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June 7, 2012

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RE: *State of West Virginia ex rel. McGraw v. JP Morgan Chase & Co.*  
Civil Action No. 11-C-094-N, Mason County Circuit Court

Gentlemen:

I will start by pointing out that the Attorney General cannot enter into a stipulation that extinguishes claims or rights vested with the State. The private agreement between parties in a prior class action does not prohibit public proceedings brought by a non-party to that release. Support for this proposition can be found in the Supreme Court's decision in *Equal Employment Opportunity Commission v. WaffleHouse*, 534 U.S. 279 (2002), where the Equal Employment Opportunity Commission (EEOC) filed an enforcement action against an employer on behalf of a former employee for violations of the Americans with Disabilities Act. The Supreme Court held that a mandatory arbitration clause in the former employee's employment contract did not bar the EEOC from pursuing victim-specific judicial relief on behalf of the employee. The Court reasoned that "[t]o hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function." *Id.* at 296.

Similarly, in *Commodity Futures Trading Commission v. Commercial Hedge Services, Inc.*, 422 F. Supp. 2d 1057 (D. Neb. 2006), a federal district court held that a federal agency was not barred from seeking restitution for private parties who had entered into settlement agreements with the company and received money. The court found that when private parties settle their disputes, without the consent of the government agency, those settlements cannot preclude the government agency from later seeking additional or full restitution for those specific individuals. *Id.* at 1061. *See also, Herman v. South Carolina National Bank*, 140 F.3d 1413, 1425 (11<sup>th</sup> Cir. 1998) (recognizing the "well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests").

By comparison, the plaintiffs in *Kardonick* did not have the authority to waive or release any right inherent and statutorily vested with the sovereign. *See, Commonwealth v. Budget Fuel Co.*, 122 F.R.D. 184, 185-186 (E.D. Pa. 1988). As such, the proposed stipulation limits the

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rights of the State more so than the *Kardonick* settlement when considered in light of prevailing law.

In the instant state court enforcement action, the West Virginia Attorney General's Office, pursuant to the West Virginia Consumer Credit and Protection Act (WVCCPA), seeks injunctive relief, civil penalties, disgorgement, restitution, as well as all other relief as the court deems appropriate. Courts have consistently held that the consumer protection law is to be broadly construed to effect its object of preventing unfair and deceptive practices and protecting the public. *Duncan v. J.P. Morgan Chase N.A.*, 2011 WL 5359698 (S.D. W.Va. 2011), *State ex rel. McGraw v. Imperial Marketing*, 472 S.E.2d 792, 798 (1996). The WVCCPA grants a number of remedies to the Attorney General.

Although the release in the *Kardonick* settlement is intended to limit members of the class the right to seek further relief, it does not prohibit the State from enforcing the provisions of the WVCCPA, W. Va. Code § 46A-1-101, et seq. Rather, because this release was part of an agreement entered into by private parties, its effect is only binding on the parties to the settlement.

Nevertheless, the State agrees that entering into a stipulation to clarify some of the issues addressed in the *Kardonick* settlement would aid all parties in the instant action. Accordingly, I've attached an alternative stipulation (which is not much different from your proposal) that would address the issues mentioned and allow the lawsuit to continue appropriately.

Sincerely,



L. Lee Javins, II

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

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

*Plaintiff,*

v.

Civil Action No. 11-C-94-N

JPMORGAN CHASE & CO. and  
CHASE BANK, USA, N.A.

*Defendant.*

AGREED STIPULATION

Whereas, Defendants JPMorgan Chase & Co. (“JPMorgan”) and Chase Bank USA, N.A. (“Chase”) aver that they have made certain monetary refunds to some of their West Virginia credit card customers as a result of a class action settlement in *Kardonick v. JPMorgan Chase*, No. 10-cv-23235 (U.S. District Court, S.D. Fla.) (“*Kardonick*”), and

Whereas, the West Virginia class members did not have standing to bring or dismiss claims that are inherent and statutorily vested with the State of West Virginia, and the State was not a class member to the *Kardonick* settlement, and

Whereas, in the instant action the State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General is not seeking to recover funds that have actually been paid to West Virginia consumers by virtue of the *Kardonick* settlement, therefore, the State will agree to a dollar for dollar credit for any sums received by West Virginia consumers as a result of the *Kardonick* settlement, and

JPMorgan, Chase, and the State, acting through its Attorney General, Darrell V. McGraw, Jr., hereby STIPULATE as follows:

1. The State will grant Defendants JPMorgan and Chase a dollar-for-dollar credit offset in the amount of money actually paid by said Defendants to their West Virginia credit card customers as restitution for payment protection plan charges in the *Kardonick* settlement as an offset in any recoveries obtained in the instant action. The State otherwise reserves all other rights that it may have in the instant action, including without limitation, the right to pursue injunctive relief, civil penalties, equitable remedies, the equitable relief of disgorgement, fees and costs of court, interest on amounts other than the dollar-for-dollar credit, and any other damage elements that may otherwise be available to the State under law or equity.

2. The rights reserved by the State include without limitation the State's rights pursuant to Article 7 of the West Virginia Consumer Credit and Protection Act, including the State's rights to seek disgorgement and/or restitution and any other appropriate relief under W. Va. Code § 46A-7-108, and also including without limitation the State's rights to seek relief, such as statutory penalties, pursuant to W. Va. Code § 46A-7-111(2).

3. In consideration for the foregoing stipulation, Chase agrees (a) not to seek enforcement of the *Kardonick* injunction against the State or its counsel in connection with any claim asserted in this action, and (b) not to undertake any action of any kind against the State or its counsel in the *Kardonick* court in connection with the claims asserted in this action. Chase reserves all other rights and defenses it may have to the claims asserted in the action, including but not limited to any rights and defenses that Chase may have under W. Va. Code § 46A-7-111(1).

DATED: May \_\_, 2012

STIPULATED AND AGREED TO BY:

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