

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

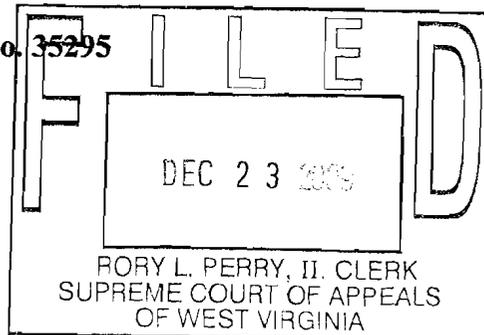
Plaintiffs,

v.

JACKSON HEWITT, INC.,

Defendant.

Case No. 35295



PLAINTIFFS' 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 presents certified questions about the legal status and obligations of Jackson Hewitt, Inc., a tax preparation company that arranges refund anticipations loans (also called RALs) for tens of thousands of West Virginia consumers each year. RALs are short-term, high-cost loans (at rates ranging from 50% to up to 700% APR) that provide a cash advance to borrowers based on their expected tax refund. These loans are widely condemned as predatory and valueless, and target the working poor. In fact, most West Virginia RAL purchasers qualify for the earned income tax credit, a refundable credit provided by the federal government to lift low-income workers out of poverty.

Jackson Hewitt handles *all* aspects of the RAL transaction for its West Virginia customers. From negotiating rates and fees with the lending banks, to completing loan applications for customers and submitting them to the banks, to providing and receiving from the IRS loan-related documentation on the customer's behalf, to printing the check and giving it to the borrower, Jackson Hewitt takes care of everything. And for good reason. Jackson Hewitt annually pockets millions of dollars in direct and indirect payments from the lending banks, the bulk of it made on the backs of the most financially-vulnerable consumers.

Because Jackson Hewitt is paid for arranging consumer loans, it is a "credit services organization" subject to state regulation under the Consumer Credit and Protection Act. And because it handles all aspects of the loan transaction for borrowers, it is subject to the fiduciary obligations of an agent, a status it futilely attempts to disclaim through false and self-serving fine-print contained in the RAL applications.

Kind of Proceeding and Nature of Rulings Below

..... This is a putative class action brought in the United States District Court for the Southern District of West Virginia on behalf of State refund anticipation loan borrowers to recover damages and civil penalties for Jackson Hewitt's wholesale violations of West Virginia law. Plaintiffs Christian and Elizabeth Harper are low-income West Virginians and residents of Mason County who obtained RALs from Jackson Hewitt for several years. Plaintiffs assert claims for breach of fiduciary duty arising out of an agency relationship (Count I), violation of West Virginia's statute governing credit services organizations, or CSOs (Count IV), and unfair or deceptive acts or practices (UDAPs) in violation of the Consumer Credit and Protection Act, West Virginia Code § 46A-6-104 (Count VI).

After nearly two-and-a-half years of litigation, both parties moved for summary judgment. Plaintiffs sought summary judgment on their credit services organization claim (Count IV), while Jackson Hewitt sought summary judgment on all claims. After the parties concluded extensive briefing, Plaintiffs moved to certify four questions to this Court under West Virginia Code § 51-1A-3. On September 29, 2009, the district court issued an order certifying the questions, denying Jackson Hewitt's summary judgment motion outright in certain respects, and deferring a ruling on other issues pending this Court's consideration of the certified questions.¹

Specifically, the district court denied Jackson Hewitt's request for summary judgment on the agency breach claim, finding that if this Court concluded an agency relationship existed between the Plaintiffs and Jackson Hewitt, the factual allegations

¹ Mem. Op. and Order, Sept. 29, 2009, Doc. No. 152.

were sufficient both to establish breach of duties arising from the relationship, and damages resulting from the breach.

On the CSO claim, the district court denied Jackson Hewitt's summary judgment motion to the extent it argued Plaintiffs were not injured by the alleged violation of the CSO statute. However, in deference to this Court's resolution of the issue, the district court reserved ruling on whether the CSO statute, as a threshold matter, applies to RALs obtained by Jackson Hewitt for its West Virginia customers. The district court also reserved ruling on the UDAP claim pending this Court's determination regarding the applicability of the CSO statute.²

Certified Questions Presented

The questions certified by the district court are:

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))?
2. Is the appropriate limitations period for actions alleging violations of the CSO statute (*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 limitations period in West Virginia Code § 55-2-12?
3. Are the contractual agency disclaimers in the RAL 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?

² The district court also reserved ruling on Jackson Hewitt's contention the CSO claim is preempted by the National Bank Act. That issue presently is before the Fourth Circuit Court of Appeals in an unrelated case, *H&R Block Eastern Enterprises, Inc. v. Turnbaugh*, Nos. 08-2162, and 08-2163 (filed Oct. 9, 2008)(4th Cir.).

Facts

A. Refund anticipation loans are widely-criticized predatory loans that target West Virginia's working poor.

A RAL is a short-term, high-interest loan sold to consumers at Jackson Hewitt's tax preparation offices and arranged through a lending bank, here Santa Barbara Bank & Trust, or SBB&T. It is a loan of the borrower's own money, the tax refund. To provide that refund roughly ten days sooner than the IRS would deliver it, RAL lenders like SBB&T frequently impose triple-digit interest rates on RAL borrowers, despite the fact the loans are virtually risk-free for the lending bank. When RAL fees are added to the cost of tax preparation, some RAL purchasers pay their tax preparer and the lending bank 25% or more of their expected tax refund.³

Financially sophisticated entities consider RALs to be predatory loans that provide little if any real value to consumers. It would be difficult to find a credible, objective financial expert who would endorse obtaining a RAL as a prudent financial measure, and indeed Jackson Hewitt has not found such an expert in the underlying litigation. Virtually everyone outside the industry who knows RALs criticizes them – courts, finance professors, legislators, consumer advocates, state regulators, attorneys general, financial advisors, and, of course, consumer advocates.⁴ Even the market-

³ *Magic Money a Mere Illusion: Refund Anticipation Loans & the Earned Income Tax Credit in West Virginia ("Magic Money")*, Elizabeth Paulhus, West Virginia Center on Budget & Policy, July 2009, at 4 [<http://www.wvpolicy.org/ralb.html>].

⁴ See, e.g., *Just Say No to Refund Anticipation Loans*, Consumer Reports, March 2009; *Beware the Refund Anticipation Loan* [<http://www.banking.state.ny.us/brral.htm>]; Press Release, New York City Dept. of Consumer Affairs, *Consumer Affairs Releases Preliminary Results of Tax Preparer Enforcement and Monitoring for 2004 Season*, Apr. 5, 2004, [<http://www.ci.nyc.ny.us/html/dca/pdf/pr40504.pdf>]; Press Release, *Attorney General Lockyer Urges Consumers to Avoid Expensive Loans Disguised as 'Instant' Tax Refunds*, Jan. 26, 2005; Iowa Attorney General Tom Miller, *Rapid Tax-Refund Loans: Costly Way to Gain Few Days on*

oriented Seventh Circuit has pointedly observed that “[t]he bargain struck [for a RAL] is a good one for only one of the two parties. Guess which one?” *Kleven v. Household Bank*, 334 F.3d 638, 640 (7th Cir. 2003), *cert. denied*, 540 U.S. 1073 (2003).

RALs are mostly sold to the working poor. As one court noted in another RAL case:

[E]ven a few weeks is too long for the most necessitous taxpayers [to wait for a refund], and so Beneficial through Block offers to lend the customer the amount of the refund for the period between the filing of the claim and the receipt of the refund. The annual interest rate on such a loan will often exceed 100 percent--easily a quarter of the refund, even though the loan may be outstanding for only a few days.

Reynolds v. Beneficial National Bank, 277 F.3d 277, 280 (7th Cir. 2003). Jackson Hewitt understands its target demographic. As its marketing materials state, “If the wolf is at the door, so to speak, a refund anticipation loan becomes an imperative, and the customer will go wherever s/he has to and will do whatever is required to expedite the refund process.”⁵

In particular, most RAL borrowers receive the earned income tax credit (“EITC”), the largest federal poverty assistance program.⁶ EITC recipients are easy fodder for Jackson Hewitt. More than half of them who go to a tax preparer end up with a RAL, and, because EITC forms are daunting to many recipients, most go to tax preparers.⁷ The National Consumer Law Center estimates that EITC recipients “gave

Tax Refund, Daily Nonpareil, Jan. 26, 2005; Bruce Mohl, *State Urges Low-Income Taxpayers To Avoid Refund Loans*, Boston Globe, Feb. 5, 2004.

⁵ Dep. of Jackson Hewitt Senior Vice President of Marketing Peter Tahinos at 91-92 and Exhibit A thereto (JH-WV-06-0146), attached as Exhibit A to Pls.’ Mot. Partial Summ. J. (Doc. No. 200).

⁶ *One Step Forward, One Step Back: Progress Seen In Efforts Against High-Priced Refund Anticipation Loans, But Even More Abusive Products Introduced*, National Consumer Law Center, Jan. 2007, at 11 [[http:// www.consumerlaw.org](http://www.consumerlaw.org)].

⁷ *Id.* at 8-9.

back” almost \$1.75 billion of EITC credits in the form of tax preparation and RAL-related fees.⁸

Closer to home, EITC recipients in West Virginia spent a whopping \$12.66 million on RALs in 2007.⁹ RAL-purchase rates were highest in southern West Virginia. In 2007, EITC recipients in Mingo, McDowell and Logan counties alone spent almost \$1 million on RAL fees, money that could have been used to purchase food, pay rent, or cover child-care costs for these families.¹⁰

B. Jackson Hewitt facilitated loans in exchange for direct payments from consumers and indirect payments from RAL lending banks.

1. Jackson Hewitt facilitates RALs.

Jackson Hewitt’s RAL is a three-party transaction. The taxpayers (here the Plaintiffs) are the borrowers, a national bank (here SBB&T) is the lender, and the tax preparer (here Jackson Hewitt) is the RAL facilitator. As facilitator, Jackson Hewitt serves as the necessary intermediary between the borrower and the bank.

Jackson Hewitt’s RAL customers have no personal contact with the lending bank. Instead, Jackson Hewitt handles all aspects of the transaction. Jackson Hewitt facilitates RALs by:

- Giving tax preparers RAL sales scripts and computer software;
- formatting the prospective RAL-borrower’s tax return to secure the RAL;
- completing the electronic RAL application using Jackson Hewitt computers and software;
- verifying the borrower’s identity for the lending bank;
- transmitting the purchaser’s RAL application to the bank;

⁸ *Id.*

⁹ *Magic Money* at 2.

¹⁰ *Id.* at 7.

- grouping the returns in “batches” to be sorted by the IRS service center;
- obtaining on behalf of the customer the required (by the bank) IRS “debt indicator,” which is a confirmation from the IRS that the RAL customer has no liens on his or her refund; and
- printing the loan check for the borrower and handing it to the borrower, or giving the borrower a Jackson Hewitt “iPower” prepaid debit card loaded with the RAL proceeds.¹¹

Not surprisingly, Jackson Hewitt involves itself deeply each year in negotiations with SBB&T over the terms of the RAL program; it negotiated for itself the ability to influence RAL prices and the criteria for obtaining a RAL.¹²

2. Jackson Hewitt acknowledges it facilitates RALs.

Jackson Hewitt management personnel candidly admit that Jackson Hewitt facilitates RALs. In fact, “RAL facilitator” is the term high-ranking corporate officials use to describe Jackson Hewitt’s role in the RAL transaction.¹³ Jackson Hewitt’s documents likewise describe it as a facilitator. For example, documents entitled “Jackson Hewitt Tax Service® Privacy Policy” and given to RAL purchasers with their RAL application documents in 2006 through 2008 consistently refer to “facilitated financial products,” and to transactions “facilitated by us.”¹⁴ And Jackson Hewitt stated

¹¹ Dep. of Jackson Hewitt Rule 30(b)(6) Designee and V.P. of Financial Products William San Giacomo at 30, 47, 58-59, 64, attached as Exhibit C to Pls.’ Mot. Partial Summ. J. (Doc. No. 200); Dep. of Jackson Hewitt Rule 30(b)(6) Designee and V.P. of Financial Product Strategic Relations Clark Gill at 18-21, attached as Exhibit D to Pls.’ Mot. Partial Summ. J. (Doc. No. 200); Dep. of Jackson Hewitt’s Enterprise Architect and former Senior Director of Technical Development Philip Leonard at 43-46, attached as Exhibit E to Pls.’ Mot. Partial Summ. J. (Doc. No. 200).

¹² San Giacomo Dep. at 104, 118-22; Gill Dep. at 81-82.

¹³ Dep. of former Jackson Hewitt C.F.O. Mark Heimboch at 43, attached as Exhibit F to Pls.’ Mot. Partial Summ. J. (Doc. No. 200-4); Dep. of Jackson Hewitt V.P. of Financial Planning and Analysis Kevin Linder at 31, attached as Exhibit G to Pls.’ Mot. Partial Summ. J. (Doc. No. 200); Gill Dep. at 17.

¹⁴ See, e.g., Exhibit H to Pls.’ Mot. Partial Summ. J. (Doc. No. 200) (Bates No. JH-WW-09-0022; JH-WW-09-0056-57; JH-WW-09-0091-92).

in its discovery responses that between tax seasons¹⁵ 2002 and 2008, it “facilitated” over \$122 million worth of RALs in West Virginia.¹⁶

3. From 2002 through 2005, Jackson Hewitt received compensation directly from RAL borrowers for each RAL it facilitated, and indirectly from the lending bank.

Annually Jackson Hewitt receives millions of dollars in payments – separate and apart from tax preparation fees – for facilitating RALs. Specifically, from 2002 through 2005 Jackson Hewitt received a “documentation fee” for its RAL-facilitation services *directly* from West Virginia consumers who obtained RALs. In addition, it received a percentage of the lending bank’s “handling fee,” royalties on application fees charged directly to the consumer, a “fixed rebate” that included a “performance adjustment,” and a percentage of collected past-due accounts.¹⁷ In tax season 2005, for example,

Plaintiffs paid the following fees for their RAL:

Tax preparation and electronic filing fee:	\$106
Documentation fee:	\$20
SBBT federal refund processing fee:	\$25
SBBT state refund processing fee:	\$10
Total Estimated Prepaid Finance Charge:	\$90 ¹⁸

¹⁵ “Tax season 2003,” for example, refers to the period from January 1, 2003 through April 15, 2003 during which taxpayers file their 2002 tax returns.

¹⁶ Def.’s Suppl. Resp. to Pls.’ First Set of Ints., Resp. to Int. No. 3, attached as Exhibit I to Pls.’ Mot. Partial Summ. J. (Doc. No. 200).

¹⁷ Linder Dep. at 35-37, 50, 94-95.

¹⁸ Exhibit J to Pls.’ Mot. Partial Summ. J. (Doc. No. 200-5) (Bates Nos. JH-WV-09-0015-18). The RAL applications contain misleading statements about these fees. For example, the 2005 RAL application states the “processing fees” and the finance charge “may be shared with Jackson Hewitt.” In fact, these fees were shared with Jackson Hewitt.

Kevin Linder, Jackson Hewitt’s Vice President of Financial Planning and Analysis, acknowledged that Jackson Hewitt received these fees – both the documentation fee directly charged to the RAL borrower and the payments received from the lending bank – as compensation for Jackson Hewitt’s “facilitation of the products.”¹⁹ Similarly, its Rule 30(b)(6) designee, William San Giacomo, candidly admitted that Jackson Hewitt charged the documentation fee (which he tellingly called the “application fee”) for “facilitating” the RAL and “the work involved in the financial product process.”²⁰

Through discovery, Plaintiffs learned that Jackson Hewitt earned hundreds of thousands of dollars annually for facilitating RALs for West Virginia borrowers.²¹ The following chart lists Jackson Hewitt’s annual compensation for facilitating RALs in West Virginia:

<i>Tax Season</i>	<i>Amount earned from facilitating West Virginia RALs</i>
2005	\$292,801
2004	\$496,000
2003	\$308,682
2002	\$232,494

4. From 2006 through 2008, Jackson Hewitt was paid for facilitating RALs on a lump-sum, rather than per-RAL, basis.

In 2006, Jackson Hewitt, concerned about its RAL program’s compliance with state loan broker and CSO laws, stopped taking payments on a per-RAL basis and

¹⁹ Linder Dep. at 37-38.

²⁰ San Giacomo Dep. at 44, 47.

²¹ Def.’s Suppl. Resp. to Pls.’ First Set of Ints., Resp. to Int. No. 1.

instead negotiated for lump-sum payments from the lending banks at the end of each tax season.²² For these same reasons, beginning in 2007 Jackson Hewitt prohibited its franchisees from charging application fees.²³ The change was a financial success for Jackson Hewitt: in 2006 under the new lump-sum payment arrangement, Jackson Hewitt earned more from its RAL-facilitation than it earned under the per-transaction arrangement in place in 2005.²⁴

And despite the change in payment arrangement, the company continues to reap large profits for its RAL facilitation efforts. In fiscal year 2008, the company reported over \$71 million in revenues from facilitating financial products such as RALs, in its franchise offices alone.²⁵ That figure amounts to 37% of Jackson Hewitt's total franchise revenue for 2008.²⁶

Argument

A. Answer to First Certified Question: Because it received both direct and indirect payments for facilitating RALs, Jackson Hewitt is subject to the CSO statute.

1. Jackson Hewitt is a CSO because it assists buyers in obtaining extensions of credit in return for the payment of money.

The controlling statutory definitions are straightforward, and clearly encompass Jackson Hewitt's role in the RAL transaction. 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 . . . obtain[s] an extension of credit for a buyer . . . [or] provid[es] advice or assistance to a buyer" in obtaining a loan. W.

²² Linder Dep. at 13-14, 40-43; Heimboach Dep. at 42, 47-49, 83.

²³ *Id.* at 63.

²⁴ *Id.* at 43-44.

²⁵ Jackson Hewitt, Inc.'s 2008 Form 10K at 34, attached as Exhibit K to Pls.' Mot. Partial Summ. J. (Doc. No. 200-6).

Va. Code § 46A-6C-2(a).²⁷ A “buyer” is “an individual who is solicited to purchase or who purchases the services of a credit services organization[.]” *Id.* § 46A-6C-1(1), and as this Court has held, a “buyer” under the meaning of the CSO statute includes “prospective borrowers.” *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 863 (W. Va. 1998).

Longstanding principles of statutory interpretation hold that the terms of a clear statute must be read “according to its unvarnished meaning.” *Arnold* at 863. Put another way, “If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery.” Syl. Pt. 4, *West Va. Health Care Cost Rev. Auth. v. Brooke Mem. Hosp.*, 472 S.E.2d 411 (W. Va. 1996). Equally well-settled is the maxim that, to the extent any interpretation is required, the provisions of the Consumer Credit and Protection Act (of which the CSO statute is part) are remedial and must be “liberally construed to protect consumers from unfair, illegal or deceptive acts.” Syl. Pt. 6, *Dunlap v. Friedman’s, Inc.*, 582 S.E.2d 841, 842 (W. Va. 2003).

²⁶ *Id.*

²⁷ West Virginia Code § 46A-6C-2(a) provides in full:

- (a) 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, provides, or represents that the person can or will provide, any of the following services:
- (1) Improving a buyer's credit record, history or rating;
 - (2) Obtaining an extension of credit for a buyer; or
 - (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.

Applying these principles to the undisputed facts outlined above, the CSO statute plainly applies to Jackson Hewitt in the RAL transactions at issue here. Jackson Hewitt unquestionably – indeed, admittedly – assists RAL purchasers in obtaining extensions of credit. True to its self-described status as loan “facilitator,” Jackson Hewitt handles all aspects of the RAL transaction for RAL borrowers, from negotiating terms with the lending banks, to marketing the availability of the product, to completing and submitting loan applications to the banks, to distributing the loan proceeds to the RAL purchasers. *See infra* at 6-7, 23-24. Jackson Hewitt’s role in the process is so all-encompassing that the RAL purchasers have no personal contact with the lending banks at all. Jackson Hewitt handles everything.

Nor is there any dispute that Jackson Hewitt facilitates RALs “in return for the payment of money or other valuable consideration.” W. Va. Code § 46A-6C-2(a). Before 2006, Jackson Hewitt received directly from the lending bank a documentation fee for each RAL Jackson Hewitt facilitated, plus it received a sizable share of other RAL fees. And after 2006, Jackson Hewitt – in a transparent, clumsy and ultimately futile attempt to evade state CSO laws – changed its compensation scheme to receive lump-sum payments from SBB&T for facilitating RALs. Despite the lump-sum payment arrangement, the fact remains that Jackson Hewitt was being paid for facilitating SBB&T RALs, *i.e.*, it was assisting the Plaintiffs obtain an extension of credit, in return for the payment of money. This makes Jackson Hewitt a credit services organization subject to the disclosure and consumer-protection provisions of the statute.

On the other end of the transaction, the Plaintiffs, who obtained RALs as a result of Jackson Hewitt’s acknowledged and indispensable facilitation of the RAL transaction,

are “buyers” under the statutory definition of that term. The Plaintiffs purchased, or were solicited to purchase, the services of a credit services organization. W. Va. Code § 46A-6C-1(1). Before 2006, the Plaintiffs paid Jackson Hewitt a “documentation fee” or “application fee” for their RALs. This fee was not charged to customers who wanted only tax preparation, and was direct payment to Jackson Hewitt for its credit services. And after 2006, the Plaintiffs paid Jackson Hewitt indirectly, through fees kicked back from the bank to Jackson Hewitt. The CSO statute makes no distinction between direct and indirect compensation; all that is required is that a buyer be solicited to purchase or purchase the services of a CSO. That is exactly what the Plaintiffs did, both before 2006 through the direct payment of the documentation fee and the lending bank’s sharing of fees with Jackson Hewitt, and after 2006, when Jackson Hewitt arranged for a lump-sum from the bank as payment for its RAL-facilitation services.

If the Legislature intended that direct payment to the CSO were required, the statute would define buyer as “an individual who is solicited to purchase or who purchases the services of a credit services organization *and makes a direct payment to the credit services organization.*” The italicized language is simply not in the statute, nor is there any basis for superimposing a requirement of direct payment. If direct payment were required, businesses could make an end-run around the statute by arranging for indirect payments from lenders, as Jackson Hewitt has tried to do here.

Further, there can be no dispute that the Plaintiffs in the RAL transaction are “prospective borrowers,” and squarely fit this Court’s characterization of the term “buyer” in *Arnold*, the only case in which this Court has examined the CSO statute. 511 S.E.2d at 863.

All of the above demonstrates the CSO statute applies to Jackson Hewitt's West Virginia RAL transactions, regardless of whether Jackson Hewitt is paid directly for facilitating RALs (as in tax years 2002-2005), or indirectly through lump-sum payments (as in tax years 2006-2008).

2. The statutory exemption for car dealers, who are paid for arranging loans in the same manner as Jackson Hewitt, makes clear that the CSO statute applies here.

West Virginia's CSO statute exempts a number of business activities from its coverage. W. Va. Code § 46A-6C-2(b)(1) – (b)(11) (exempting, among others, car dealers, banks, credit unions, real estate brokers, accountants, lawyers, and broker-dealers). Tax preparers and RAL facilitators like Jackson Hewitt are not among them. Standing alone, that fact is not outcome-determinative. However, the Legislature's recent exemption of car dealers – who are paid indirectly by lenders for facilitating loans, just like Jackson Hewitt – makes clear that the CSO statute applies regardless of whether the loan-facilitator is paid directly or indirectly for its services.

The Legislature exempted car dealers from the CSO statute in 2004. Like Jackson Hewitt, car dealers are paid for arranging credit not through up-front fees paid by the borrower, but *indirectly* by lenders for arranging car loans. Here's how car dealers are paid for facilitating car loans: a prospective car buyer completes a credit application at the dealership, and the dealership submits the application to a third-party lender that does business with the dealership. The lender gives the dealer the lowest rate the dealer can extend to the borrower, say 6% APR. The dealer marks up the rate, say to 7%, and offers the customer a loan from the lender at that rate. The loan, of course, is from the bank, not the dealer, and the customer does not pay the dealer directly for

arranging the loan. Instead, the bank periodically makes back-end payments to the dealership (in the amount of the difference between the rate offered by the bank and that extended by the dealer) for its help in arranging loans.²⁸

That is precisely the indirect payment arrangement Jackson Hewitt adopted beginning in 2006: the borrower pays no up-front fees for the loan, but the dealer is paid on the back-end of the transaction by the lender for arranging the loan. If Jackson Hewitt's interpretation of the statute were correct, and only entities that are paid directly by the borrower are CSOs, the Legislature would have no reason whatsoever to amend the statute to exempt car dealers. See *Appalachian Power Co. v. State Tax Dept. of West Va.*, 466 S.E.2d 424, 436-37 (W. Va. 1995) (“[T]he Legislature is presumed to have known and understood the laws they earlier enacted.”).

Rather than simply complain about application of the CSO statute to its business practices, Jackson Hewitt could have focused its efforts on obtaining an express exemption, just as the car dealers did five years ago. It did not do so, and the CSO statute plainly applies to its facilitation of RALs.²⁹

²⁸ Report of Expert Witness Harold A. Phillips, attached as Exhibit J to Pls.'s Mem. Opp. to Def.'s Mot. for Summ. J. (Doc. No. 216-7).

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B. Answer to Second Certified Question: The statute of limitations for an action alleging UDAP and CSO violations is four years under West Virginia Code § 46A-5-101(1).

Plaintiffs have alleged Jackson Hewitt violated the CSO provisions of Article 6C, Chapter 46A of the Code. The CSO statute expressly provides that a violation of Article 6C constitutes an unfair or deceptive act or practice, or UDAP:

The breach by a credit services organization of a contract under this article [Article 6C of Chapter 46A] or of any obligation arising from this article, is an unfair or deceptive act or practice.

W. Va. Code § 46A-6C-7(d).³⁰

Because a violation of the CSO statute is a UDAP, the statute of limitation applicable to UDAPs governs an action for violation of the CSO statute. The UDAP statute of limitation is contained in West Virginia Code § 46A-5-101(1), which provides:

With respect to violations of this Chapter 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 6 [46A-6-101 et seq.] of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred.

compensated in any way (whether by the consumer or the lender) to assist consumers in obtaining RALs from third-party lenders.” May 15, 2008 Commissioner’s Advisory Notice. *But see Gomez v. Jackson Hewitt, Inc.*, Case No. 30418-V Montgomery County Cir. Ct., Md.), Mem. Op. & Order, June 18, 2009 (contrary to the Maryland Commissioner’s determination finding RALs require direct payment). For all the reasons discussed in AARP’s Brief of Amicus Curiae, the *Gomez* decision is an outlier and should be given no weight.

³⁰ The UDAP provision of the CCPA states broadly, “Unfair methods of competition and unfair or deceptive acts or practices in trade or commerce are prohibited.” W. Va. Code § 46A-6-104. This Court has aptly observed this provision is “among the most broadly drawn provisions contained in the Consumer Credit and Protection Act[.]” *McFoy v. Amerigas, Inc.*, 295 S.E.2d 16, 19 (W. Va. 1982). The definitional section of the statute, West Virginia Code § 46A-6-102, spells out sixteen acts or practices that meet the definition of a UDAP, but expressly states the list is not exhaustive: “‘Unfair methods of competition and unfair or deceptive acts or practices in trade or commerce’ means and includes, but is not limited to, any one or more of the following” acts or practices listed in West Virginia Code § 46A-6-102(7)(A)-(P) (emphasis added). As stated above, the CSO statute provides that breaches of obligations imposed by the CSO statute likewise constitutes a UDAP.

Id.

The RAL transaction and the resultant violation of Chapter 46A's provisions arises from a "sale" as that term is defined in Chapter 46A. "Sale means any sale, offer for sale or attempt to sell . . . any services or offer for services for cash or credit." W. Va. Code § 46A-6-102(5). By obtaining RALs for its West Virginia store customers, Jackson Hewitt is offering those customers the sale of their services in obtaining RALs. This conclusion is reinforced by the statutory definition of "sale of services." "Sale of services means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another." W. Va. Code § 46A-1-102 (43). In the RAL transaction, Jackson Hewitt "furnishes or agrees to furnish [its] services" of facilitating the RAL transaction. Jackson Hewitt also "mak[es] arrangements to have services furnished by another," specifically, it serves as intermediary and facilitator of a loan between the RAL purchaser and the lending bank. Therefore, under these express statutory provisions, the applicable limitations period is four years after the issuance of the RAL.

The same result would obtain even if the CSO statute did not define a violation as a UDAP. A RAL can also be characterized as a "consumer loan," *id.* § 46A-1-102(15), and Plaintiffs are "consumers," *id.* § 46A-1-102(12).³¹ The limitations period

³¹ A "consumer loan" is:

A loan made by a person regularly engaged in the business of making loans in which:

(a) the debtor is a person other than an organization;

(b) the debt is incurred primarily for a personal, family, household, or agricultural purpose;

(c) either the debt is payable in installments or a loan finance charge is made; and

(d) either the principal does not exceed forty-five thousand dollars or the debt is secured by an interest in land or a factory-built home as defined in section two, article fifteen, chapter thirty-seven of this code.

for consumer loans that violate Chapter 46A (of which the CSO statute is part) is

likewise four years. *Id.* § 46A-6-101(1); Syl, Pt. 6, *Dunlap*, 582 S.E.2d at 841, 846).

C. Answer to Third Certified Question: The contractual agency disclaimers in the RAL applications are not enforceable.

The fine-print of the RAL application states: “You agree that neither your Tax Preparer nor [Jackson Hewitt, Inc.] is acting as your agent or is under any fiduciary duty to you regarding this Application or your RAL.”³² This self-serving agency disclaimer is flatly contradicted by the facts of the transaction, as described in Part D *supra*, and, for five separate reasons, does not exculpate Jackson Hewitt from liability for breach of agency duty.

1. The clause is unenforceable under West Virginia contract law.

Under West Virginia law, an exculpatory provision in a contract of adhesion that, if applied, would prohibit or limit a person from enforcing statutory or common law rights, is unconscionable and will only be enforced in exceptional circumstances. Syl. Pt. 2, *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002)

The contract at issue is indisputably a contract of adhesion. “[A]dhesion contracts’ include all ‘form contracts’ submitted by one party on the basis of this or nothing.” *Id.* at 273. In a contract of adhesion, “a party’s contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all.” *Id.* at n. 4. (citation

W. Va. Code § 46A-1-102(15). A “consumer” is “a natural person who incurs debt pursuant to a consumer credit sale or consumer loan, or debt or other obligations pursuant to a consumer lease.” *Id.* § 46A-1-102(12).

³² Attached as Exhibit 1 is one of the Plaintiffs’ RAL applications containing the putatively exculpatory language. The no-agency clause is contained on page 4, paragraph 12 of the single-spaced document.

omitted). The RAL application is a standardized form contract, drafted through negotiations between Jackson Hewitt and the lending bank, and presented to Jackson Hewitt customers on an “all or nothing” basis. Anyone who wants a RAL must sign the form, and there is no bargaining or negotiation as to the RAL terms between RAL applicants and Jackson Hewitt or anyone else.

The “no agency” clause purports to be exculpatory. Its purpose, as evidenced by the arguments Jackson Hewitt is now advancing, is to insulate Jackson Hewitt from liability under an agency theory, despite overwhelming and indisputable evidence that in fact it acts as the RAL borrower’s agent. The clause is unconscionable, and no exceptional circumstances exist that would render the clause enforceable.

2. An agency relationship is established through conduct, and cannot be disclaimed by fine-print provisions of adhesion contracts.

Jackson Hewitt’s agency disclaimer is a transparent attempt to mischaracterize a relationship that in fact has all the characteristics of an agency relationship. “Whether a relationship is characterized as agency in an agreement between parties . . . is not controlling.” Restatement (Third) of Agency § 1.02 (citing, *inter alia*, *MJ & Partners Rest. Ltd. P’ship v. Zadikoff*, 10 F. Supp. 2d 922, 932 (N.D. Ill.1998) (“the existence of an agency relationship is determined on the actual practices of the parties, and not merely by reference to a written agreement”), and *Prudential Ins. Co. v. Eslick*, 586 F. Supp. 763, 764 (S.D. Ohio 1984) (action by insurer against former salesman alleging breach of fiduciary duty; although contract between insurance company and former salesman characterized salesman as an “independent contractor,” nature of parties’ relationship must be determined by comprehensive factual analysis; court denied

insurer's motion for summary judgment on point that former salesman was its agent)).

As explained in the Restatement, "Actions may speak louder than words." Restatement (Third) of Agency §1.03, cmt e. "For example, if a lawyer accepts a retainer and files a complaint on behalf of a person, a client-lawyer relationship results although the lawyer has disclaimed in writing any intention to have such a relationship." *Id.*

As stated *supra* Part D, the *facts* of the relationship between the Plaintiffs and Jackson Hewitt support a finding of agency. These facts, and not self-serving disclaimers contained in impenetrable adhesion contracts, determine the existence of an agency relationship.

3. The clause is void on public policy grounds.

The clause is also unenforceable on public policy grounds. It purports to assert that Jackson Hewitt owes the Plaintiffs no fiduciary or agency duty, when one in fact exists under applicable law.

A clause in an agreement exempting a party from tort liability is . . . unenforceable on grounds of public policy, if . . . the injured party is similarly a member of a class which is protected against the class to which the party inflicting the harm belongs.

Murphy v. North Amer. River Runners, Inc., 412 S.E.2d 504, 509 (W. Va. 1991).

The Plaintiffs are members of a class of persons to whom Jackson Hewitt owes statutory and common-law obligations, and as the district court held, have sufficient evidence of breach of those duties. Under *Murphy*, the disclaimer cannot stand.

4. The clause is void because it is based on misrepresentations.

"A misrepresentation is an assertion that is not in accord with the facts."

Restatement (Second) of Contracts §159. Contract terms that are based on a misrepresentation of fact are voidable. *Id.* § 164 ("If a party's manifestation of assent is

induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

The “no agency” clause is based on the misrepresentation that Jackson Hewitt is not acting as the RAL borrower’s agent, and therefore is voidable by the Plaintiffs. Its purportedly factual statements are simply false. Jackson Hewitt cannot avoid liability by requiring a consumer to “agree” to a patently false statement. Its misrepresentation renders the “no agency” clause voidable.

5. The clause is voidable because of Jackson Hewitt’s abuse of its fiduciary relation to the Plaintiffs.

Plaintiffs have alleged Jackson Hewitt’s practice of accepting payments from the lending bank constitutes a breach of its agency duties. The district court concluded the Plaintiffs’ allegations of breach establish a genuine issue of material fact that must be determined by a jury. *See infra* at 2-3. Although that issue is not presently before this Court, to the extent the Plaintiffs can prove breach of fiduciary duties arising from the agency relationship, the agency disclaimer is void.

“If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless (a) it is on fair terms, and (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.” Restatement (Second) Contracts § 173. Jackson Hewitt never adequately informed the Plaintiffs of its kickbacks from the lending bank or of its payment relationship with the bank. Walter Hudnall, the person who prepared the Plaintiffs’ tax returns every year, never explained that Jackson Hewitt was receiving money from SBB&T. Indeed, Mr. Hudnall could not have explained the relationship to

the Plaintiffs – even he had no understanding of it.³³ While Mr. Hudnall, who has owned the St. Albans Jackson Hewitt franchise since 2002, did not know Jackson Hewitt was receiving kickbacks from SBB&T, Jackson Hewitt expects the Plaintiffs, who visit the office once a year, to have figured it out on their own. The Plaintiffs did not have a “full understanding of their legal rights and of all relevant facts” known to Jackson Hewitt. Therefore, the “no agency” clause is voidable by the Plaintiffs.

D. Answer to Fourth Certified Question: A tax preparer who helps a customer obtain a refund anticipation loan in exchange for compensation is an agent under West Virginia law.

West Virginia law recognizes an agency relationship in broad terms. “When a person is authorized and directed to act on behalf of another, that person or entity is generally recognized to be acting in the capacity of an agent.” *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 510 S.E.2d 764, 788 (W. Va. 1998). Put somewhat differently:

An agent in the restricted and proper sense is a representative of his principal in business of contractual relations with third persons; while a servant or employee is one engaged, not in creating contractual obligations, but in rendering service, chiefly with reference to things but sometimes with reference to persons when no contractual obligation is to result.

Syl. Pt. 3, *Thomson v. McGinnis*, 465 S.E.2d 922 (W. Va. 1995).

Applying these principles to the facts of this case, Jackson Hewitt cannot seriously contend it did not act as the Plaintiffs’ agent in the RAL transaction. Every aspect of the RAL transaction – from calculation of the borrower’s income tax refund, to completion and submission of loan application forms, to physically printing and giving

³³ Hudnall Dep. at 28-30, attached as Exhibit E to Pls.’ Mem. Opp. Def.s’ Mot. Summ. J. (Doc. No. 214).

to the borrowers the loan proceeds check – is handled for the borrower by Jackson Hewitt.

More specifically, the following facts conclusively establish this agency relationship:

- RAL borrowers authorize Jackson Hewitt to disclose their tax return information to a prospective RAL lender for purposes of obtaining a RAL.
- RAL borrowers prohibit Jackson Hewitt from disclosing their tax return information for any other purposes.
- Jackson Hewitt asks the RAL borrower a series of questions and completes the RAL application using its own proprietary computer software program.³⁴
- Jackson Hewitt prepares the RAL application – an electronic file containing various tax return data it transmits directly to the lending bank.³⁵
- RAL borrowers never deal directly with the lending bank; all contact with the bank is handled by Jackson Hewitt.³⁶
- On behalf of RAL borrowers, Jackson Hewitt files a form with the IRS authorizing electronic filing of the tax return.³⁷
- Jackson Hewitt tells the IRS which bank account should receive the borrower's income tax refund.³⁸
- Jackson Hewitt obtains from the IRS the borrower's "debt indicator," an electronic form indicating whether the borrower's refund is encumbered by other debt, such as back taxes.³⁹
- Jackson Hewitt sends the borrower's debt indicator to the lending bank, without which the lending bank will not issue a RAL.⁴⁰

³⁴ San Giacomo Dep. at 51-52, attached as Exhibit B to Pls.' Mem. Opp. Def.s' Mot. Summ. J. (Doc. No. 214).

³⁵ *Id.* at 59, 70-72.

³⁶ *Id.* at 73-74.

³⁷ *Id.* at 110-13.

³⁸ *Id.* at 110-13.

³⁹ *Id.* at 59-60, 64, 74-75.

⁴⁰ *Id.*

- Jackson Hewitt obtains from the IRS an “acknowledgment” that the return is complete and sends it to the lending bank (and after that, the lending bank’s “underwriting” process takes “less than a second.”)⁴¹
- Jackson Hewitt prints the RAL checks at its offices for its customers, makes a telephone call to the RAL borrower, and then informs SBB&T that the check was printed⁴² or provides the customer with a “cash card” “loaded” with the RAL proceeds.⁴³
- Jackson Hewitt intended to and did negotiate a competitive RAL price for its customers.⁴⁴

These undisputed facts establish that Jackson Hewitt represented the Plaintiffs in their contractual relations with the lending bank, and acted on their behalf, all at the Plaintiffs’ authorization and direction. The Plaintiffs simply could not obtain a RAL from SBB&T – *i.e.*, they could not enter into contractual relations with the bank – without the critical RAL-facilitation services provided by Jackson Hewitt.

Self-serving agency disclaimers or supposed “lack of consent” by Jackson Hewitt to serve as agents for RAL borrowers do not alter the fact of the agency relationship. As this Court has held, “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.” *Syl. Pt. 1, State ex rel. Yahn Elec. Co. v. Baer*, 135 S.E.2d 687, 690 (W. Va. 1964) (citations omitted). *See also* Restatement (Third) of Agency § 1.03 (“A person manifests assent or intention through written or spoken words or other conduct.”) Further, as the Restatement notes, “It is not necessary that the agent manifest assent to the principal.” *Id.* § 1.01 cmt a. The parties’

⁴¹ Turner Dep. at 60, attached as Exhibit C to Pls.’ Mem. Opp. Def.s’ Mot. Summ. J. (Doc. No. 214).

⁴² San Giacomo Dep. at 115.

⁴³ *Id.* at 30-31.

⁴⁴ *Id.* at 119-120.

arranging the loan. Instead, the bank periodically makes back-end payments to the dealership (in the amount of the difference between the rate offered by the bank and that extended by the dealer) for its help in arranging loans.²⁸

That is precisely the indirect payment arrangement Jackson Hewitt adopted beginning in 2006: the borrower pays no up-front fees for the loan, but the dealer is paid on the back-end of the transaction by the lender for arranging the loan. If Jackson Hewitt's interpretation of the statute were correct, and only entities that are paid directly by the borrower are CSOs, the Legislature would have no reason whatsoever to amend the statute to exempt car dealers. See *Appalachian Power Co. v. State Tax Dept. of West Va.*, 466 S.E.2d 424, 436-37 (W. Va. 1995) (“[T]he Legislature is presumed to have known and understood the laws they earlier enacted.”).

Rather than simply complain about application of the CSO statute to its business practices, Jackson Hewitt could have focused its efforts on obtaining an express exemption, just as the car dealers did five years ago. It did not do so, and the CSO statute plainly applies to its facilitation of RALs.²⁹

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The breach by a credit services organization of a contract under this article [Article 6C of Chapter 46A] or of any obligation arising from this article, is an unfair or deceptive act or practice.

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Because a violation of the CSO statute is a UDAP, the statute of limitation applicable to UDAPs governs an action for violation of the CSO statute. The UDAP statute of limitation is contained in West Virginia Code § 46A-5-101(1), which provides:

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1. The clause is unenforceable under West Virginia contract law.

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The contract at issue is indisputably a contract of adhesion. “[A]dhesion contracts’ include all ‘form contracts’ submitted by one party on the basis of this or nothing.” *Id.* at 273. In a contract of adhesion, “a party’s contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all.” *Id.* at n. 4. (citation omitted). The RAL application is a standardized form contract, drafted through

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As stated *supra* Part D, the *facts* of the relationship between the Plaintiffs and Jackson Hewitt support a finding of agency. These facts, and not self-serving disclaimers contained in impenetrable adhesion contracts, determine the existence of an agency relationship.

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The Plaintiffs are members of a class of persons to whom Jackson Hewitt owes statutory and common-law obligations, and as the district court held, have sufficient evidence of breach of those duties. Under *Murphy*, the disclaimer cannot stand.

4. The clause is void because it is based on misrepresentations.

"A misrepresentation is an assertion that is not in accord with the facts." Restatement (Second) of Contracts §159. Contract terms that are based on a

misrepresentation of fact are voidable. *Id.* § 164 (“If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

The “no agency” clause is based on the misrepresentation that Jackson Hewitt is not acting as the RAL borrower’s agent, and therefore is voidable by the Plaintiffs. Its purportedly factual statements are simply false. Jackson Hewitt cannot avoid liability by requiring a consumer to “agree” to a patently false statement. Its misrepresentation renders the “no agency” clause voidable.

5. The clause is voidable because of Jackson Hewitt’s abuse of its fiduciary relation to the Plaintiffs.

Plaintiffs have alleged Jackson Hewitt’s practice of accepting payments from the lending bank constitutes a breach of its agency duties. The district court concluded the Plaintiffs’ allegations of breach establish a genuine issue of material fact that must be determined by a jury. *See infra* at 2-3. Although that issue is not presently before this Court, to the extent the Plaintiffs can prove breach of fiduciary duties arising from the agency relationship, the agency disclaimer is void.

“If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless (a) it is on fair terms, and (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.” Restatement (Second) Contracts § 173. Jackson Hewitt never adequately informed the Plaintiffs of its kickbacks from the lending bank or of its payment relationship with the bank. Walter Hudnall, the person who prepared the Plaintiffs’ tax returns every year, never explained that Jackson Hewitt was receiving

money from SBB&T. Indeed, Mr. Hudnall could not have explained the relationship to the Plaintiffs – even he had no understanding of it.³³ While Mr. Hudnall, who has owned the St. Albans Jackson Hewitt franchise since 2002, did not know Jackson Hewitt was receiving kickbacks from SBB&T, Jackson Hewitt expects the Plaintiffs, who visit the office once a year, to have figured it out on their own. The Plaintiffs did not have a “full understanding of their legal rights and of all relevant facts” known to Jackson Hewitt. Therefore, the “no agency” clause is voidable by the Plaintiffs.

D. Answer to Fourth Certified Question: A tax preparer who helps a customer obtain a refund anticipation loan in exchange for compensation is an agent under West Virginia law.

West Virginia law recognizes an agency relationship in broad terms. “When a person is authorized and directed to act on behalf of another, that person or entity is generally recognized to be acting in the capacity of an agent.” *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 510 S.E.2d 764, 788 (W. Va. 1998). Put somewhat differently:

An agent in the restricted and proper sense is a representative of his principal in business of contractual relations with third persons; while a servant or employee is one engaged, not in creating contractual obligations, but in rendering service, chiefly with reference to things but sometimes with reference to persons when no contractual obligation is to result.

Syl. Pt. 3, *Thomson v. McGinnis*, 465 S.E.2d 922 (W. Va. 1995).

Applying these principles to the facts of this case, Jackson Hewitt cannot seriously contend it did not act as the Plaintiffs’ agent in the RAL transaction. Every aspect of the RAL transaction – from calculation of the borrower’s income tax refund, to completion and submission of loan application forms, to physically printing and giving

³³ Hudnall Dep. at 28-30, attached as Exhibit E to Pls.’ Mem. Opp. Def.s’ Mot. Summ. J. (Doc. No. 214).

to the borrowers the loan proceeds check – is handled for the borrower by Jackson Hewitt.

More specifically, the following facts conclusively establish this agency relationship:

- RAL borrowers authorize Jackson Hewitt to disclose their tax return information to a prospective RAL lender for purposes of obtaining a RAL.
- RAL borrowers prohibit Jackson Hewitt from disclosing their tax return information for any other purposes.
- Jackson Hewitt asks the RAL borrower a series of questions and completes the RAL application using its own proprietary computer software program.³⁴
- Jackson Hewitt prepares the RAL application – an electronic file containing various tax return data it transmits directly to the lending bank.³⁵
- RAL borrowers never deal directly with the lending bank; all contact with the bank is handled by Jackson Hewitt.³⁶
- On behalf of RAL borrowers, Jackson Hewitt files a form with the IRS authorizing electronic filing of the tax return.³⁷
- Jackson Hewitt tells the IRS which bank account should receive the borrower's income tax refund.³⁸
- Jackson Hewitt obtains from the IRS the borrower's "debt indicator," an electronic form indicating whether the borrower's refund is encumbered by other debt, such as back taxes.³⁹
- Jackson Hewitt sends the borrower's debt indicator to the lending bank, without which the lending bank will not issue a RAL.⁴⁰

³⁴ San Giacomo Dep. at 51-52, attached as Exhibit B to Pls.' Mem. Opp. Def.s' Mot. Summ. J. (Doc. No. 214).

³⁵ *Id.* at 59, 70-72.

³⁶ *Id.* at 73-74.

³⁷ *Id.* at 110-13.

³⁸ *Id.* at 110-13.

³⁹ *Id.* at 59-60, 64, 74-75.

⁴⁰ *Id.*

- Jackson Hewitt obtains from the IRS an “acknowledgment” that the return is complete and sends it to the lending bank (and after that, the lending bank’s “underwriting” process takes “less than a second.”)⁴¹
- Jackson Hewitt prints the RAL checks at its offices for its customers, makes a telephone call to the RAL borrower, and then informs SBB&T that the check was printed⁴² or provides the customer with a “cash card” “loaded” with the RAL proceeds.⁴³
- Jackson Hewitt intended to and did negotiate a competitive RAL price for its customers.⁴⁴

These undisputed facts establish that Jackson Hewitt represented the Plaintiffs in their contractual relations with the lending bank, and acted on their behalf, all at the Plaintiffs’ authorization and direction. The Plaintiffs simply could not obtain a RAL from SBB&T – *i.e.*, they could not enter into contractual relations with the bank – without the critical RAL-facilitation services provided by Jackson Hewitt.

Self-serving agency disclaimers or supposed “lack of consent” by Jackson Hewitt to serve as agents for RAL borrowers do not alter the fact of the agency relationship. As this Court has held, “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.” Syl. Pt. 1, *State ex rel. Yahn Elec. Co. v. Baer*, 135 S.E.2d 687, 690 (W. Va. 1964) (citations omitted). *See also* Restatement (Third) of Agency § 1.03 (“A person manifests assent or intention through written or spoken words or other conduct.”) Further, as the Restatement notes, “It is not necessary that the agent manifest assent to the principal.” *Id.* § 1.01 cmt a. The parties’

⁴¹ Turner Dep. at 60, attached as Exhibit C to Pls.’ Mem. Opp. Def.s’ Mot. Summ. J. (Doc. No. 214).

⁴² San Giacomo Dep. at 115.

⁴³ *Id.* at 30-31.

⁴⁴ *Id.* at 119-120.

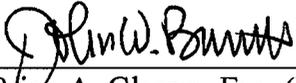
conduct is the factor that determines the existence of an agency relationship. Here, the Harpers authorized Jackson Hewitt to prepare their taxes to support the RAL application, to submit the application to the bank (thereby binding the Harpers to the terms specified in the RAL agreement), and to accept the RAL check and hold it for the Harpers to retrieve. Jackson Hewitt consented to this grant of authority by performing each of the acts it was authorized and directed by the Plaintiffs to perform.

Relief Sought

Plaintiffs urge this Court to rule as the Plaintiffs propose on each certified question.

Respectfully submitted,

Plaintiffs
By Counsel



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**SANTA BARBARA BANK & TRUST (SBBT) REFUND PROCESSING AND
REFUND ANTICIPATION LOAN (RAL) APPLICATION AND AGREEMENT**

(SBBT is a division of Pacific Capital Bank, N.A., P.O. Box 1270, Solana Beach, CA 92075)

A Program Available Through Jackson Hewitt Tax Service (R)

Page 1 of 5

**IMPORTANT DISCLOSURES:
PLEASE READ BEFORE YOU SIGN THIS AGREEMENT**

If you are owed a federal tax refund, you have a right to choose how you will receive your money. There are several options available to you. Some options cost money and some options are free. Please read about these options below.

- 1. You can file your tax return electronically and obtain your refund directly from the IRS for free.** If you file your return electronically, you can receive a refund check directly from the IRS within 21 to 28 days from the time you file your tax return or the IRS can deposit your refund directly into your bank account in as little as 9 to 16 days from the time you file your tax return. You do not have to obtain a RAL in order to take advantage of this option. **If you choose this option, you will have to pay your tax preparer to prepare and file your tax return. The IRS cannot deduct and pay tax preparer fees from your refund on your behalf.**
- 2. You can file your tax return electronically and have SBBT process your income tax refund without obtaining a RAL from SBBT.** If you file your tax return electronically you can request the IRS to deposit your refund with SBBT. Upon receipt of your refund, SBBT will deduct and pay from your refund any fees charged by your tax preparer for the preparation and filing of your electronic tax return and any other amounts authorized by you and disburse the balance of your refund to you in as little as 9 to 16 days from the time you file your tax return. SBBT will deduct \$25 from your refund for this service (SBBT charges an additional \$10 to process your state refund).
- 3. You can file your tax return electronically and apply for a RAL from SBBT.** If you file your tax return electronically and apply for and are approved for a RAL, the loan proceeds will be available to you in as little as 1 to 2 business days from the time you file your tax return. A RAL is a loan from SBBT in the amount of all or part of your refund. Your refund is used to pay back the loan. **If SBBT does not receive your refund, you are responsible for paying back SBBT the full amount of the loan.** If you apply and are approved for a Money Now advance on your RAL, up to \$1085 of your RAL proceeds will be available to you within 1 hour from the time you file your tax return. You do not have to apply for a Money Now RAL Advance in order to apply for a RAL.

PLEASE NOTE: The average repayment term for a RAL is 11 days. Because of the short repayment term, the Annual Percentage Rate (APR) on a RAL may be high compared to other sources of credit and it may cost less to use other sources of credit such as credit cards, equity lines, etc., instead of a RAL. Please refer to your Truth In Lending Act (TILA) disclosures and consult with your tax preparer to determine the cost of your RAL and/or Money Now RAL Advance before you accept any loan proceeds from SBBT.

4. Collection of an outstanding RAL, Money Now RAL Advance or Holiday Loan. If you have an outstanding unpaid RAL, Money Now RAL Advance or Holiday Loan with SBBT or any other RAL lender named in this application, SBBT will use this signed agreement as your authorization to deduct the amount of the outstanding debt from your refund and pay the outstanding amount to the appropriate lender on your behalf prior to disbursing the remainder of your refund, if any, to you (if you applied for a RAL, your RAL application may also be denied). SBBT may be acting as a third party debt collector in collecting this debt. **If you have an outstanding unpaid RAL, Money Now RAL Advance or Holiday Loan and do not want some or all of your tax refund to be used to repay this unpaid debt, do not sign this application. See Section 6 below for more information concerning the collection of outstanding debts.**

F 10/25/04

TaxYear: 2004 File: dxw12608.dun TIN: 235293752 Apr 24, 2008 3:00 PM Machine: CROA2 Pg 6

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CONFIDENTIAL

EXHIBIT

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SBBT REFUND PROCESSING AND REFUND ANTICIPATION LOAN (RAL) APPLICATION AND AGREEMENT (Page 2 of 5)

APPLICANT INFORMATION (Complete for both taxpayers only if filing a joint return and application.)

Taxpayer's Name CHRISTIAN R HARPER Social Security No. [REDACTED]
Spouse's Name ELIZABETH J HARPER Social Security No. [REDACTED]

1. **IRS REFUND PROCESSING:** As used in this Refund Processing and Refund Anticipation Loan Application and Agreement ("Agreement") the term "you" and "your" refers to the person signing below as the "Taxpayer" (or, if this is a joint return, both "Taxpayers"). SBBT refers to Santa Barbara Bank & Trust, a division of Pacific Capital Bank, N.A., P.O. Box 1270 Solana Beach, CA 92075. You are having your 2004 federal (and state if applicable) income tax return electronically prepared and filed by your Jackson Hewitt Tax Service^(R) Tax Preparer/Electronic Filer ("Tax Preparer") and hereby authorize SBBT to receive your income tax refund(s) on your behalf and to make disbursements from your refund(s) as authorized by this Agreement. You authorize SBBT to establish a deposit account (the "Account") in your name for the purpose of receiving a direct deposit of your refund from the Internal Revenue Service ("IRS") and/or state taxing authorities. If and when SBBT receives your income tax refunds, you authorize SBBT to deduct from your Account any amounts, fees and charges authorized by this Agreement and disburse any remaining balance in the Account to you using the disbursement method indicated below. Unless there are delays by the IRS, you can expect your refund to be direct deposited with SBBT within 9 to 16 days from the time the IRS accepts your electronic tax return. If you apply for and are approved for a RAL and/or a Money Now RAL Advance, your RAL and/or Money Now RAL Advance proceeds will be disbursed to you using the same disbursement method selected below. SBBT's federal refund processing fee is \$25.

DISBURSEMENT METHOD:

Accelerated Check Refund: If you choose this option, the balance of your Account or your RAL proceeds (if applicable) will be disbursed to you via an SBBT cashier's check printed by your Tax Preparer.

Accelerated Direct Deposit: If you choose this option, the balance of your Account or your RAL proceeds (if applicable) will be deposited directly to your bank account. Please enter your bank account information below. If you enter your bank account information incorrectly and your deposit is returned to SBBT, the Account balance will be disbursed to you via an SBBT cashier's check printed by your Tax Preparer. If the deposit is not returned to SBBT, you will be responsible for the loss.

RTN _____ DAN _____

Accelerated Card Refund (CashCard): If you choose this option, you authorize SBBT to transfer the balance of your Account or your RAL proceeds (if applicable) to Wright Express Financial Services, Inc. and its affiliates or authorized designees (collectively "WE") to allow you to participate in, and obtain your refund or RAL proceeds via, the Jackson Hewitt CashCard Program (the "Card Program") offered by JHI and WE through your Tax Preparer. In addition to SBBT's refund processing fee, there are other fees and charges that you will have to pay if you choose this option, including fees to access your funds. Please review the Jackson Hewitt CashCard Agreement and Disclosure Statement prior to selecting this option to learn of the maximum fees and charges that may apply and certain other terms and conditions.

Accelerated Card Refund (Payroll Card): If you choose this option, you authorize SBBT to deposit the balance of your Account or your RAL proceeds (if applicable) to your Payroll Card bank account to allow you to obtain your refund or RAL proceeds via your Payroll Card.

2. **STATE REFUND PROCESSING:** If you are also filing your state tax return electronically and elect to have your state refund disbursed by SBBT, you hereby authorize your 2004 state refund amount to be directly deposited from the appropriate state agency to the Account and disbursed to you using the disbursement method selected above. SBBT's state refund processing fee is \$10.

3. **REFUND ANTICIPATION LOAN ("RAL") APPLICATION AND AGREEMENT:** In addition to choosing to have your refund processed as described above, you are requesting a loan from SBBT in the amount of your 2004 IRS income tax refund (the maximum loan amount is \$7000). If you are approved for a loan under this option, your loan proceeds minus authorized deductions will be disbursed within 24 hours after the IRS accepts your electronic tax return using the disbursement method you selected above. If SBBT is unable to approve a RAL for you in the full amount of your refund, you agree that SBBT may provide a RAL to you in a lesser amount at SBBT's discretion. If you are approved for a RAL, you authorize SBBT to collect the outstanding RAL from your Account upon receipt of your IRS refund. If SBBT does not receive your IRS refund, you will remain obligated to SBBT for the entire RAL amount. The finance charge for a RAL is equal to 3% of the total loan amount but not less than \$10 or more than \$80. The finance charge will be increased by \$10 if the tax refund includes Earned Income Credit (EIC). The finance charge, federal refund processing fee and any other fees and charges authorized by this Agreement will be deducted from the RAL before the RAL proceeds are disbursed to you. If you are approved for a RAL, the terms and conditions of this Agreement and applicable Truth-in-Lending Act (TILA) disclosure will govern your RAL, including your obligation to repay all amounts loaned to you.

4. **MONEY NOW RAL ADVANCE:** In addition to applying for a RAL, you are requesting SBBT to advance up to \$1065 of your expected RAL proceeds to you before your tax return has been accepted by the IRS. You acknowledge that if your request for a Money Now RAL Advance is approved, the RAL advance amount will be disbursed to you within one hour after your loan application and tax return have been filed using the disbursement method you selected above. If both your RAL and your Money Now RAL Advance are approved, you authorize SBBT to pay the RAL advance amount from the proceeds of your RAL and increase the RAL finance charge by \$35. If you are approved on your Money Now RAL Advance but denied on your application for a RAL, the outstanding RAL Advance amount, the Money Now RAL Advance fee of \$35 and any other fees and charges authorized by this agreement, including the \$25 federal refund processing fee, will be deducted from your Account if and when SBBT receives your IRS refund. If SBBT does not receive your IRS refund your full RAL advance amount and the \$35 Money Now RAL Advance fee will be due and payable on demand.

SBBT REFUND PROCESSING AND REFUND ANTICIPATION LOAN (RAL) APPLICATION AND AGREEMENT (Page 3 of 5)

Name: **CHRISTIAN R & ELIZABETH J HARPER**

SSN: [REDACTED]

5. CONSENT/AUTHORIZATION: If you apply for and are approved for a RAL, you authorize SBBT to deduct from your Total Refund Anticipation Loan Amount the Total Fees and Charges shown on Line (i) below and any amounts due pursuant to Section 6 and disburse the balance of the Account proceeds to you in accordance with the disbursement method selected above. The actual loan amount, amount financed, finance charge, APR, and fees will be disclosed to you on your Truth-In-Lending Disclosure Form. When SBBT receives your 2004 federal tax refund, you authorize SBBT to deduct from your Account the Total Refund Anticipation Loan Amount disclosed on your Truth-In-Lending Form prior to disbursing the balance of your Account to you. If SBBT does not receive all or part of your tax refund, you will be responsible for paying off the loan amount still outstanding. **Denied RAL:** If your loan is denied, you authorize SBBT to continue to process your refund in accordance with Section 1. If you have selected only refund processing as described in Section 1, you authorize SBBT to deduct from the Account the Total Fees shown on Line (g) below and any outstanding amounts described in Section 6, prior to disbursing the balance of the Account to you (state refund processing fee will only be deducted from the Account after the state refund is received).

a. Tax preparation and electronic filing fees (payable to your Tax Preparer)	\$	<u>106</u>
b. Documentation fees (payable to your Tax Preparer)	\$	<u>20</u>
c. SBBT federal refund processing fee*	\$	<u>25</u>
d. SBBT state refund processing fee*	\$	<u>10</u>
e. Additional products and services purchased from Jackson Hewitt, Inc.	\$	<u> </u>
f. Other	\$	<u> </u>
g. Total Fees	\$	<u>161</u>
h. Total Estimated Prepaid Finance Charge (payable to SBBT)*	\$	<u>90</u>
i. Total of Fees and Finance Charge	\$	<u>251</u>

* A portion of these fees may be shared with Jackson Hewitt, Inc., and your tax preparer.

6. a. COLLECTION OF AN OUTSTANDING RAL. You authorize JHI and SBBT to exchange information about your current and prior RALs with other RAL lenders including Bank One, N.A., Beneficial National Bank/Household Bank, Imperial Capital Bank, First Republic Bank, First Security Bank, River City Bank, First Bank of Delaware, and Republic Bank & Trust Company/ Refunds Now. If you have outstanding unpaid RALs from prior years with SBBT or any one or more of these lenders that have not been discharged in bankruptcy, you irrevocably authorize SBBT to deduct from the Account, after deducting the applicable fees as set forth in Section 5, the total amount due on the prior year RALs and forward such amount(s) to the appropriate RAL lender(s) prior to disbursing the balance of the Account to you.*

b. COLLECTION OF OUTSTANDING TAX PREPARER FEES: If you still owe fees to a Tax Preparer for preparing your prior year federal (and state if applicable) tax return, you authorize SBBT to deduct the amount of the outstanding fees from your RAL proceeds after the applicable fees in Section 5 and amounts pursuant to 6(a) and (c) have been deducted and prior to disbursing the balance of your RAL proceeds to you or, in the event your RAL is denied and your refund is processed according to Section 1, you authorize such outstanding Tax Preparer fees to be deducted from the Account after the applicable fees as set forth in Section 5 and amounts in Section 4 and Section 6(a) and (c) have been deducted from the Account and prior to disbursing the balance of the Account to you.*

c. COLLECTION OF OUTSTANDING HOLIDAY LOAN: If you (either Taxpayer if this is a joint return) have an outstanding loan ("Holiday Loan") provided by SBBT, Imperial Capital Bank, Household Bank or HSBC Bank USA, N.A. under the Holiday Express Loan Program and the Holiday Loan has not been discharged in bankruptcy, you authorize SBBT to deduct from your RAL proceeds or the Account, after deducting the applicable fees and charges disclosed in Section 5, the total amount due on the Holiday Loan and apply it towards your outstanding Holiday Loan balance with SBBT or forward the amount to HSBC Bank USA, N.A. prior to disbursing the balance of the RAL proceeds or Account to you.*

* You understand that SBBT may be acting as a third party debt collector hereunder in attempting to collect a debt pursuant to Section 6 and may use your authorization pursuant to this Agreement and any information obtained in connection with this Agreement to collect a delinquent RAL, Holiday Loan or Tax Preparer fees as noted above.

7. SHARING INFORMATION: You authorize Jackson Hewitt Tax Service, the preparer and transmitter of your tax return and the IRS (or state taxing authority) to disclose your 2004 tax return or refund information to SBBT. You acknowledge that SBBT may share information about you with a) Jackson Hewitt Tax Service, the preparer and transmitter of your tax return and with other third parties to the extent necessary to process your product request and b) financial institutions who are performing third-party debt collection on behalf of SBBT. This sharing is not subject to your consent or right to opt out. By signing below, you consent to SBBT, Jackson Hewitt Tax Service, the preparer and transmitter of your tax return, and other RAL lenders sharing information about you with each other from time to time, including without limitation for the purposes of underwriting RALs and other loans and to offer you other products and services. You may revoke this consent by contacting SBBT in writing at P.O. Box 1270, Solana Beach, CA 92075. California residents will be asked to sign a separate consent. **Consumer Reports:** By signing below, you authorize SBBT or Jackson Hewitt Tax Service to obtain consumer reports on you from time to time in connection with your RAL or to offer you additional products or services.

8. IDENTIFICATION OF TAXPAYER: You hereby certify that you have presented your Tax Preparer with one form of picture I.D. issued to you by a government agency and your valid social security card or IRS label showing your name and SSN and, if you are claiming dependents, valid social security cards for each dependent claimed on your tax return.

SBBT REFUND PROCESSING AND REFUND ANTICIPATION LOAN (RAL) APPLICATION AND AGREEMENT (Page 4 of 5)

Name: CHRISTIAN R & ELIZABETH J HARPER

SSN: [REDACTED]

9. SECURITY INTEREST AND ASSIGNMENT. You hereby assign to SBBT your 2004 federal income tax refund, your Account, and all funds deposited therein, to the extent necessary to reimburse SBBT for your RAL or Money Now RAL Advance and/or facilitate collection by SBBT of any other amounts pursuant to this Agreement. You also grant SBBT a security interest in the same. You agree that SBBT may assign, sell or transfer its ownership of the RAL and all or part of its rights arising under this Agreement to a third party or affiliate of SBBT and that SBBT may make any transfers from the Account necessary to accomplish the assignment, sale or transfer. You may not revoke this security interest or any assignment.

10. MISCELLANEOUS. (a) The provisions in this Agreement survive the issuance of the ACR check, the approval of this Agreement and the execution and delivery of the RAL proceeds. (b) The enforcement and interpretation of this Agreement and the transactions contemplated herein (including, without limitation, the applicable interest rate) shall be governed by the laws of the State of California applicable to contracts executed and to be performed entirely in the State of California by residents of the State of California, without regard to the conflicts of laws, and, to the extent applicable, by the laws of the United States of America. (c) You agree to pay any costs of collection, including reasonable attorneys' fees, if the RAL is not paid when due.

11. CERTIFICATION. You hereby certify that: (a) you are not delinquent in the payment of taxes, either individual or business, to the IRS or any state agency; (b) you are not delinquent in the payment of any child support or alimony; (c) you are not delinquent in the payment of any student loans, Veteran Administration loans or other Federally sponsored loans; (d) you have not previously filed a 2004 federal income tax return; (e) you have not paid any estimated tax and/or did not have any portion of your 2003 refund applied to your 2004 taxes; (f) you are of legal age to enter into contracts in the State where you reside; (g) you do not have a power of attorney presently in effect or on file with the IRS to direct your federal tax refund to any third party; (h) you have read all documents relating to this Agreement, including disclosure statements; and (i) you are not presently making regular payments or are delinquent in making such payments to the IRS for unpaid taxes in prior years.

12. ACKNOWLEDGEMENT REGARDING TAX PREPARER AND JHI. 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. Among other things, you agree and consent to the receipt by your Tax Preparer and/or JHI of fees as set forth in this Agreement.

SIGNATURES: By signing below, you acknowledge that everything you have stated in this Agreement is true and correct. You acknowledge that you have read and understand and agree to each of the terms and conditions herein. If approved for a RAL, you promise to pay upon demand or from the account the "Total Loan Amount" disclosed on your RAL Truth-in-Lending disclosure form. You acknowledge receiving a completed copy of this Agreement and, among other things, consent to the collection authorizations in Section 6 above and the certification in Section 11 above. If you are applying for a RAL, you also acknowledge receiving a Truth-in-Lending form which includes additional important disclosures, terms and conditions concerning your RAL and you acknowledge that you have read and understand these additional disclosures and agree to the terms and conditions therein. If you apply for and receive a RAL and/or a Money Now RAL Advance and the tax refunds deposited to your account are insufficient to reimburse SBBT for your RAL and/or Money Now RAL Advance, you promise to pay your RAL and/or Money Now RAL Advance immediately upon demand. If you elected to participate in the Payroll Card program or the CashCard program, you acknowledge that you have received, read, understand and agree to the terms and conditions applicable to those programs.

Signature of Taxpayer Date

Signature of Joint Taxpayer (if joint application) Date

Witness (Tax Preparer) Date

PLEASE NOTE: YOUR RAL OR MONEY NOW RAL ADVANCE CAN BE DECLINED BY SBBT!

If you applied for a RAL and your RAL request is denied or if you decline to accept your RAL proceeds for any reason, SBBT will keep your Account open to receive your tax refund(s) and in the event that SBBT receives your tax refund(s), SBBT will process your tax refund(s) and make deductions and disbursements from your Account in accordance with the terms and conditions of this Agreement. If you applied for a RAL and a Money Now RAL Advance and your request for a Money Now RAL Advance is declined, SBBT will continue to process your RAL request in accordance with the terms and conditions of this Agreement and the RAL Truth-in-Lending Disclosure provided with this application. If your request for a Money Now RAL Advance is approved but your RAL request is denied (e.g., the IRS acknowledgment indicates that your tax refund is going to be offset to pay outstanding taxes or government agency debt), SBBT will keep your Account open to receive your tax refund(s) and, in the event that SBBT receives your tax refund, SBBT will process your Money Now RAL Advance and your tax refund in accordance with the terms and conditions of this Agreement and the Money Now RAL Advance Truth-in-Lending Disclosure.

FEDERAL ELECTRONIC FUND TRANSFER ACT DISCLOSURES: The Federal Electronic Fund Transfer Act provides you with certain rights and obligations regarding the preauthorized federal and state income tax refund that will be electronically deposited into your Account established at SBBT for that purpose. If you believe that there is an error or if you have a question about your Account, write to Santa Barbara Bank & Trust, P.O. Box 1270, Solana Beach, California 92075 or telephone (888) 353-7228 and provide SBBT with your name, a description or explanation of the error and the dollar amount of the suspected error. SBBT will advise you of the results of its investigation within 10 business days.

Name: CHRISTIAN R & ELIZABETH J HARPER

SSN: [REDACTED]

USA PATRIOT ACT DISCLOSURE: To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means for you: When we open an account for you for the purpose of receiving your IRS refund deposit or if you apply for one of our products, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

TRUTH IN SAVINGS DISCLOSURE: The Account is being opened for the purpose of receiving your (both spouses if this is a jointly filed return) 2004 federal (and 2004 state, if applicable) income tax refund. No fee is charged for opening the Account. No other deposits may be made to the Account. No withdrawals will be allowed from the Account until all disbursements and payments authorized by this agreement have been made. No interest will be paid on the deposit. The Account will be closed after all authorized deductions have been made and any remaining balance has been disbursed to you.

New York Residents: A credit report may be requested in connection with your Agreement. At your request SBBT will tell you whether or not a credit report was obtained and, if so, the name and address of the credit reporting agency that furnished the report. **Ohio Residents:** Ohio laws against discrimination require that all creditors make credit equally available to all credit-worthy customers and that credit-reporting agencies maintain separate credit histories on each individual upon request. The Ohio Civil Rights Commission administers compliance with this law. **Wisconsin Residents:** Wisconsin law provides that no agreement, court order, or individual statement applying to marital property will affect a creditor's interest unless, prior to the time credit is granted, the creditor is furnished with a copy of the agreement, court order, or statement, or has actual knowledge of the adverse provision.

Santa Barbara Bank & Trust Privacy Notice

Dear Customer: In the process of applying for a tax-related bank product from Santa Barbara Bank & Trust (SBBT), you were required to provide us with information about yourself and we obtained information about you from others. The Federal Financial Privacy Law requires us to provide you with this statement. In this Privacy Notice, "Confidential Information" means most non-public personally identifiable information about you. This Notice applies only to individuals who have applied for a tax-related bank product from SBBT. We may change our privacy policy at any time, giving you any notice that may then be required.

Confidential information we collect. The Confidential Information that we collect about you includes information in your application and your tax return in each year that you applied for a tax-related financial product, such as your name, address, social security number, income, deductions, refund and the like. We also collect information about your transactions with us, other lenders, tax preparers and similar providers, such as payment histories or balances due or tax information. We may also collect information concerning your credit history from a credit-reporting agency.

Information we share and with whom. We may disclose your Confidential Information to nonaffiliated third parties as permitted by law. SBBT and other tax-related bank product providers may disclose information to each other about their experiences with you in order to collect outstanding tax-related loans or tax preparation fees, or to prevent actual or potential fraud, unauthorized transactions, claims or other liability. We may also disclose Confidential Information with your consent or as otherwise permitted by law. Your signed bank product application and agreement included a consent to certain sharing of information. You may revoke that consent by notifying us at any time. If you revoke, we will continue the processing of any pending application but we will not share the information you asked us not to share unless otherwise permitted by law.

Former customers. These policies continue to apply after you become a former customer.

Joint marketing. We may disclose all of the Confidential Information that we collect as described above to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing arrangements. Before we share Confidential Information with any of these companies, we require that they agree in writing to protect the information and limit its use to the business purpose of our agreement with them.

Security procedures we use to protect your Confidential Information. Inside SBBT, your information is accessible only to employees who need the information in order to process your product request, answer your questions or determine the types of additional products or services that we think may interest you. We have a formal Code of Ethics and train our employees on their responsibility to maintain the privacy of your Confidential Information. We also maintain physical, electronic and procedural safeguards and that comply with federal standards to guard your Confidential Information.

Questions? If you have any questions regarding our Privacy Policy, please call 888-353-7228.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiffs,

v.

Case No. 35295

JACKSON HEWITT, INC.,

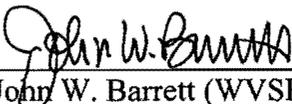
Defendant.

Certificate of Service

The undersigned hereby certifies that the foregoing **Plaintiffs' Brief** was served upon the Defendant as follows on this the 23rd day of December, 2009:

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