

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTIAN and ELIZABETH HARPER,
on their own behalf and on behalf of those
similarly situated,

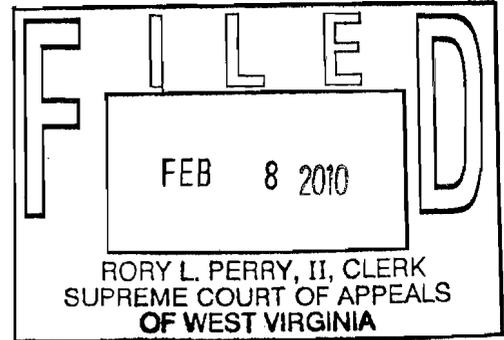
Plaintiff,

v.

JACKSON HEWITT INC.,

Defendant.

CASE NO. 35295



DEFENDANT JACKSON HEWITT'S BRIEF

On Certified Questions from the United States District Court
for the Southern District of West Virginia, Huntington Division
Honorable Robert C. Chambers
(Civil Action No. 3:06-0919)

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STATEMENT OF THE CASE

This case revolves around a series of successful refund anticipation loans (“RAL”) obtained by Plaintiffs from a national bank, Santa Barbara Bank & Trust (“SBB&T”). A RAL is a loan that SBB&T offers to customers based on several criteria, including the customer’s anticipated tax refund for a given tax year. Plaintiffs applied for their loans each year after they had their tax returns prepared by an independent franchisee of Jackson Hewitt Inc. (“Jackson Hewitt”). Because SBB&T had a contract with Jackson Hewitt, the loan application (and Plaintiffs’ tax return information) was provided by Jackson Hewitt to the bank for processing and consolidation. Plaintiffs do not claim that they did not get the loan they applied for or that they were somehow tricked into applying for it.

The complaint contains colorful (and demonstrably false) allegations that Jackson Hewitt received “secret kickbacks” in connection with the RALs and that Jackson Hewitt was “recommending [to Plaintiffs] transactions it knew were financially unsound.” Significantly, these allegations are disproved by the RAL application itself, and by the Harpers’ own sworn deposition testimony.

Similarly, there is neither evidence nor law to support the Harpers’ Credit Services Organization (“CSO statute” or “CSOA”) statutory claim. Under the plain terms of that statute, Jackson Hewitt is not a “credit services organization” (or “CSO”) and the Harpers are not “buyers” under the Act.¹ As the court did in *Gomez v. Jackson Hewitt Inc.*, Case No. 308418-V,

¹ The District Court has already found that Jackson Hewitt did not have an agreement with the Harpers to obtain a RAL for them. (See Docket Entry 129 at 8.) Moreover, the record establishes that the Harpers never paid (or were solicited to pay) Jackson Hewitt a single cent in connection with their RAL. Similarly, and especially because the Harpers admit that they would obtain a RAL again, the Harpers cannot satisfy the statutory requirement that they were “injured” by the supposed violation of the CSO statute.

2009 Md. Cir. Ct. LEXIS 5 (Md. Cir. June 18, 2009) (involving a virtually identical statute), this Court should reject the Harpers' CSO claim.

Plaintiffs also rely on the wrong statute of limitations in support of their CSO statutory claim and their claim under West Virginia's statute governing unfair and deceptive acts or practices. The statute upon which they rely encompasses only actions brought against "creditors" – which Jackson Hewitt plainly is not.

Finally, at no time was Jackson Hewitt an "agent" or "fiduciary" of the Harpers in connection with their purchase of a RAL – a fact expressly memorialized in the Harpers' RAL application and agreement with SBB&T. Under existing West Virginia law, there is simply no reason to find the agency disclaimer in the Harpers' contract with SBB&T unenforceable. Indeed, a review of the facts of this case and the conduct of the parties demonstrates that a tax preparer providing ministerial services pursuant to a contract with a national bank is not the agent of a person who purchases a financial product from that bank.

Contrary to Plaintiffs' claim that this case is about whether Jackson Hewitt should have registered as a credit services organization or whether Jackson Hewitt is Plaintiffs' agent, Plaintiffs' own brief reveals that the real motivation behind this proceeding is to stamp out RALs based upon counsel's belief that they are an unwise financial move.² But neither the legality nor the economic wisdom of RALs is at issue here. If West Virginia wants to outlaw these types of loans, it is the Legislature, not the plaintiff's bar, who should do so.

² This conclusion becomes inescapable when the brief of the amici is considered. That brief, which merely parrots the same flawed legal arguments as Plaintiffs', goes out of its way to denigrate RALs as a matter of economics as opposed to law. Jackson Hewitt will resist the urge to respond to such inflammatory, flawed, and ultimately irrelevant arguments.

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

This putative class action was filed on October 30, 2006 in the United States District Court for the Southern District of West Virginia. No class has been certified. The original plaintiff was Linda Hunter, who brought six causes of action against Jackson Hewitt: (1) breach of fiduciary duty arising out of an agency relationship; (2) breach of fiduciary duty arising out of a confidential relationship; (3) breach of fiduciary duty arising out of Jackson Hewitt's status as a loan broker; (4) breach of West Virginia's statute governing credit services organizations; (5) breach of contract; and (6) unfair or deceptive acts or practices. (*See* Docket Entry 1.)

On November 6, 2007, the United States District Court for the Southern District of West Virginia (per Chambers, J.) granted in part Jackson Hewitt's motion to dismiss and dismissed the breach of fiduciary duty claim arising out of a confidential relationship and the breach of fiduciary duty claim arising out of Jackson Hewitt's alleged status as a loan broker. (*See* Docket Entry 49.) The District Court reasoned that although "Plaintiff placed her confidence with Defendant with regard to her taxes, and Defendant accepted that confidence, those facts only extend to whether there was a confidential relationship with regard to Plaintiff's taxes." (*Id.* at 13.) There were no similar allegations regarding Plaintiff's RAL. (*See id.*) Moreover, the Judge rightly found that Jackson Hewitt was not a loan broker because "[t]here is nothing to suggest that Defendant took part in any direct negotiations of the terms of the contract between Plaintiff and the bank, nor is there anything to indicate that Defendant has authority or the power to negotiate the terms of the contract when it was offered to Plaintiff." (*Id.* at 14-15.) The District Court further stated that "the fact that Defendant accepted compensation from SBB&T does not make Defendant a broker." (*Id.* at 15.)

A few months later, on March 13, 2008, the District Court granted Jackson Hewitt's motion for partial summary judgment on Plaintiff's breach of contract claim. (*See* Docket Entry 129.) The District Court correctly ruled that "[t]he Court finds there is simply nothing in the provisions cited by Plaintiff which a reasonable juror could find contractually obligated Defendant to Plaintiff with respect to the RAL." (*Id.* at 7.)

That same day, the parties jointly moved to amend the scheduling order in the case. (*See* Docket Entry 131.) The motion stated, in part, that "Defendant has obtained discovery relating to Plaintiff and her husband's tax returns. Mrs. Hunter no longer desires to participate in this action, and Plaintiff's counsel have determined that Mrs. Hunter is not an appropriate class representative." (*Id.* at 1.) On April 21, 2008, Plaintiff moved for leave to amend the complaint to substitute Christian and Elizabeth Harper and Donna Wright for Mrs. Hunter. (*See* Docket Entry 133.) On June 30, 2008, the District Court granted Plaintiff's motion for leave to amend but stated "those claims in the Amended Complaint which previously were dismissed and/or for which Defendant was granted summary judgment are not revived by virtue of the Amended Complaint being filed." (Docket Entry 138.) The Amended Complaint was filed that day. (*See* Docket Entry 141.)³

In February 2009, Plaintiffs moved for class certification and partial summary judgment with respect to their CSO claim. (*See* Docket Entries 198, 200, respectively.) On February 13, 2009, Jackson Hewitt filed its cross motion for summary judgment. (*See* Docket Entry 204.) All of these motions were fully briefed before the District Court.

³ On September 4, 2008, the parties stipulated to dismissal without prejudice of Donna Wright's claims. (*See* Docket Entry 152.)

On April 7, 2009, almost two and a half years after the case was brought in the District Court (and after half their claims were dismissed on dispositive motions), Plaintiffs moved to certify four questions to this Court. (*See* Docket Entry 230.) On September 29, 2009, the District Court granted Plaintiffs' motion to certify four questions to this Court, denied in part Defendant's motion for summary judgment, denied without prejudice the remainder of Defendant's motion for summary judgment, denied without prejudice Plaintiffs' motion for summary judgment, and held in abeyance Plaintiffs' motion for class certification. (*See* Docket Entry 236.) On November 12, 2009, this Court agreed to review the certified questions.

CERTIFIED QUESTIONS

The following four questions were certified by the District Court:

1. Does a tax preparer who receives compensation, either directly from the borrower or in the form of payments from the lending bank, for helping a borrower obtain a refund anticipation loan meet the statutory definition of a credit services organization, or "CSO," (W. VA. CODE § 46A-6C-2(a)), and do the borrowers in such a transaction meet the definition of a buyer (*id.* § 46A-6C-1(1)) (emphasis added)?
2. Is the appropriate limitations period for actions alleging violations of the CSO statutes (*id.* § 46A-6C-1 *et seq.*) and the statutory prohibition on unfair or deceptive acts or practices (*id.* § 46A-6-104) four years under West Virginia Code § 46A-5-101(1), or one year under the general limitation period in West Virginia Code § 55-2-12?
3. Are the contractual agency disclaimers in the refund anticipation loan applications enforceable under West Virginia law?
4. Is a tax preparer who helps a customer obtain a refund anticipation loan in exchange for compensation an agent under West Virginia law?⁴

⁴ We would have preferred a slightly different wording for these certified questions – especially by omitting the underlined language in Question 1 (because it is undisputed that the Harpers did not pay anything to Jackson Hewitt) and Question 4 (because Jackson Hewitt only provided services to SBB&T in allowing it access to Plaintiffs and other customers who desired to apply for a RAL whereas "obtain" suggests Jackson Hewitt had a role in approving or guaranteeing approval of the loan – which was expressly disavowed in the RAL application material).

STANDARD OF REVIEW

This Court applies a *de novo* standard “in addressing the legal issues presented by a certified question[] from a federal district or appellate court.” *L.H. Jones Equip. Co. v. Swenson Spreader LLC*, __ S.E.2d __, 2009 WL 3857999, at *3 (W. Va. 2009) (citations and internal quotation marks omitted). *See also* W.VA. CODE § 51-1A-3 (stating that the “supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state). The Court does not, however, review questions of fact. *See, e.g., Preussag Int’l Steel Corp. v. March-Westin Co.*, 655 S.E.2d 494, 498 n. 2 (W. Va. 2007) (recognizing that the Court “reviews issues of law *de novo* in certified question cases-not issues of fact”). In this case, the parties have not agreed upon a statement of facts and the district court’s summary judgment and certification orders are devoid of meaningful factual findings with respect to certified questions one, three and four.⁵

The Court also has the authority to reformulate certified questions. *See, e.g., Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 614 S.E.2d 15, 24 n. 12 (W. Va. 2005) (reformulating a question certified from the U.S. Court of Appeals for the Fourth Circuit); *Kincaid v. Mangum*, 432 S.E.2d 74, 82-83 (W. Va. 1993) (quoting with approval John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand.L.Rev. 411, 426

⁵ The Court has previously recognized the indispensable value of findings of fact made by district courts in deciding certified questions. *See Osborne v. United States*, 567 S.E.2d 677, 679 n. 2 (W.Va. 2002) (stating that “a certified question must be accompanied by a statement of the facts upon which it is based”) (citing Uniform Certification of Questions of Law Act, W.VA. CODE § 51-1A-1, *et seq.*). *See also* W.VA. CODE § 51-1A-6(a)(2), (b) (requiring that a certification order include “[t]he facts relevant to the question, showing fully the nature of the controversy out of which the question arose” and directing, “[i]f the parties cannot agree upon a statement of facts, then the certifying court shall determine the relevant facts and shall state them as a part of its certification order”).

(1988), for the proposition that “the ability of the answering court to reshape or add to the issues is necessary to further the goals of certification”). Reformulating the certified questions may be particularly appropriate where “a certified question is framed so that this Court is not able to fully address the law which is involved in the question[.]” *Barefield v. DPIC Cos.*, 600 S.E.2d 256, 262 (W. Va. 2004).⁶

FACTS

I. The Parties.

Plaintiffs Christian and Elizabeth Harper are both high school graduates who have significant experience at obtaining credit. Over the course of their marriage, they have successfully obtained a mortgage for their house, three credit cards, and at least three car loans. (Docket entry 204-1, C. Harper Dep. at 104:21-106:14; 108:6-9; 110:23-111:7.) The Harpers did not receive any professional assistance in obtaining this credit. (*Id.* at 106:14-16; 110:12-15; 111:10-20.) As early as 2005, Mr. Harper had obtained a credit report, understood what was in his credit report, and reported inaccuracies that he found to the appropriate entity. (*Id.* at 114:4-8; 115:11-117:12.)

Since 2002, the Harpers had their tax returns prepared by a West Virginia citizen named Walter Hudnall, Jr. (*Id.* at 125:4-6.) When the Harpers first utilized Mr. Hudnall, he operated his own business as a franchisee of a tax service named DanTax. (*Id.* at 127:8-13; Docket Entry 204-3, E. Harper Dep. at 28:7-14.) Later on, Mr. Hudnall signed a franchise agreement with Jackson Hewitt Inc. and continued to run his own business in the same location. (Docket Entry 204-1 at 134:14-135:1.) Mr. Hudnall is not a party to this lawsuit.

⁶ See footnote 4, *supra* for Jackson Hewitt’s suggestions on how to reformulate some of the certified questions.

Jackson Hewitt is engaged in the principal business of tax preparation through its company-owned offices and through offices independently owned and operated by third parties such as Mr. Hudnall. In West Virginia, Jackson Hewitt has never had any company-owned offices. (Docket Entry 204-4, W. San Giacomo Dep. at 184:6-12.)

Over the last several years, Jackson Hewitt has entered into agreements with SBB&T, a federally regulated bank and a division of Pacific Capital Bank, N.A. Under these agreements, SBB&T is permitted to offer a variety of financial products to customers at Jackson Hewitt's company-owned offices and at the offices independently owned and operated by franchisees such as Mr. Hudnall. The existence of the agreements is not secret and they are publicly filed with the Securities and Exchange Commission by Jackson Hewitt. (Docket Entry 7, Exhs. 1 and 2.) Moreover, as described in greater detail below, customers are consistently informed and agree to the fact that Jackson Hewitt will receive payments from SBB&T in connection with services performed by the former in connection with that agreement. (*See infra* at 9, 17-19.)

Customers are also expressly informed about all the available options on how to receive their refund. As indicated on the front page of every loan application, every customer at Jackson Hewitt is told that they could obtain their refund directly from the IRS for free. (Docket Entry 204-5, Declaration of Clark Gill, Exh. A at 1; Docket Entry 204-6, Exhs. D at 1 and G at 1; and Docket Entry 204-7, Exh. J at 1.) Under this option, the IRS could deposit the customers' refund directly into the customers' bank account in as little as 8 to 15 days (if a bank account existed) or mail the customer a check by mail within 21 to 28 days from the time the customers' tax return is filed. (*Id.*; *see also* Docket Entry 204-8.) For purposes relevant here, SBB&T offered two basic financial products to customers:

- (1) SBB&T could provide a one-time bank account to receive the customers' refund in as little as 8 to 15 days in exchange for a flat fee (which was known as an Accelerated Check Refund in 2005 and 2006 and an Assisted Refund in 2007 and 2008); or
- (2) SBB&T could offer a loan to customers that would be paid back from the customers' refund, which is known as a refund anticipation loan.

(Docket Entry 204-5, Exh. A at 1; Docket Entry 204-6, Exh. D at 1 and G at 1; Docket Entry 204-7, Exh. J at 1; and Docket Entry 204-8.) If a customer selected a financial product from SBB&T, the customer had to pay additional fees to SBB&T. (*Id.*)

Jackson Hewitt did not permit SBB&T to offer its financial products to Jackson Hewitt customers for free. Prior to 2006, Jackson Hewitt was compensated by SBB&T primarily on a per-financial product basis. (Docket Entry 204-5 at ¶ 2.) For 2006, 2007, and 2008, however, Jackson Hewitt received fees from SBB&T pursuant to two agreements: a Program Agreement and a Technology Services Agreement. (*Id.*) In these years, Jackson Hewitt received a lump sum from SBB&T at the beginning of each year.

II. The Harpers Have A Long Experience In Obtaining RALs.

Before first utilizing Mr. Hudnall as their tax preparer in 2002, the Harpers were experienced in obtaining RALs. Although they could not remember exactly how many, both Harpers testified that they have obtained more than one RAL when their tax returns were prepared by H&R Block. (Docket Entry 204-1 at 122:20-123:9; Docket Entry 204-3 at 32:14-21.) Mrs. Harper testified that they may have received as many as five RALs during their visits to H&R Block. (Docket Entry 204-3 at 32:14-23.) Mrs. Harper has known that a RAL was, in fact, a loan since the 1990s. (*Id.* at 33:13-34:5.) Mrs. Harper testified that the Harpers also received RALs when Mr. Hudnall prepared their tax return as a DanTax franchisee. (*Id.* at 31:15-32:4.)

III. The Harpers Obtained Four RALs Without Reading Their Agreements And Without Any Advice From Mr. Hudnall.

Over a four year time period, the Harpers obtained RALs when they visited Mr. Hudnall's Jackson Hewitt franchise office. In particular, the Harpers applied for and obtained RALs on January 11, 2005, January 14, 2006, January 29, 2007, and February 1, 2008.⁷ (See Docket Entries 204-5 through 204-7.)

Despite having the opportunity to do so, the Harpers did not read their refund anticipation loan agreements before signing them. (Docket Entry 204-1 at 151:12-152:3; Docket Entry 204-2 at 166:11-17; 168:15-20; Docket Entry 204-3 at 37:14-38:4.) They also decided not to read any of the other disclosures provided by Mr. Hudnall. (Docket Entry 204-1 at 151:17-152:3.) Importantly, Mr. Hudnall never suggested in any way to the Harpers that they should not read those documents. (Docket Entry 204-1 at 152:7-21; Docket Entry 204-3 at 37:20-38:4.) The Harpers made their own personal decision not to read them (Docket Entry 204-1 at 152:18-21), even when the disclosures contained the following in capital letters: "IMPORTANT DISCLOSURES: PLEASE READ THIS BEFORE YOU APPLY FOR A REFUND ANTICIPATION LOAN." (Docket Entry 204-8.)

Although they had not read their refund anticipation loan agreements, the Harpers understood the total fee that was being charged for their RALs as well as the total amount of the tax preparation fees. (Docket Entry 204-2 at 192:5-12; 193:14-19.) Even without reading the agreements or disclosures, the Harpers also understood that

⁷ Amici state that RAL customers pay interest rates that range from 50 to 500 percent. (See Amici Br. at 4.) The Harpers' annual interest rates were 57.618%, 56.983%, 83.108%, and 56.42%, respectively. The numbers are high because they are based upon an annualized number even though a RAL is usually paid off within weeks. The Harpers actually paid \$20-\$30 to SBB&T for an account handling fee and \$90-\$95 in prepaid finance charges to SBB&T.

simply waiting for their refund and paying nothing to SBB&T was an option for them.

(Docket Entry 204-1 at 156:14-157:2.)

The Harpers did not pay any compensation to Jackson Hewitt for their RALs. In 2005, the Harpers paid \$126 in tax preparation and documentation fees to Mr. Hudnall and another \$125 in fees and finance charges to SBB&T. (Docket Entry 204-5, Exh. A at 3.) In 2006, the Harpers paid \$133 in tax preparation and processing fees to Mr. Hudnall and \$120 in fees and finance charges to SBB&T. (Docket Entry 204-6, Exh. D at 3.) In 2007, the Harpers paid \$113 in tax preparation fees to Mr. Hudnall and \$124.95 in fees and finance charges to SBB&T. (*Id.*, Exh. G at 3.) In 2008, the Harpers paid \$133 in tax preparation fees to Mr. Hudnall and \$125.95 in fees and finance charges to SBB&T. (Docket Entry 204-7, Exh. J at 3.) For these years, the Harpers obtained loans of \$5,273, \$5,627, \$3,888, and \$5,678 from SBB&T, respectively.

Mr. Harper testified that the RALs made financial sense for him, given his financial situation, because it was worth it to pay \$140 in fees in order to obtain money in as little as 48 hours. (Docket Entry 204-2 at 162:7-18; 211:3-8; 220:19-22.) Mr. Harper testified that it was “very important” for him personally to receive money faster. (Docket Entry 204-1 at 147:11-24.) The Harpers used their RALs to pay overdue bills, including credit card bills, homeowners’ taxes, utility bills, grocery store bills, car bills, car insurance bills, and personal property taxes. (*Id.* at 148:1-6; Docket Entry 204-2 at 181:19-182:4; Docket Entry 204-3 at 39:18-42:4.) By obtaining a RAL, the Harpers paid less in interest to credit card companies and therefore saved money. (Docket Entry 204-2 at 181:10-13.)

Mr. Hudnall never recommended to the Harpers that they obtain a RAL and did not have any influence at all on the Harpers' decision to apply for a RAL. (*Id.* at 217:4-16.) Mr. Harper testified that he was fully capable of understanding, on his own, whether a RAL was a good deal for him in his particular financial situation. (Docket Entry 204-1 at 150:2-20.)⁸ Mr. Harper testified that no one else had intimate knowledge of his current financial situation and that no one else was in a position to advise the Harpers on whether a RAL made sense for them in their particular financial situation. (*Id.* at 150:11-20.)

ARGUMENT

I. Answer To First Certified Question: Jackson Hewitt Is Not Subject To The Credit Services Organization Statute.

Virtually every principle of statutory construction favors the interpretation that the CSO statute does not apply to Jackson Hewitt.

- “[T]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” *Wetzel v. Employers Service Corp. of West Virginia*, 656 S.E.2d 55, 63 (W. Va. 2007) (internal quotations omitted).
- “A statute must be construed in accord with the Legislature’s intent, and in a manner that will uphold the law and further justice.” *Howell v. Appalachian Energy, Inc.*, 519 S.E. 2d 423, 431 (W. Va. 1999).
- “[S]tatutory interpretation is a holistic endeavor . . . and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure and subject matter.” *West Virginia Health Care Cost Review Auth. v. Boone Mem’l Hospital*, 472 S.E.2d

⁸ Indeed, Mr. Harper testified that given the chance to do so again, he would have obtained a RAL. (Docket Entry 204-2 at 196:20-197:7.)

411, 423 (W. Va. 1996) (internal quotations omitted). Therefore, “[i]n the interpretation of statutes, words and phrases therein are often limited in meaning and effect, by necessary implications arising from other words or clauses thereof.”

Osborne, 567 S.E.2d at 684 n.9 (internal quotations omitted).

- “Courts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law” Syl. pt. 29, *Coal & Coke Ry. Co. v. Conley*, 67 S.E. 613, 615 (W. Va. 1910).
- Finally, it is the “duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” *Sale ex rel. Sale v. Goldman*, 539 S.E.2d 446, 453 (W. Va. 2000) (internal quotations omitted). In this respect, “[i]t is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in the statute, when such construction would lead to injustice and absurdity.” *Conseco Finance Servicing Corp. v. Myers*, 567 S.E.2d 641, 648 (W. Va. 2002).

The CSO statute imposes a series of obligations on entities or persons that it characterizes as “credit services organizations.” Under that statute, a “credit services organization” is defined as:

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) [i]mproving a buyer’s credit record, history or rating;
- (2) [o]btaining an extension of credit for a buyer; or

- (3) [p]roviding advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.

W. VA. CODE § 46A-6C-2. A “buyer” is defined as “an individual who is solicited to purchase or who purchases the services of a credit services organization as defined in section two of this article.” *Id.* § 46A-6C-1(1).

A. Jackson Hewitt Is Not A “Credit Services Organization” And The Harpers Are Not “Buyers” Under The Plain Language Of The Statute.

Under the plain language of the CSO statute, Jackson Hewitt is not a “credit services organization” and the Harpers are not “buyers.” The CSO statute requires that there be an agreement between the “buyer” and the “credit services organization” in which the CSO will obtain credit or assist a buyer in obtaining credit from a third party in exchange for compensation. W. VA. CODE § 46A-6C-2. In this case, as the District Court has already found as a matter of fact and law on summary judgment with respect to the breach of contract claim, Jackson Hewitt did not have any agreement with the Harpers to obtain a RAL for them. (Docket Entry 129 at 8.) Because a party cannot be a “credit services organization” without an express or implicit agreement with the buyer to help obtain a RAL in exchange for compensation, the Harpers’ CSO claim cannot stand.⁹

The Harpers’ try to rewrite the statutory definition of the term “credit services organization” in order the eliminate the requirement that there be an agreement between a buyer and a CSO. Essentially, the Harpers ask the Court to rewrite the definition of a CSO as follows:

A credit services organization is a person who, with respect to the extension of credit by others and ~~in return~~ for the payment of money or other valuable consideration, [**regardless of the source**] provides, or represents that the person can or will provide, any of the following services:

⁹ The RAL application itself specifically and repeatedly notes that SBB&T could deny Plaintiffs’ loan request. (See Docket Entry 204-5, Declaration of Clark Gill, Exh. A at pp. 2, 4.)

- (a) Improving a buyer's credit record, history, or rating;
- (b) Obtaining an extension of credit by others ~~for a buyer~~;
- (c) Providing advice or assistance ~~to a buyer~~ with regard to subdivision (1) or (2) of this subsection.

The Harpers' attempt to rewrite the CSOA is improper. *See Jones v. West Virginia State Bd. of Educ.*, 622 S.E.2d 289, 294 (W. Va. 2005) (courts cannot add language that does not appear in the statute).¹⁰ First, the Legislature enacted the CSOA with the phrase “in return,” which contemplates a bilateral agreement in which one party provides one thing of value in return for another thing of value from the other party.¹¹ *See Merriam-Webster's Dictionary* (11th Ed. 2004) 1065 (defining “return” as, among other things, “to give or perform in return:REPAY” and “to respond to in kind”). Second, the Harpers' interpretation attempts to delete the statutory language restricting the CSOA's application only to situations where a company agrees to act “for the buyer,” not where a company agrees to perform services for a bank. For example, before a company qualifies under the definition of a CSO, the CSOA requires that the company promise to provide “an extension of credit *for a buyer*” W.VA. CODE § 46A-6C-2(a)(2), or provide “advice or assistance *to a buyer*,” W.VA. CODE § 46A-6C-2(a)(3). The only reasonable interpretation of the words “for a buyer” and “to a buyer” is that the

¹⁰ The amici claim that because the Oklahoma statute explicitly exempted “person[s] authorized to file electronic income tax returns who do[] not receive any consideration for refund anticipation loans,” the CSOA must apply. (*See Amici Br.* at 19.) Oklahoma's CSO statute, however, also explicitly provides that a credit services organization under Oklahoma law is an entity that provides specified services “in return for the payment of money or other valuable consideration *from any source*.” OKLA. STAT. tit. 24, § 8-132(2)(a) (emphasis added). The West Virginia Legislature chose not to include this language in the statute, and therefore amici cannot draw any support from the Oklahoma statute.

¹¹ The phrase “in return” is not defined in the CSO statute. The Court may refer to the dictionary when a term lacks a statutory definition. *See Barefield*, 600 S.E.2d at 266 & n. 7-10.

Legislature intended for the CSOA only to apply when there is an agreement in which a CSO has agreed to perform services to or for the benefit of a buyer. The formulation of the CSO-buyer relationship appears time and time again throughout the CSOA. *See, e.g.*, W.VA. CODE § 46A-6C-6(a)(1) (requiring the CSO to provide “[a] complete and detailed description of the services to be performed by the credit services organization *for the buyer*” (emphasis added)); W.VA. CODE § 46A-6C-7(a)(3) (requiring the contract between the CSO and buyer to contain “[a] full and detailed description of the services to be performed by the credit services organization *for the buyer*” (emphasis added)). All of these limitations are superfluous and meaningless if the CSOA also applies to agreements between a bank and a retailer.

For similar reasons, the Harpers cannot allege that they were “buyers” under the CSOA. As they did with the definition of CSO, they seek to re-write the definition of “buyer” to mean “an individual who is solicited to purchase or who purchases the services of a credit services organization *or who purchases the services of a lender, which lender contracts for the services of a third party.*” But these italicized words were never enacted by the Legislature.

Moreover, the Harpers’ interpretation of “buyer” also conflicts with the everyday definition of the word. In ordinary English language, consumers cannot be considered “buyers” when they paid no money to the retailer, they had no agreement with the retailer for credit services, they received no promises from the retailer, and they had no obligations to the retailer.¹² SBB&T – which did pay money to Jackson Hewitt, did have a written agreement with Jackson Hewitt, did negotiate the extent of Jackson Hewitt’s services for the bank, and had obligations of

¹² *Merriam-Webster* defines the word “buy” to mean “to acquire possession, ownership, or *rights to the use or services* of by payment especially of money.” The Harpers have not alleged, nor can they, that they acquired any right as a matter of law to the service of Jackson Hewitt in connection with their RALs.

its own to Jackson Hewitt – is the only entity that can be construed as the buyer of Jackson Hewitt’s services.

In addition, the Harpers did not make any payments to Jackson Hewitt, which itself precludes any finding that Jackson Hewitt is a CSO or that the Harpers were “buyers” under the plain language of the statute. In 2005 and 2006, the Harpers paid fees to SBB&T and to Walter Hudnall, Jr. (Docket Entry 204-5, Exhs. A at 3 and Docket Entry 204-6, Exh. D at 3) and therefore could only be deemed to be the “purchaser of services” or a “buyer” from SBB&T and Mr. Hudnall – neither of which are a party to this lawsuit. In 2007 and 2008, the Harpers paid fees only to SBB&T (Docket Entry 204-6, Exh. G at 3 and Docket Entry 204-7, Exh. J) and therefore can only be deemed to be a “purchaser of services” or a “buyer” from SBB&T, not Jackson Hewitt.¹³

Throughout their brief, the Harpers affirmatively misstate the record by claiming that they made payments to Jackson Hewitt.¹⁴ (*See* Pl. Br. at 12-13.) But the undisputed evidence is that the Harpers paid Walter Hudnall, not Jackson Hewitt to prepare their tax returns. (*See* Docket Entry 204-9, W. Hudnall Dep. at 27:13-18.) In each year, Walter Hudnall, not Jackson Hewitt, set the tax preparation fees. (*See id.* at 28:13-15.) Similarly, the undisputed evidence is that, in 2005 and 2006, Mr. Hudnall charged administrative fees as a way for paying for his paper and printing costs. (*See* Docket Entry 215-2 at 30:20-31:5.) Moreover, Mr.

¹³ The Harpers state that the fee structure between Jackson Hewitt and SBB&T changed in a “futile attempt to evade state CSO laws.” (Pl. Br. at 11.) But this argument is a red herring as the CSO statute is not applicable to agreements between SBB&T and Jackson Hewitt, regardless of whether SBB&T compensates Jackson Hewitt on a per-RAL basis or in a lump sum.

¹⁴ Amici repeatedly refer to Jackson Hewitt as a loan or RAL broker. (*See* Amici Br. at 14, 16, 19, 23.) But the District Court has already ruled that Jackson Hewitt is not a loan broker. (*See* Docket Entry 49 at 13.) This ruling also demonstrates that amici’s citation of the Delaware CSO is a red herring. (*See* Amici Br. at 19.)

Hudnall charged those fees for any financial product, including for those financial products that were *not* loans (such as Assisted Refunds). (See Docket Entry 204-9 at 27:24-28:4.) In any event, the Harpers cannot attribute the decision of an independently owned and operated franchise – which is not a party to this litigation – to Jackson Hewitt. See *Kennedy v. McDonald's Corp.*, 610 F.Supp. 203, 205 (S.D. W. Va. 1985) (granting summary judgment on a Title VII claim of a franchise employee against the franchisor on the ground that the decision at issue was made without consultation or approval of the franchisor); see also *Pinero v. Jackson Hewitt Tax Services, Inc.*, 638 F.Supp.2d 632, 639-41 (E.D. La. 2009) (granting motion to dismiss invasion of privacy claim because Jackson Hewitt could not be liable for actions of employee of franchisee).

The Harpers argue that any party receiving payments from a bank falls within the CSO statute because the statute does not say that the buyer must make a direct payment to the credit services organization. (See Pl. Br. at 13.) However, this argument fails because the Legislature *did* limit the scope of the CSO statute to “buyers.” And the undisputed evidence is that SBB&T purchased Jackson Hewitt’s services when it entered into a series of contracts with Jackson Hewitt. It was SBB&T, not the Harpers, who decided how much to pay Jackson Hewitt in connection with these agreements. It was SBB&T, not the Harpers, who negotiated a series of obligations for Jackson Hewitt to perform in exchange for this compensation. Because the Harpers had no input in or impact on how much SBB&T compensated Jackson Hewitt and had no input in how Jackson Hewitt performed the services required under those contracts, the Harpers cannot be “buyers” in any ordinary sense of the word. *Freeman v. San Diego Ass'n of*

Realtors, 322 F.3d 1133, 1144 (9th Cir. 2003) (observing that the party who pays is the “buyer” and others, at most, can be third party beneficiaries).¹⁵

Moreover, in the one West Virginia case interpreting the CSO statute, *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 857 (W. Va. 1998), this Court dealt with a situation where the alleged credit services organization was paid \$50 by the buyers in order to arrange a loan – which is not the case here.¹⁶

Finally, the fact that the Legislature exempted automobile dealers from the CSO statute in 2004 is of no moment. The change to the legislation proves only that automobile dealers were able successfully to lobby for an exemption from the Legislature, and not that every entity not exempt from the CSO statute is subject to it. Indeed, until this case was filed, there was no reason for tax preparers, who have never before been alleged – by private plaintiffs or West Virginia regulators – to have been subject to the CSOA in its 19 year existence, to seek such an exemption.

¹⁵ Amici point to the fact that the Ohio CSO statute initially included language that the consideration had to be paid “directly from the buyer” in support of its indirect payment argument. (See Amici Br. at 18-19.) But this argument goes too far. Although the Ohio statute was revised to delete this “directly” language, it also added “in return.” A review of Ohio cases interpreting the difference between these two versions of the CSO statute shows that the statute was amended to connect the payment received by the CSO to the extension of credit. See *Hall v. Jack Walker Pontiac, Toyota, Inc.*, Case No. 97-6565, 1999 Ohio Misc. LEXIS 64, *23-27, *30-31 (Ct. Pleas Sept. 24, 1999) (stating that the original Ohio CSOA applied to car dealerships but that the court’s analysis “would change” if the statute defined the consideration in return for the CSO services). Moreover, amici appears incorrectly to suggest that the original Ohio CSOA included both the “in return” language and the “direct[ly] from the buyer” language. (See Amici Br. at 18.) That is not the case as the “in return” language was not included until the statute was amended.

¹⁶ The Harpers argue that “buyers” are sometimes defined to include “prospective borrowers” and that it does not matter that the Harpers never made a payment to Jackson Hewitt. (See Pl. Br. at 11.) This point is irrelevant because Jackson Hewitt never solicited the Harpers to enter into a CSO-buyer relationship (whether as a “prospective borrower” or as an “actual borrower”).

B. The Statutory Scheme Supports Jackson Hewitt's Interpretation Of The CSOA.

The context of the statute demonstrates that the Legislature's purpose in enacting the CSO statute was to protect consumers with poor credit from unscrupulous businesses – so called credit repair companies – promising that they will assist the consumer with obtaining credit or improving their credit rating for a fee. For instance, W. VA. CODE § 46A-6C-3 prohibits a CSO from guaranteeing that it could obtain credit for customers regardless of the customers' credit history or from guaranteeing that it could erase the customer's bad credit history. Similarly, W. VA. CODE § 46A-6C-6 requires CSOs to provide buyers with a series of disclosures designed to inform the customers that they had the ability to contest negative credit information held by consumer agencies. There are also a series of registration and bonding requirements in the CSO statute along with a series of stringent penalties, all of which are designed to prevent fly-by-night companies and individuals from making grandiose promises to consumers with poor credit and then simply absconding with the money. *See, e.g.*, W. VA. CODE § 46A-6C-4 (bonding requirements); *id.* § 46A-6C-5 (registration requirements); *id.* § 46A-6C-9 (allowing disgorgement and punitive damages); *id.* § 46A-6C-10 (providing for criminal penalties for anyone who violates the CSO statute). None of these provisions makes any sense outside the context of credit repair companies, let alone where the lender, and not the consumer, has a services agreement with the retailer.¹⁷

¹⁷ If a company absconds with the *bank's* money without providing the services it promise to the *bank*, the bank has causes of action against the company (including breach of contract and fraud) – but not under the CSOA. Likewise, if a customer pays money to the bank and does not receive a loan from the bank, the customer potentially has a cause of action for fraud or breach of contract against the bank – but not under the CSOA.

This conclusion is reinforced by reviewing the *mandated* “disclosure statement” required by the CSOA, which includes informing consumers of their right to obtain a copy of their credit reports and to dispute inaccurate information contained therein. The notion that Jackson Hewitt, a tax preparation company, would be obligated by the CSOA to counsel a customer about his or her bad credit is both insulting to the customer and absurd. Despite what the Harpers and amici¹⁸ may think, people who obtain RALs do not necessarily have bad credit. Thus, it would have been absurd for the Legislature to *require* such disclosures to RAL customers. And, it is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result. *Conseco Finance Servicing Corp.*, 567 S.E.2d at 648.¹⁹

In addition, the three-day right of cancellation that is required by the CSO statute would not apply to the RAL in this case even if Jackson Hewitt was required to register as a CSO. The contract regarding the RAL is between SBB&T, a national bank expressly exempted from the Act, and the Harpers.

¹⁸ The amici brief in this case should be afforded little weight. First, the brief does not advance the merits analysis here because to the extent it discusses anything other than amici’s dislike of refund anticipation loans, it merely parrots Plaintiffs’ brief. Second, the authoritativeness of amici’s various extra-record facts and characterizations are questionable because amici often cite their own studies. Third, many of the facts are misleading. For example, amici say that consumers paid \$68 million in RAL-related fees in 2007. (*See* Amici Br. at 3-4, n.3.) But these fees are not attributable to Jackson Hewitt as amici acknowledge that “all three of the major tax preparation chains” – which includes Jackson Hewitt – dropped administrative add-on fees prior to the 2007 tax year. Fourth, AARP has announced that it will begin providing free tax preparation for low and moderate income individuals and senior citizens, making it essentially a competitor of Jackson Hewitt. Finally, and most ironically, AARP Financial, a subsidiary of AARP, offers an AARP Credit Card Program from Chase, which according to Plaintiffs’ overbroad reading of the credit services organization statute would appear to require AARP Financial to register as a CSO.

¹⁹ Amici argue that “[o]nly the provisions of state CSOAs provide some degree of protection for RAL borrowers.” (Amici Br. at 13-14.) But this argument is without merit as the written disclosures, prohibited conduct, and other requirements of the CSO statute *have nothing to do with RALs*.

C. Courts Have Recognized That CSO Statutes Were Intended To Apply To Credit Repair Companies And Not Retailers Like Jackson Hewitt.

When confronted with a virtually identical complaint concerning Maryland's virtually identical version of the CSO statute, the court held the following:

It is manifest that the reason why the General Assembly passed the CSBA [Credit Services Business Act] was to protect unsuspecting Marylander's from credit repair agencies who offered to "fix" their credit rating, or to obtain loans for the credit impaired customer, in exchange for a fee. The CSBA was neither intended nor designed to cover firms engaged in the business of selling goods or services to their customers, when such goods or services are not aimed at improving one's credit rating. Nor was it intended to cover the extension of credit by a third party, not privy to the primary transaction, which is ancillary to the customer's purchase of goods or services provided by the merchant.

Gomez, 2009 Md. Cir. Ct. LEXIS at *25. That same reasoning applies with equal force here.

In their briefs, the Harpers oversimplify this holding by arguing that *Gomez* is the only court to have found that a state CSOA requires a direct payment from the consumer to the loan arranger. (See Pl. Br. at 16 n.29.) *Gomez*, however, focused on the broader issue of whether there is a CSO-buyer relationship (which requires an agreement between a buyer and a CSO to work on behalf of the buyer in obtaining credit from a third party, and a payment by the customer to the CSO).

Moreover, *Gomez* is in line with the Illinois Supreme Court's decision in *Midstate Siding and Window Co. v. Rogers*, 789 N.E.2d 1248 (Ill. 2003). There, the Illinois Supreme Court held, among other things, that "[t]he Credit Services Act is not intended to regulate retailers primarily engaged in the business of selling goods and services to their customers" because "[t]he goods and services provided by retailers are not generally services aimed at *improving the consumer's credit* or obtaining an extension of credit for the consumer, *otherwise unattainable because of the consumer's poor credit history or rating.*" *Id.* at 324 (emphasis added). See also *Thele v. Sunrise Chevrolet, Inc.*, No. 03 C 2626, 2004 WL 1194751, *6 (N.D.

Ill. May 28, 2004) (holding that a car dealership is not a CSO where “[p]assing its customers’ credit applications to potential lenders is incidental to Sunrise’s business of selling automobiles”); *Cannon v. William Chevrolet/GEO, Inc.*, 794 N.E.2d 843, 852 (Ill. App. 2003) (holding that, although it had obtained financing for a consumer, a car dealer was not a credit services organization because it was “in the business of selling and leasing cars, not primarily in the business of obtaining extensions of credit”).

Amici argue that the text of the CSOA is nowhere limited to credit repair companies, as was held by the *Gomez* and *Midstate* cases. (See Amici Br. at 22.) Yet, the *Gomez* and *Midstate* interpretation being advanced by Jackson Hewitt here is solidly grounded in: (1) the definition of the word “buyer;” (2) the definition of the phrase “credit services organization;” (3) the statutory requirement that the CSO perform the work “for the buyer,” not for the lender; (4) the description of the primary practices that the Legislature sought to prohibit; (5) the enforcement mechanisms of the statute (including the bonding requirements as well as the strict liability civil penalties); and (6) the CSO’s disclosure requirements to its customers. These substantive provisions demonstrate that the Legislature was concerned about companies making bogus promises to buyers with poor credit about the ability to fix their bad credit or to obtain a loan, collecting money and other valuable consideration from buyers, and then failing to deliver any meaningful services in return to the buyer.²⁰

²⁰ Amici also attack the *Gomez* decision for relying on legislative history, including the testimony of the groups that advocated for the CSO statute. (See Amici Br. at 22 n.62.) However, Maryland courts routinely use bill files to interpret legislative history. See, e.g., *State v. Duran*, 967 A.2d 184, 194 n.10 (Md. 2009); *Trail v. Terrapin Run, LLC*, 943 A.2d 1192, 1220 (Md. 2008). The legislative history for the Maryland version of the CSO statute, which is virtually identical to the West Virginia statute, reflects why state legislatures throughout the country were enacting CSO statutes during the early 1990s. Indeed, the Maryland bill analysis specifically states that its purpose was to regulate credit repair services. See Md. Bill Analysis H.B. 1242, at 1 (1990). The Harpers and amici have no

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D. The Sources Cited By The Harpers And Amici Support Jackson Hewitt.

The Harpers and amici rely on two unpublished, out-of-state cases interpreting the federal version of the CSOA, the federal Credit Repair Organizations Act, 15 U.S.C. § 1679, *et seq.* However, those cases only serve to demonstrate why the CSOA should *not* be applied to Jackson Hewitt. (Pl. Br. at 10-11.) In those cases: (1) there *is* an agreement between the customer and the credit repair organization; (2) the credit repair organization had promised to improve the customer's credit record; and (3) there was a payment by the customer for credit services. None of these factors are present in the Harpers' case.

In *Parker v. 1-800 Bar None, a Financial Corp., Inc.* No. 01 C 4488, 2002 U.S. Dist. LEXIS 2139, *2 (N.D. Ill. Feb. 12, 2002) a federal district court concluded that a company was a credit repair organization when it advertised "in the local news media that it can obtain or provide auto financing for anyone, no matter how bad his or her credit, and that it can 'restore your credit'" – a wholly different situation than what occurred here. Moreover, the *Bar None* court based its ruling in part on the finding that the company (unlike Jackson Hewitt) "did not engage in offering financing assistance ancillary to some other, primary purpose" – like the sale of cars (or the preparation of tax returns) – and thereby distinguished contrary precedent and the Harpers' case. *Id.* at *12. Similarly, in *Asmar v. Benchmark Literacy Group, Inc.*, No. 04-70711, 2005 U.S. Dist. LEXIS 23197, *29-30 (E.D. Mich. Oct. 11, 2005), a federal district court concluded that a company was a credit repair organization when it promised to provide a program improving the customers' credit reports. None of those factual scenarios are present here.

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basis to argue that the West Virginia Legislature had a materially different legislative intent in enacting a nearly identical CSO statute at or about the same time Maryland passed its statute.

Moreover, the Harpers and amici also claim that their interpretation of the West Virginia statute is supported by: a press release issued by the Commissioner of Financial Regulation of the Maryland Department of Labor, Licensing, and Regulation; a 1994 opinion by the Maryland Attorney General; and two settlements entered by the California Attorney General. (See Pl. Br. at 14-16, n.29; Amici Br. at 20-22.)

In terms of their persuasive power, the Maryland press release and the Maryland Attorney General's opinion have already been *rejected* by the Maryland court in *Gomez*. See *Gomez*, 2009 Md. Cir. Ct. LEXIS 5, at *16, *18-22. The Maryland court found that the Maryland press release by the administrative agency did not provide any explanation and therefore cannot be considered persuasive. Similarly, the *Gomez* court determined that the Attorney General opinion "is neither persuasive nor dispositive because it concerns a wholly different factual circumstance and mentions the Act only in passing." *Id.* at *18. These rejected out-of-state opinions should be given no weight here.²¹

E. The Harpers' Interpretation Would Result In Federal Preemption.

Significantly, the Harpers' interpretation of the CSOA should not stand because it would result in federal preemption of numerous parts of the statute. A basic canon of statutory construction is that statutes should be construed to avoid constitutional questions or conflicts with the U.S. Constitution. See *Coal & Coke Ry. Co.*, 67 S.E. at 615; see also *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (discussing the canon that a legislative enactment "ought not be construed to violate the Constitution if any other possible construction remains available"). Yet,

²¹ The Harpers' and amici's attempt to rely on California settlements contravenes fundamental federal and West Virginia law that settlements are not construed as evidence of liability. See W. Va. R. Evid. 408; *Schartiger v. Land Use Corp.*, 420 S.E.2d 883, 888 (W. Va. 1991). They too have no persuasive power on the legal interpretation of whether the statute applies here.

as one court has found, if the CSOA were, in fact, extended to tax preparers like Jackson Hewitt, numerous provisions of the statute would be preempted. In *H & R Block Eastern Enters., Inc. v. Turnbaugh*, No. 1:07-cv-01822 (D. Md. July 30, 2008), the District Court for the District of Maryland “assumed,” at the behest of the parties thereto, that Maryland’s CSO statute applied to H&R Block. It then held that certain provisions of the CSO statute were preempted by the National Bank Act, including the three-day right of rescission and the interest rate limitation.²² This Court, therefore, should not go out of its way to accept a strained construction of the CSOA only to have that construction result in the federal preemption of that Act.²³

F. The Harpers’ Interpretation Of The CSOA Would Lead To Absurd Results.

The Harpers’ interpretation of the CSO statute is vastly overbroad and would set a precedent that would subject hundreds of retailers across West Virginia to substantial forfeitures and would prohibit, as a practical matter, any retailer from contracting with a bank in connection with allowing customers to apply for credit. As demonstrated in the expert report of David Gibbons, retailers routinely utilize their own brand name to promote credit cards offered by third-party banks and then invite customers to apply for the bank’s credit card through the retailers’ websites and through applications physically located in the retailer’s stores. (Docket Entry 204-14 at 4-6; Docket Entries 204-15 and 204-16.) These retailers are compensated for

²² The Fourth Circuit recently vacated the District Court’s ruling because it determined that the District Court should have first determined whether the CSO statute applied to H&R Block before deciding the preemption issue. *See H & R Block Eastern Enters., Inc. v. Raskin*, _ F.3d _, 2010 WL 155383 (4th Cir. 2010).

²³ Although not a certified question, we respectfully disagree with the District Court’s ruling that “[t]he injury exists if the [CSO] provision is violated regardless of the consumer’s hindsight decision-making.” (*See* Docket Entry 236 at 7.) Such an interpretation in fact reads out the injury requirement completely. Rather, we call this Court’s attention to *Norris v. Jackson Hewitt*, Case No. 1:09-cv-00543 (S.D. Ind. Dec. 8, 2009), which correctly held that a violation of the statute itself is insufficient to plead injury; facts must be alleged.

this service by the banks and therefore could be (mis)characterized, as the Harpers do here, as assisting customers with obtaining credit in exchange for a fee. (Docket Entry 204-14 at 4-5.) Mr. Harper himself admits that “[m]ost major stores” offer credit cards. (Docket Entry 204-1 at 32:13-16.)

There is nothing in the CSO statute to suggest that the Legislature intended to criminalize the activities of hundreds of retailers and countless employees such as Mr. Harper – which would be a facially absurd result.²⁴ West Virginia’s canons of statutory construction therefore require the rejection of the Harpers’ overly broad interpretation of the CSO statute. *See, e.g., Conseco Finance Servicing Corp.*, 567 S.E.2d at 648 (observing that a court has a duty to avoid absurd results even when apparently warranted by the plain language of the statute); *Goldman*, 539 S.E.2d at 453 (W. Va. 2000).²⁵

II. Answer To Second Certified Question: The Applicable Statute Of Limitations For Plaintiffs’ CSO And UDAP Claims Is One Year Under § 55-2-12.

The Second Certified Question asks whether the appropriate limitations period for alleged violations of the CSO and UDAP statutes is four years under W. VA. CODE § 46A-5-101(1) or one year under W. VA. CODE § 55-2-12. This court need go no further than the clear

²⁴ Mr. Harper, in fact, worked at two retailers that offered credit cards on behalf of third-party lenders. At one of those companies, Mr. Harper obtained compensation and would assist customers obtain credit by informing them where to apply at the customer service desk. (Docket Entry 204-1 at 24:13-28:15.) Other employees at the retailer would then enter the customer’s information into an application and transmit it to the lender. (*Id.* at 25:19-23; *see also* Docket Entry 204-15 (demonstrating the retailer’s relationship with the third party lender).) Under his interpretation of the statute, all of these retailers and their employees would have qualified as a credit services organization, be obligated to forfeit their compensation, face a potential statutory penalty of \$200 for every customer they assisted, and potentially face criminal prosecution. *See* W. VA. CODE § 46A-6C-10.

²⁵ The Harpers attempt to justify this expansion of the statute by arguing that the Consumer Credit and Protection Act should be construed liberally. (*See* Pl. Br. at 11.) In doing so, the Harpers ignore that the CSO statute, like other “[c]riminal statutes, of course, should be narrowly and strictly construed in favor of a defendant in order to conform to constitutional notions of due process.” *State v. Miller*, 476 S.E.2d 535, 546 (W. Va. 1996).

and specific language in W. VA. CODE § 46A-5-101(1) to determine that W. VA. CODE § 55-2-12 applies to the Harpers' causes of action. The Harpers cite only the second sentence of W. VA. CODE § 46A-5-101(1) and ignore the first sentence, which makes imminently clear that § 46A-5-101(1) applies only to actions brought against a "creditor." Read in full context, the subsection provides:

If a creditor has violated the provisions of this chapter . . . , the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars. With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

W. VA. CODE § 46A-5-101(1) (emphasis added). According to its plain language, the four-year statute of limitations only applies to "actions pursuant to this *subsection*" – meaning only actions against "creditors" – and not for every conceivable claim under West Virginia's Consumer Credit and Protection Act. *See id.* (emphasis added).²⁶

Jackson Hewitt, however, was not a "creditor" of the Harpers and therefore § 46A-5-101 does not apply to the Harpers' claims. The RAL was extended to the Harpers by

²⁶ A review of the West Virginia Consumer Credit and Protections Act shows that the Legislature enacted different statutes of limitation for actions arising from violations of different subsections of the Act, including certain violations that are denominated "unfair or deceptive acts and practices." *See* W. VA. CODE § 46A-6A-4(d) (one year statute for new motor vehicle warranties); *id.* § 46A-6F-502(1) (two year statute for actions arising from certain "unfair or deceptive acts or practices" by telemarketers); *id.* § 46A-6F-502(4) (two year statute for excess charges by telemarketers); *id.* § 46A-6F-701(a) (two year statute for actions arising from certain "abusive acts or practices" by telemarketers).

SBB&T, not Jackson Hewitt, and they only owed fees to Walter Hudnall (the independent businessman who prepared their taxes) and to SBB&T. As the District Court has already found, Jackson Hewitt never had a contract with the Harpers. (*See* Docket Entry 129.) If the Harpers did not repay their loan or did not pay any of their fees, Jackson Hewitt would have no cause of action against the Harpers and therefore cannot be considered a “creditor.” Because Jackson Hewitt was not a “creditor,” the Harpers are wrong to rely on the four-year statute of limitations in § 46A-5-101.

Because the Legislature did not specify a statute of limitations for the CSO statute, or for actions against tax preparers alleging violations of the UDAP statute, the one-year statute of limitations contained in W. VA. CODE § 55-2-12 applies to the Harpers’ CSO and UDAP claims. Section 55-2-12(c) provides that:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

(Emphasis added.)

The Harpers’ claims do not fall within the two-year limitations period in subsections (a) and (b) because they do not allege property damage or physical injury. *Wilt v. State Auto. Mut. Ins. Co.*, 506 S.E.2d 608, 612-13 (W. Va. 1998) (reasoning that “personal injury” has been historically construed to involve physical injury). The CSO statute was passed on April 2, 1991, and the UDAP provision became effective on September 1, 1974. Because of their recent statutory genesis, these causes of action did not survive at common law. *Id.* at 614 (using same logic to conclude that an unfair settlement practices claim did not survive at common law). Finally, CSO and UDAP claims do not survive a party’s death. *See id.* (only

claims listed in W. VA. CODE § 55-7-8a(a), which do not include CSO or UDAP claims, survive a party's death).

III. Answer To Third Certified Question: The Agency Disclaimer In The Harpers' Contract With SBB&T Is Enforceable.

The agency clause in the Harpers' refund anticipation loan agreement with SBB&T is valid and enforceable under West Virginia law. The clause memorializes the Harpers' agreement (which was confirmed by Mr. Harper) that neither their tax preparer nor Jackson Hewitt acted as their agent or otherwise owed them a fiduciary duty with respect to their RAL. First, this Court has previously reviewed allegations involving purported agency relationships in the face of similar clauses and has not invalidated the clauses as a matter of law. Instead, courts should continue to review and apply principles of contract and agency law when a party alleges the existence of an agency relationship – even where the parties execute an agreement negating an agency relationship.

Second, and in any event, the Harpers offer no reason to declare such a clause unenforceable, particularly where, as here, the clause accurately memorializes the lack of an agency or fiduciary relationship. Indeed, the consistent theme in each of the Harpers' arguments is that the Harpers simply presumed that a fiduciary duty relationship existed when, as shown in Part IV below, that was not the case. This Court should answer the third certified question in the negative because – as properly evidenced in the Harpers' RAL application and agreement – no agency or fiduciary relationship existed with respect to the Harpers' purchase of a refund anticipation loan. *See* Restatement (Third) of Agency § 1.02 (2009), cmt. b (“An agreement between or among parties may positively characterize their relationship as one of agency or assert a negation of agency.”).

A. The Agency Clause In The Harpers' Agreements Is Subject To Existing Principles Of Agency Law.

There is no reason for the Court to declare the agency clause unenforceable as a matter of law. Established West Virginia and black letter law governing the existence of an agency relationship recognizes that the underlying conduct of parties can be reviewed to determine whether an agency relationship exists. *See, e.g., State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E.2d 764, 788 (W. Va. 1998) (quoting 2A C.J.S. *Agency* § 4, at 552, for the proposition that “[a]gency is succinctly defined as a relation created by an agreement between the parties”).²⁷ And, although not necessarily controlling, *see* Restatement (Third) of Agency § 1.02 (stating that “[w]hether a relationship is characterized as agency in an agreement between parties . . . is not controlling”), an agreement is strong evidence of the parties intentions with respect to agency. *See id.* at cmt. b (recognizing that “such statements are relevant to determining whether the parties consent to a relationship of agency”).

In this case, the Harpers’ agreement with SBB&T – together with their conduct in purchasing a RAL and the district court’s finding that the Harpers never had a contract with Jackson Hewitt (whether written or implied) for their RAL – evidences that no agency relationship was ever formed with Jackson Hewitt in connection with the Harpers’ RAL.

²⁷ *See also Cole v. Fairchild*, 482 S.E.2d 913, 923 (W. Va. 1996) (“[A]gency means a fiduciary relation[ship] which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and *consent by the other so to act.*” (emphasis added) (internal quotation marks omitted)); *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141, 146-49 (W. Va. 1969) (reviewing the conduct of the parties in determining whether an agency relationship existed even where the contract between the parties expressly disclaimed any agency relationship); *State ex rel. Yahn Elec. Co. v. Baer*, 135 S.E.2d 687, 690 (W. Va. 1964) (“While agency is usually created by express contract between the parties, it may be implied from the conduct of the parties and the nature and the circumstances of the particular acts done.”); Restatement (Third) of Agency § 1.01 (2008) (before an agency relationship is established, there is a requirement that “the agent manifests assent or otherwise consents so to act”); Restatement (Third) of Agency § 1.03 (“A person manifests assent or intention through written or spoken words or other conduct.”).

B. There Is Nothing Unconscionable, Unenforceable, Offensive To Public Policy, Or Untrue About The Agency Clause In The Harpers' Agreements.

This Court has been asked to consider whether the contractual agency disclaimers in the Harpers' contract with SBB&T are enforceable under West Virginia law. The short answer is yes. The Harpers, however, make a series of arguments in an attempt to declare the "no agency" clause in their RAL application and agreement unenforceable. (*See* Pl. Br. at 18-22.) The consistent theme in each of these arguments is that the Harpers simply presumed that a fiduciary duty relationship existed when, as shown in Part IV below, no such relationship (or "presumption" for that matter) ever arose. These arguments also ignore the fact that Mr. Harper admitted in his deposition that, if he had read his RAL application and agreement, he would have understood that Jackson Hewitt was *not acting as his agent* or in any fiduciary capacity. (Docket Entry 204-2 at 190:9-20 (recognizing that the agency clause is "saying that [the tax preparer] is [not] acting as [my] agent" or is under any fiduciary duty to me regarding this particular application or my RAL).) Because none of the parties did or could have contemplated that Jackson Hewitt was acting as an agent or in a fiduciary capacity for the Harpers, there is nothing unconscionable, unenforceable, offensive to public policy, or untrue about the provision in the agreement.

Additionally, there is no merit to any of the "five separate reasons" offered by the Harpers in response to the third certified question. First, the Harpers erroneously assume that an agency relationship exists and that Jackson Hewitt breached a duty (which it did not) and assert that the agency clause is exculpatory because it "insulates" Jackson Hewitt from liability. What "insulates" Jackson Hewitt from liability under an agency theory is not simply the fact of the written agreement, but that Jackson Hewitt was *not acting as the Harpers' agent* in connection with their purchase of a RAL from SBB&T. The clause properly records the Harpers' agreement

and understanding that Jackson Hewitt was not acting as their agent or in any other fiduciary capacity with respect to the Harpers' RAL.

Second, the Harpers assert that “[a]n agency relationship is established through conduct, and cannot be disclaimed by fine-print provisions of adhesion contracts.” (*See* Pl. Br. at 19.) It is puzzling how this argument in any way advances the Harpers' position. Even assuming that the contract between the Harpers and SBB&T is a contract of adhesion (which it is not), the Harpers would have to prove that an agency relationship existed in the first place (which it did not). The Harpers' second “reason” therefore offers no basis to “declare” the clause unenforceable.

Third, the clause is not void on public policy grounds. The Harpers assert that if party A owes a fiduciary duty to party B, a clause exculpating party A from the duty is unenforceable. Again, this argument requires that the Court assume that Jackson Hewitt owes the Harpers a fiduciary duty in the first place and therefore has no merit.

Fourth, the Harpers claim that the agency “clause is void because it is based on misrepresentations” and argue that the alleged misrepresentation was that Jackson Hewitt was not acting as the Harpers' agent. (*See* Pl. Br. at 20-21.) Again, this argument is entirely circular and erroneously assumes that an agency relationship exists in the first place.

In their final argument, the Harpers again assume that Jackson Hewitt owed them some fiduciary duty and argue that this alleged duty was violated because Jackson Hewitt “never adequately informed the Plaintiffs of its kickbacks from the lending bank or of its payment relationship with the bank.” (*See* Pl. Br. at 21.) The Harpers add that they could not have been expected to “figure out on their own” that Jackson Hewitt would receive compensation from SBB&T and they “did not have a ‘full understanding of their legal rights and of all relevant

facts' known to Jackson Hewitt." (*See* Pl. Br. at 22.) However, Mr. Harper candidly admitted at his deposition that, when he read the agreement he executed with SBB&T to purchase a RAL from SBB&T,²⁸ he understood that Jackson Hewitt would receive compensation from SBB&T. (*See* Docket Entry 204-2 at 179:17-22.) This Court should reject these arguments.

IV. Answer To Fourth Certified Question: Jackson Hewitt Is Not An Agent Of The Harpers Under West Virginia Law.

The deficiencies in the Harpers' agency argument can be seen most clearly by the unprecedented nature of the ruling they seek. The Harpers ask that the Court interpret the agency and fiduciary duty law in a way that would force hundreds of retailers to forfeit all compensation they have earned in exchange for providing lenders access to customers. Specifically, the Harpers ask that the Court make a ruling that would prevent a bank from paying any retailer (whether tax preparer, electronic goods supplier, or any other) for the right to offer the banks' loans to customers at the retailers' locations. In each instance, if a retailer forwarded any application to the bank and accepted any money from the bank (as hundreds in West Virginia already do), the Harpers' theory would require that those retailers forfeit all money to the customer because "the [retailer would] thereby place[] itself in conflict with its customers" and "[m]ore money for [the retailer] meant a worse deal for its [customers]." (Docket Entry 214 at 10.) That is not the law in West Virginia or anywhere else.

Moreover, the Harpers' brief fails to acknowledge the essential elements for the existence of an agency relationship. The Harpers ignore the black letter law that "there are three

²⁸ According to Mr. Harper, the first time he read the agreement he executed with SBB&T to purchase a RAL was during his deposition on January 20, 2008. (*See* Docket Entry 204-2 at 151:19-152:3 (admitting that he had discussed a RAL as an option with his tax preparer, that he "pretty much . . . signed just about every paper that [he] had to," and responding "[t]o be honest, no" to the question whether he read any of the RAL papers provided to him).)

elements that are integral to an agency relationship: the agent is subject to the principal's right of control; the agent has a duty to act, as a fiduciary, primarily for the benefit of the principal; and the agent holds the power to alter the legal relations of the principal." *Compare* C.J.S. § 5 *with* Pl. Br. at 22-25. Instead, the Harpers imply that this Court adopted a different standard when it stated that "[a]n agent in the restricted and proper sense is a representative of the principal in business of contractual relations with third persons" *Thomson v. McGinnis*, 465 S.E.2d 922, 926 (W. Va. 1995) (internal quotation marks and citation omitted). However, by using words such as "agent in the *restricted and proper sense*" and "*representative of the principal*," this Court incorporated the very concepts expressed in the C.J.S.

Jackson Hewitt was not the Harpers' agent. First, Jackson Hewitt had no authority to bind the Harpers. The evidence shows that none of the parties consented for Jackson Hewitt to act as an agent for the Harpers. Second, the refund anticipation loan agreements on their face show that Jackson Hewitt never agreed to subordinate its interests to the Harpers' interests, which would be necessary for the existence of a fiduciary relationship. Third, the deposition testimony shows that the Harpers exercised no control over how Jackson Hewitt met its obligations under its own contracts with SBB&T. Because the Harpers cannot establish any one of these elements, let alone all of them, the Court should respond to the fourth certified question in the negative.

A. Jackson Hewitt Had No Authority To Bind The Harpers And Neither Jackson Hewitt Nor The Harpers Consented To Act As An Agent For The Harpers' Benefit.

The undisputed evidence is that neither the Harpers nor Jackson Hewitt consented to an agency relationship with respect to the Harpers' loan applications to SBB&T. As the District Court stated, "[a]n agency relationship is said to exist when one party (the principal) grants either express or implied authority to another party (the agent) to represent the principal in

dealings with third persons, thereby creating a fiduciary relationship between the principal and the agent.” (Docket Entry 49 at 4 (citing *Blue Cross Blue Shield*, 510 S.E.2d at 788).) “The special relationship arising from an agency agreement, with its concomitant heightened duty, cannot arise from any and all actions, no matter how trivial, arguably undertaken on another’s behalf” but “[r]ather, the action must be a matter of consequence or trust, such as the ability to actually **bind** the principal or alter the principal’s legal relations.” *Basile v. H & R Block, Inc.*, 761 A.2d 1115, 1121 (Pa. 2000) (emphasis in the original). *See also* Restatement (Third) Agency, § 1.01, comment h (stating that “[s]ome agents have authority to commit the principal to the terms of a transaction”); Restatement (Second) Agency, § 12 (“An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.”).

Jackson Hewitt did not have a contractual relationship to act as an agent for the Harpers in connection with their RAL. The district court has already held that Jackson Hewitt had no contractual relationship to obtain a RAL for the Harpers. (*See* Docket Entry 129 at 8.) *See also Mutafis v. Erie Ins. Exchange*, 328 S.E.2d 675, 678 (W.Va. 1985) (recognizing that when sitting to answer certified questions, the Court “must assume the findings of fact of the district court are correct”). Jackson Hewitt was never given any authority to alter any of the Harpers’ legal relationships. *See John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141 (W. Va. 1969) (holding that the defendant was not the plaintiff’s agent where nothing “was done or said on the part of any person at the time of the transaction . . . or before to indicate that the defendant knowingly permitted [the plaintiff] to exercise such authority as defendant’s agent or to hold himself out as possessing such authority”). In particular, in every year, the Harpers’ refund anticipation loan agreement expressly disclaimed that Jackson Hewitt

was acting as an agent or as a fiduciary for the Harpers: “You agree that neither your Tax Preparer nor JHI is acting as your agent or is under any fiduciary duty to you regarding this Application or your RAL.” (Docket Entry 204-5 Exh. A; Docket Entry 204-6, Exh. D and G; Docket Entry 204-7, Exh. J at § 12.) When Mr. Harper read this disclaimer, he understood what it meant. (Docket Entry 204-2 at 188:14-189:4.)

In addition, there are no facts or circumstances under which the existence of consent to a fiduciary relationship by either the Harpers or Jackson Hewitt could be inferred. Even with respect to Mr. Hudnall, Mr. Harper admits that Mr. Hudnall never suggested that any of the terms of the RALs could be negotiated and never suggested that he would attempt to negotiate terms of the loans on the Harpers’ behalf. (*See, e.g., id.* at 185:8-14 (admitting that his tax preparer never suggested that he could negotiate any of the terms of Mr. Harper’s RAL).) Mr. Harper also did not form a belief that he had given any authority to Mr. Hudnall to negotiate with SBB&T on the Harpers’ behalf. (*Id.* at 185:23-186:6 (stating that he did not “expect” his tax preparer to negotiate the terms of his RAL).) *See Basile*, 761 A.2d at 1121 (affirming summary judgment where there was no showing that the customers “intended Block to act on their behalf in securing the RALs”).

At most, Mr. Harper testified that he expected Mr. Hudnall to enter his information correctly and transmit his application so that he could receive money more quickly. (Docket Entry 204-2 at 187:1-188:9 (stating that he expected that Mr. Hudnall would enter his tax information correctly and would transmit his RAL application).) As shown in the expert report of David Gibbons, retailers perform the same functions across the state of West Virginia and the country every day. (Docket Entry 204-14 at 4.) As far as Jackson Hewitt is aware, no case has ever suggested that the multitude of retailers engaged in these activities become

fiduciaries by transmitting loan applications to lenders. *Basile*, 761 A.2d at 1122 (rejecting an identical fiduciary duty claim against H&R Block and reasoning that “[m]any providers of goods and services also make referrals to banks or agencies that will finance the purchase at issue”).

As observed by *Basile*, the weight of the authority is that a tax preparer cannot become an agent, with all of the heightened duties imposed on a fiduciary, merely by allowing a lender to offer its products to customers. *See, e.g., Basile*, 761 A.2d at 1121 (recognizing that only one court had found the potential existence of an agency relationship in connection with a RAL transaction but deciding to “agree with the prevailing view” and holding that “Block was neither authorized to, nor did it in fact, act on its customers’ behalf in” their decision to purchase a RAL); *Carnegie v. H & R Block, Inc.*, 269 A.D.2d 145, 147 (N.Y. App. Div. 2000) (affirming the decision of the trial court that “Block was not acting as plaintiff’s agent in soliciting her to enter into the RAL transaction, which plaintiff did by her own acts as principal”); *Beckett v. H & R Block, Inc.*, 306 Ill. App. 3d 381, 391 (Ill. App. Ct. 1999) (affirming the trial court’s decision that H&R Block was not acting as the plaintiffs’ agent in connection with her purchase of a RAL because Block had no power to subject the plaintiffs “to liability with respect to the RAL transaction” and because the plaintiffs could not control the manner and method of the work H&R Block performed); *Peterson v. H & R Block Tax Services, Inc.*, 971 F. Supp. 1204, 1215 (N.D. Ill. 1997) (granting a motion to dismiss in part because H&R Block was not acting as the plaintiff’s agent in connection with her purchase of tax preparation and financial product services).²⁹

²⁹ The one case holding otherwise, *Green v. H & R Block*, 735 A.2d 1039 (Md. 1999), was decided on a motion to dismiss, where no discovery was conducted and where the allegations are fundamentally different than the evidence in this case. *Basile* expressly considered and rejected *Green*’s holding, reasoning that “implicit in the long-standing Pennsylvania requirement that the principal manifest an intention that the agent act on the principal’s behalf is the notion that the agent has authority to alter
(cont’d)

Moreover, the case of *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988 (4th Cir. 1990), is instructive. There, the plaintiff alleged that school officials were acting as “agents” or “intermediaries” for students seeking to purchase school photographs. The Court noted that the school officials, although “unquestionably . . . enjoy[ing] a special relationship of trust” with the students, had no authority to bind them, stating: “Instead the students were free to purchase portraits from appellees or from a photographer of their choice, or to purchase no portraits from anyone.” 903 F.2d at 993. Likewise, the Harpers can not seriously allege that Jackson Hewitt could bind them to the RALs that they purchased. Rather, the Harpers were not bound by any terms until they signed the agreements and, like the plaintiff in *Stephen Jay*, were free to purchase a RAL from SBB&T, find another loan source, or not purchase a RAL from anyone.

B. Jackson Hewitt Never Agreed To Subordinate Its Financial Interest To The Harpers’ Financial Interest.

The refund anticipation loan agreements and the facts surrounding the Harpers’ purchase of RALs from SBB&T make clear that Jackson Hewitt was not agreeing to subordinate its interests to the Harpers’ interest in obtaining the RALs. Even reviewing the facts in a light most favorable to the Harpers, Jackson Hewitt was acting only for its own benefit, not as agent. “[A]gency means a ‘fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.’” *Cole v. Fairchild*, 482 S.E.2d 913, 923 (W. Va. 1996) (quoting Restatement (Second) of Agency § 1) (emphasis added). *Accord* Restatement (Second) of Agency § 15 cmt. b (“The agency relation exists only if the agent consents to it.”). “The

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the principal’s relationship with third parties, such as binding the principal to a contract.” 761 A.2d. at 1121.

fiduciary duty is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person." *Knapp v. General Finance Inc.*, 111 F. Supp. 2d 758, 766 (S.D. W. Va. 2000) (internal quotation marks and citation omitted). Where the purported agent does not agree to subordinate its financial interest to the principal's interest, no fiduciary relationship has been created. *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 435 (1998) (defining the fiduciary duty as "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person." (quoting Black's Law Dictionary 625 (6th ed. 1990))). See also *Nymark v. Heart Fed. Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1093 n.1 (Cal. Ct. App. 1991) (rejecting fiduciary duty claim because a party's right to pursue its own financial interest in a transaction is inconsistent with the claim that the parties intended to create a fiduciary relationship).

This court has recognized that "a person is legally presumed to be acting for himself and not as the agent of another person." *John W. Lohr Funeral Home, Inc.*, 166 S.E.2d at 146 (internal quotations and citations omitted). *Accord Brand v. Lowther*, 285 S.E.2d 474, 480 (W. Va. 1981). Indeed, "[t]he law indulges no presumption that an agency exists" and "[o]n the contrary[,] one is legally presumed to be acting for himself and not as the agent of another."³⁰ *Rowe v. Grapevine Corp.*, 456 S.E.2d 1, 4 n.4 (W. Va. 1995) (internal quotations and citations omitted). See also Restatement (Third) of Agency § 1.02, comment d ("The party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence.").

³⁰ Indeed, the evidence is that Jackson Hewitt acted for its own "competitive reasons." (Docket Entry 216, Exh. B at 119:18 (Deposition of W. San Giacomo, former Group Vice President of Financial Products, stating that Jackson Hewitt's fees were negotiated with SBB&T "[p]rimarily for competitive reasons").)

The undisputed evidence is that Jackson Hewitt never agreed to subordinate its financial interest to the Harpers' financial interest.³¹ The disclosures provided to the Harpers warned on twelve different occasions that Jackson Hewitt could be paid by SBB&T. In 2005 and 2006, the Harpers were warned that "a portion of these [bank] fees may be shared with Jackson Hewitt Inc. and your tax preparer." (Docket Entry 204-5, Exh. A at 3 at § 5 and Docket Entry 204-6, Exh. 4-D at 3 at § 5.) In 2007 and 2008, the agreement stated that "SBBT *will* pay compensation to Jackson Hewitt Inc. and an affiliate . . . in consideration of rights granted by JHI to SBBT and the performance of services by JHI on behalf of SBBT." (Docket Entry 204-6, Exh. G at 5 at § 14; Docket Entry 204-7, Exh. J at 4 at § 14 (emphasis added).) In all years, the Harpers "agree[d] and consent[ed] to the receipt by [their] Tax Preparer and/or JHI of fees as set forth in th[e] Agreement." (Docket Entry 204-5, Exh. A at 4 at § 12; Docket Entry 204-6, Exhs. D at 4 at § 12 and G at 5 at § 13; Docket Entry 204-7, Exh. J at 4 at § 13.) Moreover, the TILA disclosures in each year provided similar warnings to the Harpers. (Docket Entries 204-10-204-13 at 1.)

The Harpers testified that they did not read any of the agreements or disclosures, although they had the opportunity to do so. (Docket Entry 204-1 at 151:12-152:21; Docket Entry 204-2 at 166:11-17 and 168:15-20; Docket Entry 204-3 at 37:14-38:4.) "It is a widely accepted principle of contracts that absent fraudulent or other wrongful conduct, one who signs or accepts a written instrument will normally be bound in accordance with its written terms and cannot disaffirm the contract simply by contending that he failed to read the contract or understand its contents." *Knapp*, 111 F. Supp. 2d at 763-64 (internal quotation marks and citation omitted).

³¹ This evidence alone wholly distinguishes this case from Maryland's *Green* case, where it was alleged H&R Block did not disclose the fact that it could receive compensation from the lending banks. See *Green*, 735 A.2d at 1056-57.

Because the evidence demonstrates that Jackson Hewitt did not agree to subordinate its financial interest to the Harpers' financial interest, and because the Harpers cannot disaffirm that knowledge by contending they did not know of Jackson Hewitt's right to receive compensation, there existed no agency or fiduciary relationship in connection with the Harpers' purchase of a RAL.

Indeed, the Harpers put the cart before the horse. They assume that an agency relationship exists and then argue that Jackson Hewitt violated a fiduciary duty by accepting compensation from SBB&T. But, in doing so, the Harpers skip over the elements required to establish the existence of an agency relationship: namely, that an agency relationship giving rise to fiduciary duties does not exist if the Harpers knew at the outset that Jackson Hewitt was pursuing non-mutual profit. Because the Harpers agreed at the outset that Jackson Hewitt was receiving compensation from SBB&T, the Harpers cannot establish that Jackson Hewitt owed them any fiduciary duty arising from an agency relationship.

Moreover, the Harpers allegation that an agency relationship arose during their face to face meeting in a tax preparation office would have dire consequences for retailers operating in West Virginia. Common sense, however, counsels that no person entering a tax preparation office expects to enter into an agency or fiduciary relationship with a tax preparer who contracts with a bank to allow the bank access to the tax preparer's customers.³²

³² Indeed, the Harpers' brief never acknowledges that the essence of an agency relationship requires an agreement, either explicit or implicit, by the agent to forego its personal interests in favor of the principal's interests. That is what distinguishes a fiduciary relationship from the ordinary run-of-the-mill commercial relationships established by hundreds of retailers in West Virginia. *Rickel v. Schwinn Bicycle Co.*, 144 Cal. App. 3d 648, 654 (Cal. Ct. App. 1983) (concluding that a fiduciary duty cannot be present when the element of non-mutual profit was essential to the relationships of the parties). This is one reason why an automobile dealer, for instance, can receive money from the lender for facilitating a customer's loan without incurring any type of fiduciary duty to the customer: the automobile dealer has not agreed to act for the customers' benefit to the exclusion of its own

(cont'd)

Finally, the district court already ruled that Jackson Hewitt was not a “loan broker.” (Docket Entry 49 at 13-15.) But even for so-called middlemen (which Jackson Hewitt is not), the rule in West Virginia is that they are entitled to receive compensation from any party in the transaction. *See, e.g., Princeton Power Co. v. Hardy*, 137 S.E. 362, 364 (W. Va. 1927) (holding that a buyer had no cause of action to recover profits paid to a middleman by a seller and asking “How can there be any doubt of [the middleman’s] right to receive his compensation from the seller?”); *Peters v. Riley*, 81 S.E. 530, 532 (W. Va. 1914) (holding that a middleman was allowed to receive compensation from both the buyer and the seller). *See also Moore v. Turner*, 71 S.E.2d 342, 350 (W. Va. 1952) (setting forth the same principle). Because Jackson Hewitt was not a loan broker, and particularly since SBB&T disclosed to the Harpers that it had the right to pay compensation to Jackson Hewitt, there is no evidence that an agency relationship existed.

C. The Harpers Did Not Exercise Requisite Control Over Jackson Hewitt.

“[O]ne of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.” *Teter v. Old Colony Co.*, 441 S.E.2d 728, 736 (W. Va. 1994). *Accord Arnold*, 511 S.E.2d at 865 (internal quotation marks omitted); *Cole*, 482 S.E.2d at 923; Restatement (Second) of Agency § 14 (“A principal has the right to control the conduct of the agent with respect to matters entrusted to him.”). Merely hiring a company does not create a principal-agency relationship. *Teter*, 441

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personal financial interest. *See, e.g., Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F. Supp. 2d 894, 898 (S.D. Miss. 1998) (rejecting the argument that car dealers act as their customers’ fiduciaries in obtaining financing from third party lenders); *Flowers v. Ford Motor Credit Corp.*, 959 F. Supp. 1467, 1472 (M.D. Ala. 1997) (granting summary judgment on claim that automobile dealer breached fiduciary duty claim).

S.E.2d at 736 (recognizing that a real estate broker did not have a principal-agent relationship with an engineering firm simply because the broker hired the firm to perform work).

There is, however, no evidence that the Harpers ever exercised control over Jackson Hewitt's activities – either in Jackson Hewitt's negotiations of its own agreements with SBB&T or in Jackson Hewitt's subsequent performance under those contracts. Nor did the Harpers have any legal right to do so because they did not have a contract with Jackson Hewitt. Under these circumstances, it is clear that the Harpers never exercised any control over Jackson Hewitt's activities or, therefore, that an agency or fiduciary relationship existed.

The Harpers argue that they exercised control because they “authorized Jackson Hewitt to prepare their taxes to support the RAL application, to submit the application to the bank . . . and to accept the RAL check and hold it for the Harpers to retrieve.” (*See* Pl. Br. at 25.) First, the Harpers are wrong as an evidentiary matter: Walter Hudnall, an independent business owner, transmitted the refund anticipation loan application and delivered the check to the Harpers. (Docket Entry 215 at 2-3.) More importantly, the Harpers are wrong as a legal matter: the ministerial acts performed by Mr. Hudnall do not transform Jackson Hewitt into an agent with fiduciary duties and an obligation to refrain from receiving any compensation from SBB&T pursuant to a contract that was negotiated well before the Harpers ever visited Mr. Hudnall's business. There is no evidence that the Harpers ever provided Jackson Hewitt with any authority to “represent or act on behalf” of them. *See Blue Cross Blue Shield*, 510 S.E.2d at 788 (quoting 2A C.J.S. *Agency* § 4, at 552, for its definition of an agent as ““one who acts for or in the place of another by authority from him; a person having express or implied authority to represent or act on behalf of another person who is called his principal; a person employed or authorized by another to act for him, or to transact business for him . . . ””).

Moreover, nothing in the Harpers' list of purported "facts" comes close to establishing an agency relationship in connection with their purchase of a RAL. First, the Harpers mischaracterize the evidence. For example, many of the ministerial acts, including asking the Harpers questions and completing a RAL application, were handled by Mr. Hudnall – not Jackson Hewitt. Second, many of the purported "facts" involve conduct that does not require – or otherwise involve – control or authorization from the Harpers. Indeed, Jackson Hewitt provided these ministerial acts on behalf of SBB&T, not the Harpers. To be sure, the only direction the Harpers gave Jackson Hewitt was to answer either "yes" or "no, thank you" to the question whether they wanted to purchase a RAL from SBB&T. When they chose to purchase a RAL, they chose to comply with SBB&T's application process and had no right to control or direct Jackson Hewitt to do anything other than what SBB&T required Jackson Hewitt to do by contract. Simply put, the Harpers had no control over (1) where to transmit; (2) when to transmit; or (3) how to transmit their RAL application. *See Peterson*, 971 F.Supp. at 1213 (recognizing that the "key consideration" in determining whether an agency relationship exists is whether the principal had the right to control the 'manner and method' in which the agent performs work" and holding that H&R Block was not acting as the plaintiff's agent because there was no allegation that the plaintiff "instructed Block as to how it should go about preparing her return or assessing what services were available to her" or otherwise "controlled the 'manner and method' in which Block performed its services") (citation omitted).

CONCLUSION

For the reasons identified above, Defendant Jackson Hewitt Inc. respectfully requests that the Court answer each of the certified questions in accordance with the positions set forth above.

Dated: this 8th day of February 2010

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTIAN and ELIZABETH HARPER,
on their own behalf and on behalf of those
similarly situated,

CASE NO. 35295

Plaintiff,

v.

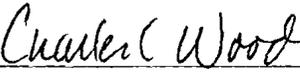
JACKSON HEWITT INC.,

Defendant.

CERTIFICATE OF SERVICE

I, Charles L. Woody, do hereby certify that I have served a true copy of the foregoing "**Defendant Jackson Hewitt's Brief**" upon the following counsel of record on this 8th day of February, 2010, by depositing the same in the United States Mail, First Class postage prepaid, addressed as follows:

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