses" arising out of the Agreement, including any claims asserted by Borrowers in connection with the Program</u>. *See* Article XI, Section 11.1(a), p. 18.

41. The previous provisions, when viewed collectively, place the entire monetary burden and risk of the loan program on CashCall and not the Bank. CashCall paid more for each loan than the amount actually financed and "purchased" such loans almost immediately after their origination, so that the Bank had no economic risk on the loans. Presumably, CashCall agreed to such terms on the belief that its business scheme would successfully evade state usury laws and it could reap the benefits of the excessive interest rates charged on each loan. Furthermore, CashCall had to procure the personal guarantee of its sole owner and stockholder, J. Paul Reddam, to personally guarantee all of CashCall's financial obligations to the Bank, including the amounts of the loans prior to "purchase" by CashCall. Also, CashCall had to indemnify the Bank against all "losses" arising out of the Agreement, including claims asserted by borrowers. Clearly, the Agreements do not place any

monetary burden or risk on the Bank. Finally, a document called "CashCall, Inc. and Subsidiaries Consolidated Financial Statements, December 31, 2007," prepared by the firm Squar Milner and paid for by CashCall as one of its obligations under its agreement with the Bank, further supports the conclusion that CashCall was the de facto lender of the subject loans. Specifically, under the heading "Organization and Summary of Significant Accounting Policies," the auditing firm of Squar Milner stated the following:

> CashCall was under contractual obligation to purchase the loans originated and funded by FBT (the South Dakota Bank) only if CashCall's underwriting guidelines were followed when approving the loan. For financial reporting purposes, CashCall treated such loans as if they were funded by CashCall.

(emphasis added). The fact that for financial reporting purposes CashCall considered itself the originator of the loans further supports the finding that CashCall was the de facto lender and the Bank was not the true lender. *See* Appendix, State's Pre-Trial Memorandum, Tab 5.

Discussion of the Predominate Economic Interest Standard and whether CashCall was the De Facto Lender Subject to the State's usury and lending claims

42. Under W. Va. Code § 46A-7-115, "every person engaged in West Virginia in making consumer loans . . . shall file notification with the state tax department within thirty days after commencing business in this state." The State argues that CashCall

violated this statute by serving as the de facto lender in transactions with West Virginia consumers without a business registration certificate from the state tax department. Furthermore, pursuant to W. Va. Code § 47-6-6, all contracts made directly or indirectly for the loan or forbearance of money at a greater interest rate than is permitted by law *shall be void* as to all interest provided and the borrower or debtor may, in addition, recover from the original lender or creditor an amount equal to four times all *interest agreed to be paid* and at least a minimum of one hundred dollars. (emphasis added).

43. In examining what constitutes a usury loan, the Supreme Court of Appeals of West Virginia held: "The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact." Syl. Pt. 4, *Carper v. Kanawha Banking & Trust Company*, 157 W. Va. 477, 207 S.E.2d 897 (1974) (citations omitted) (emphasis added).

44. In attempting to resolve the question of who is the true lender, trial courts and administrative agencies have most often conducted an inquiry to determine which party, as between the bank and the non-bank entity, had the "predominate economic interest" or risk in the loans. Based upon the review of how rent-a-bank cases have been approached by other courts and regulators, the Court concludes that the predominant economic interest standard is the proper

standard to determine who the true lender is in the present case.

45. In one of the earliest "rent-a-bank" cases, the North Carolina Commission of Banking was investigating Ace, a storefront payday lender, in connection with its rent-a-bank arrangement with Goleta National Bank. Although the state had not sued the bank, Goleta filed a separate suit against the state agency in federal court asserting federal preemption and seeking to enjoin the state's investigation of Ace. In its order dismissing Goleta's case, the Court in *Goleta National Bank v, Lingerfelt*, 211 F. Supp. 2d 711 (E.D.N.C. 2002), framed the precise factual issue that CashCall also raised in its notice of removal:

> Although Ace contends that Goleta is the real maker of the loans at issue, the State contends just the opposite; that Ace is using Goleta's name as mere subterfuge for its own unlawful lending practices. Thus, a sharp factual issue is presented as to whether Goleta, the national bank, is the real lender at issue. <u>If Ace is the de facto lender, then its payday loans may violate the North Carolina Check Casher Act (citation omitted), which prohibits licensed check cashers from making loans</u>.

Id. at 717 (emphasis added). The court in *Lingerfelt* noted that even if Goleta is the true maker of the payday loans, Ace would still have to comply with the North Carolina Loan Broker Act. *Id.* at 718. The latter act, which is very similar to the West Virginia Credit Services Organizations Act ("CSO ACT"), W. Va. Code

§ 46A-6C-1, et seq., requires that the loan broker obtain a bond in favor of the State and provide certain written disclosures to prospective borrowers. The Court notes that the State also alleged that CashCall violated the CSO Act by assisting consumers in obtaining extensions of credit from the Bank. *See* Fourth Cause of Action, Amended Complaint.

46. In another case involving Ace, *State of Colorado ex rel. Salazar v. Ace Cash Express, Inc.*, 188 F. Supp. 2d 1282 (D. Colo. 2002), the court again sided with the state in its challenge to Ace's rent-a-bank arrangement and similarly found that the state's case was not preempted. In *Salazar*, the state of Colorado sued Ace and did not sue the national bank. Ace, like CashCall in the case at bar, removed the case to federal court on the grounds of federal preemption. Specifically, Ace sought to assert the preemption of Goleta National Bank which was not a party to the case. The court in *Salazar* rejected Ace's argument, stating that the National Banking Act "regulates national banks and only national banks," and also noting that Ace attempts to circumvent this result by arguing that it is an agent for loans made by Goleta." *Id.* at 1284. In remanding the case to state court, the court in *Salazar* distinguished the case from *Marquette v. Nat 'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 99 S. Ct. 540 (1978), "where the defendant was a subsidiary of a national bank established to administer its credit card program," and *Crispin v. May Dept. Stores Co.*, 218 F.3d 919, 922-24 (8th Cir. 2000), where the national bank was a wholly-owned subsidiary of the store. *Salazar*, 188 F. Supp. 2d at 1284-85.

47. In *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp. 2d 1191 (N.D. Okla. 2004), the United States District Court for the Northern District of Oklahoma examined a challenge to a rent-a-bank arrangement in which a non-bank entity removed the case to federal court. As in the present case, the plaintiffs in *Flowers* asserted that the non-bank entity was the real lender. The *Flowers* court remanded the private class action to state court, citing *Salazar*, *supra*, with approval and noting that the plaintiffs' complaint was strictly about a non-bank's violation of state law and alleged no claims against a national bank. *Id.* at 1194.

48, *In West Virginia v. CashCall, Inc.*, *supra*, Judge Goodwin followed the precedent of the federal cases discussed above in granting the State's motion to remand. In his reasoning of the conclusion that the State's usury law claim against CashCall is not preempted, Judge Goodwin explained: "If CashCall is found to be a de facto lender, then CashCall may be liable under West Virginia usury laws." 605 F. Supp. 2d 781, 787. In making this observation, Judge Goodwin legitimized the State's position that the Court must conduct an inquiry to determine whether CashCall, the non-bank entity, was the de facto lender, and if so, the State will prevail on these claims. Pertinent to this Court's review, Judge Goodwin also found that "CashCall and the Bank are completely separate entities." *Id.* at 786. Further acknowledging the legitimacy of the State's claim that the key inquiry is whether CashCall was the de facto lender, Judge Goodwin stated: "I cannot determine which entity is the true lender based on the record before the Court. Therefore, even assuming that the Bank's definite status as the true lender would be dispositive of the complete preemption question, CashCall has not sustained its burden of establishing that fact." *Id.* at 797, n.9 (referring to the defendant's burden of establishing federal jurisdiction).

Federal Regulatory Efforts to End Rent-a-Bank

49. During this litigation CashCall has stated and implied that the subject lending program was approved by the FDIC, the primary federal agency that regulates state-chartered banks such as the Bank in question in the present case. *See* Subpoena Response Letter, pp. 1-2. However, CashCall never produced any evidence that the FDIC had approved its practices. In fact, the evidence of record and the legal authority presented indicate that both the Office of the Comptroller of the Currency ("OCC"), the agency that primarily regulates national banks, and the FDIC issued directives and took other actions intended to terminate the practice characterized as "rent-a-bank," including enforcement action against CashCall's former partner, First Bank of Delaware, and CompuCredit. Furthermore, the FDIC document identified all of the objectionable "third-party lending programs" in which the Delaware bank was involved, one of which was the bank's arrangements with CashCall. *See* Testimony of Ms. Saunders, *supra.*

50. The OCC's concerns about the misuse of bank charters in rent-a-bank arrangements with payday lenders and other non-bank entities to evade state usury laws is also evidenced in its Preemption Determination issued May 23, 2001 to clarify the extent of national bank preemption in response to

questions and concerns from state regulators and other parties, Among other things, the OCC clarified that national banks may use the services of agents and other third parties in connection with its lending activities, even when agents undertake those activities at sites other than the main office or branch office of the bank. But the OCC noted a distinction applicable to facts of this case: "This is not a situation where a loan product has been developed by a non-bank vendor that seeks to use a national bank as a delivery vehicle, <u>and where the vendor, rather than the bank, has the preponderant economic interest in the loan</u>." *See* Preemption Determination, 66 Fed. Reg. 28,593 (May 23, 2001), p. 28,595, n.6. (emphasis added). Although the loans offered by CashCall are installment loans as opposed to payday loans, the business model used by CashCall is essentially the same as the rent-a-bank arrangements subject to scrutiny and termination actions by federal regulatory agencies, as the arrangement between CashCall and the Bank was designed to enable a non-bank entity, CashCall, to make improper use of the Bank's federal preemption status to evade states' usury laws.

51. Based on the documentary and testimonial evidence produced during Phase II of the trial and the prevailing law on the subject matter as set forth above, the Court makes the following findings of fact:

a. That CashCall bore the predominant economic risk of the subject loans made to West Virginia consumers and thus, was the true lender of such loans, not the Bank;

b. That CashCall was not the agent of the Bank, but was an independent contractor;

c. That the purpose of the lending program was to allow CashCall to hide behind the Bank's charter and its right to export interest rates under federal banking law, as a means for CashCall to deliver its loan product to states like West Virginia, with usury laws;

d. That CashCall established the subject lending program with the purpose to deliver the loan product CashCall had already been offering in other states prior to its relationship with the Bank in an attempt to evade the lender licensing and usury laws of West Virginia;

e. That the maximum allowable interest rate under West Virginia law for the loans in question was 18%.

f. That the loans made by CashCall to West Virginia consumers under the lending program greatly exceeded the maximum allowable interest rates under West Virginia and are usurious loans;

g. That CashCall made loans in West Virginia, directly or indirectly, without obtaining a business registration certificate from the State Tax Department, in violation of W. Va. Code § 46A-7-115;

h. That CashCall, by the making and the collecting of usurious loans and excess charges without a license, has engaged in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104; and

i. That CashCall has engaged in a course of repeated and willful violations of the WVCCPA, specifically, repeatedly and willfully violating W. Va. Code § 46A-7-115 (making loans in West Virginia without a license) and § 46A-6-104 (unfair or deceptive acts or practices), as to warrant assessment by this Court of a civil penalty of up to $5,000 for each violation, as set forth in W. Va. Code § 46A-7-111(2).

Overview of Relief for Consumers and the State

52. Generally, the State seeks a final order from the Court permanently enjoining CashCall from engaging in unlawful lending and debt collection practices as alleged in the Amended Complaint, as authorized by W. Va. Code § 46A-7-108.[8] The State also asks that a Final Order be entered that: (1) grants the consumers restitution, debt cancellation disgorgement, and other appropriate relief, as authorized by W. Va. Code § 46A-7-108; (2) refunds and awards to the consumers the unlawful interest agreed to be paid by the consumers, as authorized by W. Va. Code § 47-6-6; (3) finds that CashCall engaged in a course of repeated and willful violations of the WVCCPA and awards the State a civil penalty of up to $5,000.00 for each violation, pursuant to W. Va. Code § 46A-7-111; and (4) grants reimbursement to the State for its attorney's fees and costs expended in

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[8] Under W. Va. Code § 46A-7-108, "the attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief."

connection with investigation and litigation of this action.

53. As stated above, pursuant to W. Va. Code § 47-6-6 the penalty for usury is that all usurious loan contracts shall be void as to all interest and that the borrower, in addition, may recover an amount equal to four times all interest agreed to be paid. The total amount of interest agreed to be paid by West Virginia consumers in relation to the usurious loans is $2,511,421.99. *See* Joint Ex. 1. According to the Court's calculations four times the amount of interest agreed to be paid by all West Virginia consumers is $10,045,687.96.

54. 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.

CONCLUSIONS OF LAW

(Phase II of Trial)

1. Based on the Court's finding that CashCall bore the predominant economic risk of the lending program and thus, was the de facto lender of such loans, the Court concludes that as the lender of consumer loans CashCall violated W. Va. Code § 46A-7-115 by failing to obtain a business registration certificate from the state tax department.

2. The Court also concludes that the loans made by CashCall to West Virginia consumers were usurious loans, having interest rates that exceeded the maximum legal amount of 18%. Therefore, under W. Va. Code § 47-6-6, the Court concludes that the loan contracts made are void as to all interest set forth in such loan contracts.

3. The Court also concludes that by making and collecting usurious loans without a license, CashCall engaged in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104. As stated above, the Court finds that such violations were repeated and willful violations of the WVCCPA.

4. The Court need not reach the question of whether CashCall violated the CSO Act based on its finding that CashCall was the true lender. However, the Court rejects CashCall's position that it would exempt from the CSO Act because it was a "bank service company," as defined by the Bank Service Company Act. In order to qualify as a bank service company, all of the capital of the company organized to perform such services must be owned by one or more insured depository institutions. 12 U.S.C. § 1861(b)(2)(A)(ii). The Court concludes that CashCall does not meet the definition of a bank service company as defined by the Bank Service Company Act, and thus, would not be exempt from the WV CSO Act.

DECISION

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

(1) The State is hereby 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, directly or indirectly, in making loans in West Virginia without a license, making or collection usurious loans, and collecting or attempting to collect excess charges, as set forth in the WVCCPA.

(2) The State is hereby awarded a civil penalty against CashCall in the amount of $730,000.00 for repeatedly and willfully making loans in West Virginia without a license in violation of W, Va. Code § 46A- 7-115 of the WVCCPA. Such amount consists of a civil penalty of $2,500.00 for each of the 292 loans made to

West Virginia consumers. Such money awarded as a civil penalty shall be placed in the State Treasury to be appropriated by the West Virginia Legislature.

(3) The State is hereby awarded a civil penalty against CashCall in the amount of $730,000 for repeatedly and willfully engaging in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104 of the WVCCPA, by the making and the collecting of usurious loans. Such amount consists of a civil penalty of $2,500.00 for each of the 292 loans made to West Virginia consumers. Such money awarded as a civil penalty shall be placed in the State Treasury to be appropriated by the West Virginia Legislature.

(4) The State is hereby awarded a judgment against CashCall in the amount of $10,045,687.96 for making usurious loans in violation of W. Va. Code § 47-6-6, said amount being equal to "four times all interest agreed to paid" by each consumer on each of the 292 loans made in West Virginia as provided in W. Va. Code § 47-6-6. This amount shall be refunded to the consumers in accordance with W. Va. Code § 46A-7-111. Any such refunded money 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.

(5) In accordance with the equitable powers of the Court and the policy underlying W. Va. Code § 46A-6-105, the Court **ORDERS** that all of the loan contracts entered into between West Virginia consumers and CashCall are void, that any debts still allegedly owed by any West Virginia consumer to CashCall are

cancelled, and that CashCall shall notify credit bureaus to delete all references to West Virginia accounts regarding the subject loan accounts &om the credit record of the West Virginia consumers. However, CashCall is not required to delete the accounts in those instances where it has only reported positive payment history. Furthermore, in light of voidance of the subject loan contracts, CashCall shall not file 1099(c) debt cancellation forms with the Internal Revenue Service.

(6) The Court further **ORDERS** that the State is awarded judgment against CashCall for all of its costs, including its reasonable attorney's fees, for the prosecution of Phase II of the trial. This amount shall be determined at a later date upon petition by the State to be filed within a reasonable time after entry of this Order.

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.

/s/ Louis H. Bloom, Judge

APPENDIX C

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of August, 2014, the following order was made and entered in vacation:

CashCall, Inc. and J. Paul Reddam, in his
Capacity as President and CEO of CashCall, Inc.,
Defendants Below, Petitioners

v.) No. 12-1274

Patrick Morrisey, Attorney General
Plaintiff Below, Respondent

The Court, having maturely considered the petition for rehearing filed by CashCall, Inc. and J. Paul Reddam, by Charles L. Woody, their attorney, and the response thereto, filed by the respondent, Patrick Morrisey, by Normal Googel, his attorney, is of opinion to and doth hereby refuse said petition for rehearing.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court