

1 State of New Hampshire Banking Department

2 In re the Matter of:) Case No.: 10-004
3 State of New Hampshire Banking)
4 Department,) Adjudicative Hearing Decision: Dargon
5 Petitioner,) Law Firm P.L.L.C. (a/k/a
6 and) www.dargonlaw.com), and Daniel Paul
7 Dargon Law Firm P.L.L.C. (a/k/a) Dargon, Esq.
8 www.dargonlaw.com), Daniel Paul Dargon,)
9 Esq., Stephen R. Kasmar, Esquire,)
10 Joseph D. Becher, Esquire, Eric J.)
11 Simenson, Esquire, Joseph R. Russell,)
12 Esquire, Patricia Ellis, Esquire,)
13 Jeffery B. Merrill, Esquire, Peter)
14 Larkowich, Michelle Preve, and Lacie)
15 Kingsbury,)
16 Respondents)
17)

18 I. PROCEDURAL BACKGROUND

19 On April 1, 2010, the Bank Commissioner issued an Order to Show Cause
20 and Cease and Desist against Respondents Dargon Law Firm P.L.L.C. (a/k/a
21 www.dargonlaw.com) ("Respondent Dargon Law Firm"), and Daniel Paul Dargon,
22 Esq. ("Respondent Dargon"). An Amended Order to Show Cause and Cease and
23 Desist was issued October 1, 2010 which added Respondents Stephen R. Kasmar,
24 Esquire, Joseph D. Becher, Esquire, Eric J. Simenson, Esquire, Joseph R.
25

1 Russell, Esquire, Patricia Ellis, Esquire, Jeffery B. Merrill, Esquire,
2 Peter Larkowich, Michelle Preve, and Lacie Kingsbury ("Other Respondents").
3 A Notice of Hearing pertaining solely to Respondent Dargon Law Firm and
4 Respondent Dargon (Collectively "Dargon") was issued October 1, 2010. This
5 Notice of Hearing was amended December 1, 2010.¹ The adjudicative hearing
6 was held on December 2, 3 and 6, 2010 before Presiding Officer Stephen J.
7 Judge ("Presiding Officer") at the New Hampshire Banking Department
8 ("Department"). The Presiding Officer was delegated the authority to decide
9 the matter pursuant to RSA 383:7-a. All respondents were served with the
10 Show Cause Order, Notice of Hearing and Cease and Desist Order. The
11 Department introduced Exhibits 1 through 129. Dargon introduced Exhibits A
12 through U. The Presiding Officer took Notice of the Superior Court
13 Pleadings. Witnesses for both Parties testified on direct and cross
14 examination.

15 After the Hearing, Proposed Findings of Fact and Conclusions of Law
16 were submitted by Assistant Attorney General Karen Gorham on behalf of the
17 Department and Respondent Daniel Paul Dargon on behalf of Respondent Dargon
18 Law Firm and himself.² At the Presiding Officer's request, The Parties also
19 provided supplemental information about potential bankruptcy representation
20 by Attorney Lader.

22 ¹ This order is confined to whether the Department has proven the alleged
23 violations of Dargon. Absent any additional Order, it has no affect
regarding the Other Respondents, some of whom have entered into a consent
decree.

24 ² The Department and Dargon are to be complimented for their professional
25 conduct during and after the hearing. The Presiding Officer is particularly
grateful that the Parties assented to a number of extensions regarding RSA
397-A:17, I's requirement that an order be issued "within 20 days from the
date of hearing...."

1 Hampshire Mortgage Loan Originator License); *Id.*

2 3. 1 violation by Dargon [A total of 2 violations] of RSA 397-A:12,VII
3 (Failure to Facilitate Exam); *Id.*

4 4. 750 violation by Dargon [A total of 1500 violations] of RSA 397-
5 A:14,IV(d) (Conducting Business or Assisting/ Aiding/ Abetting Any
6 Person in the Conduct of Business Without a Valid New Hampshire
7 Mortgage Broker License Required by RSA Chapter 397-A); *Id.*

8 5. 750 violations by Dargon [A total of 1500 violations] of RSA 397-
9 A:14,IV(d) (Conducting Business or Assisting/ Aiding/ Abetting Any
10 Person in the Conduct of Business Without a Valid New Hampshire
11 Mortgage Loan Originator License); *Id.*

12 6. 4 violations by Dargon [A total of 8 violations] of RSA 397-
13 A:17,I(a) (Violation of RSA Chapter 397-A Generally); *Id.* and

14 7. 1 violation by Dargon [A total of 2 violations] of RSA 397-
15 A:17,I(b) (Failing to Meet Standards Established by RSA Chapter
16 397-A). *Id.*

17 An Amended Order to Show Cause, dated October 21, 2010, amended the
18 complaint to allege in regards to Dargon or Respondent Dargon:

19 1. Respondent Dargon Law Firm P.L.L.C.

20 As control person:

21 a. 108 violations of RSA 397-A:14, IV(m) (Collection of advance
22 fees for loan modifications). *Amended Order to Show Cause P. 16.*

23 b. 108 violations of RSA 397-A:14, IV(b) (Entering into "best
24 efforts" contract). *Id.*

1 c. 108 violations of RSA 397-A:3 (Unlicensed loan originations).

2 *Id.*; and

3 d. 29 Violations of RSA 399-D:24, V (Unlicensed debt settlement
4 services). *Id.*

5 2. Respondent Daniel Paul Dargon, Esq.

6 a. 108 violations of RSA 397-A:14, IV(m) (Collection of advance
7 fees for loan modifications); *Id.*

8 b. 108 violations of RSA 397-A:14, IV(b) (Entering into "best
9 efforts" contract); *Id.*

10 c. 108 violations of unlicensed loan originations, as principal
11 (RSA 397-A:3; 397-A:21, V); 108 violations of RSA 397-A:3 and
12 397-A:21, V (Unlicensed loan origination as Principal); *Id.*

13 d. EITHER

14 i. 8 violations of RSA 397-A:3; RSA 397-A:21,V(Actual work on
15 loan modification cases), AND 1 violation of RSA 397-A:2,
16 III) (lack of candor to the court); *Id.*

17 OR, ALTERNATIVELY,

18 ii. 8 violations of RSA 397-14, IV(n) (Misleading
19 communications (by stating he was assigned the case); *Id.*

20 e. 1 violation of RSA 397-A:3 (Operating as an unlicensed mortgage
21 broker); *Id.*

22 f. 2 violations of RSA 397-A:12, VII (Failure to facilitate bank
23 examinations on February 17, 2010 and May 6, 2010); *Id.*

24 g. 3 violations RSA 397-A:2, III; Graham-Leach-Bliley Act (Failure
25 to safeguard client files); *Id at 17.*

1 h. 3 violations of RSA 397-A, VI(c) (Engaging in any act, practice
2 or course of business which would operate as a fraud or deceit
3 upon any person); *Id.*

4 i. Violation of RSA 397-14, IV(b) (Representing that a "forensic
5 audit" of mortgage documents would be completed): *Id.*

6 j. Violation of RSA 397-14, IV(n) (Representing Peter Larkowich as
7 a licensed attorney); *Id.*

8 k. Violation of RSA 397-14, IV(n) (Representing telemarketers as
9 loan specialists); *Id.* and

10 l. 29 Violations of RSA 399-D:24, V (Unlicensed debt settlement
11 services). *Id.*

12 During the course of the hearing and in the Department's post-hearing
13 submission dated December 16, 2010, The Department focused on violations of
14 RSA Chapter 397-A by Dargon acting as an unlicensed mortgage broker (*Finding*
15 *of Fact #7*); Failure to conduct forensic audits (*Finding of Fact #9*);
16 Failure to protect client files (*Finding of Fact #11*); Performing debt
17 adjustment services under RSA Chapter 399-D although Larkowich and Ellis
18 were not attorneys. (*Findings of Fact #12 - #14*).

19 The Department's Conclusions of Law in Paragraphs #17 through #19
20 assert that Dargon acted as a loan originator and was not exempt from RSA
21 Chapter 397-A. Paragraphs #20 and #21 assert violations of RSA Chapter 399-
22 D.

23 In a document, also dated December 16, 2010, entitled "Relief
24 Requested", although paginated as a complaint, the Department seeks the
25 following specific legal remedies:

1 1. Respondent Dargon should be banned from office as a New
2 Hampshire Mortgage Loan Originator. (*Complaint P. 1 - 3,*
3 *Paragraphs 3; 7 a, b, e, f and g.*)

4 2. A show cause hearing regarding:

5 a. the requested ban, (*Paragraph 7g*);

6 b. refunds to clients (*Paragraph 7i*); and

7 c. payment of the Department's cost of investigation.

8 (*Paragraph 7j*). *Id.*

9 3. A disgorgement of profits. (*Paragraph 7h*). *Id* at 3.

10 4. Payment of administrative fines for the following violations

11 (*Paragraph 7c*): *Id* at 2-3.

12 Respondent Dargon Law Firm:

13 a. 92 violations of RSA 397-A:14, IV (m) (collection
14 of advance fees);

15 b. 92 violations of RSA 397-A:14, IV (b) (entering
16 into best efforts contracts); and

17 c. 92 violations of RSA 397-A:3 (Unlicensed loan
18 originators).

19 Respondent Dargon:

20 a. 92 violations of RSA 397-A:14, IV (m) (collection
21 of advance fees);

22 b. 92 violations of RSA 397-A:14, IV (b) (entering
23 into best efforts contracts);

24 c. 92 violations of RSA 397-A:3 (Unlicensed loan
25 origination as principal);

- 1 d. 8 violations of RSA 397-A:3 (actual work as an
2 unlicensed loan originator) OR
3 8 violations of misleading communication (by
4 stating he was assigned the case);
5 e. 1 violation of operating as an unlicensed
6 mortgage broker;
7 f. 3 violations of Gramm-Leach-Bliley Act;
8 g. 2 violations of fraud of a client:
9 - representing a forensic audit would be
10 completed; and
11 - representing Larkowich as a licensed
12 attorney.

13 Paragraph 8 seeks fines and administrative penalties as "set forth in
14 section II of the Complaint." Section II of the Initial Petition is titled
15 "Issues at Law." Petition P. 6. Section III is titled "Relief Requested" but
16 it has been eliminated by the Amended Complaint which has no sections. See
17 *Amended Complaint, Amended Order to Show Cause P. 3.*

18 Having examined at length the Departments pleadings and considered the
19 arguments at the hearing, the Presiding Officer determines that the
20 Department has preserved the claims contained in the post submission filing.

21 Based on the record and the following discussion of law and facts, the
22 Presiding Officer DENIES the claim that Dargon acted as an unlicensed
23 mortgage broker. Any remaining claim that Dargon failed to facilitate a
24 bank examination is DENIED.

1 The claim that Dargon acted as a loan originator and was not exempt
2 from licensure under RSA Chapter 397-A is GRANTED. The claims that Dargon
3 collected advance fees and entered into best efforts contracts is also
4 GRANTED. The claim that Dargon did actual work as an unlicensed loan
5 originator is GRANTED. The alternative claim regarding misleading
6 communications is DENIED.

7 The claim regarding the violations of Gramm-Leach-Bliley Act is
8 GRANTED.

9 The claim that the activities of Larkowich and Ellis violated RSA
10 Chapter 399-D and that Dargon knew or should have known that they were not
11 licensed New Hampshire attorneys is GRANTED.

12 The claim regarding forensic audits is DENIED.

13 The Department's request for a show cause hearing is GRANTED. The show
14 cause hearing shall encompass:

- 15 1. The requested ban of Dargon from office as a New Hampshire Loan
16 Originator;
- 17 2. Whether refunds should be ordered, and, if so, in what amount;
- 18 3. Whether Dargon should be ordered to pay the Department the cost of
19 the investigation;
- 20 4. Whether there were profits, and, if so, what amount should be
21 disgorged.
- 22 5. The number of violations of RSA Chapter 397-A (not to exceed 92)
23 and/or RSA Chapter 399-D (not to exceed 29)³; and

24
25 ³ In the Order, the Presiding Officer has identified exhibits regarding
Larkowich and one exhibit regarding Ellis.

1 6. Any other matter at the discretion of the Presiding Officer.

2 To give the Parties guidance, the burden remains on the Department to
3 establish the issues at the show cause hearing. From the existing record,
4 the Department must identify, by exhibit number, each violation of RSA
5 Chapter 397-A as an originator and each violation of RSA Chapter 399-D by an
6 unlicensed attorney. From the existing record, the Department must identify
7 the actual amount charged to a borrower in order to justify restitution.
8 Based on the existing record, the Presiding Officer REJECTS the presumption
9 that clients paid \$2,500.00 for Dargon's services. For example, the
10 Department presumed that \$2,500.00 was paid in regard to Exhibit 30. The
11 exhibit contains no record that any fee was paid. In Exhibit 28, there was
12 one payment of \$675.00. In Exhibit 34, there was a refund of the entire fee.
13 In Exhibit 35, \$800.00 of the \$900.00 fee was refunded.

14 The Department must specifically identify the investigation costs
15 being requested.

16 While the Department also has the burden to prove restitution and
17 profit, the Presiding Officer has previously requested that Dargon provide
18 financial information to the Department in order to determine the amount, if
19 any, of fines, costs, penalties, profits, etc... that should be recovered.
20 If Dargon refuses to provide the information, the burden on these specific
21 issues may shift. In other words, once the Department establishes an amount,
22 the Presiding Officer may assume that Dargon has the ability to pay all
23 reasonable restitution, fines, penalties, costs, and disgorgement of
24 profits.

1 IV. FACTS

2 The facts are best understood in the context that at all relevant
3 times, Dargon was not aware of the passage of the SAFE Act nor the enactment
4 of RSA Chapter 397-A. As result, there was no effort to tailor Dargon's
5 practice to the statutory requirements.

6 Respondent Dargon Law Firm has been registered with the New Hampshire
7 Secretary of State as a limited liability company since November, 14 2008.
8 *Ex. 106.* Respondent Dargon has been a member of the New Hampshire Bar
9 Association since 2008. Respondent Dargon is the sole member of and
10 registered agent for Respondent Dargon Law Firm. *Id.* He has identified
11 himself as the Managing General Partner. *Ex. 115.* He is a principal as
12 defined in RSA 397-A:1, XIX. For the purposes of this Order, Dargon Law and
13 Attorney Dargon will be collectively known as "Dargon".

14 As early as February 2010, Dargon began to purchase loan modification
15 leads and/or referrals ("leads"). *Ex. 111.* A lead targeted an adult facing
16 foreclosure. *Id.* The lead was secured by offering a complimentary loan
17 consultation with an attorney and requesting information such as name, phone
18 number, e-mail address, loan desired, type of property, and a representation
19 of the person's creditworthiness. *Id.* In order to obtain 85 leads from
20 CSCA, Inc., Dargon executed the contract as a "client", defined in the
21 contract as a mortgage lender/broker. *Ex. 111.* This contract, dated June
22 24, 2010, also contained a representation that Dargon operated within any
23 and all state and federal laws and regulations. *Id.* While some leads
24 involved property not located in New Hampshire, a number involved loans
25 secured by New Hampshire property. *Ex. 107; Ex. 112.* See RSA 397-A:3, I.

1 (license required to make or broker loans secured by real property in New
2 Hampshire). But see RSA 397-A:2, I (Department regulates persons that engage
3 in originating . . . mortgage loans from the state of New Hampshire).

4 In addition to sending out direct mailers from the leads, Dargon
5 maintained a website and utilized third parties for television and radio
6 advertisements to reach prospective clients. *Ex. 118 (Omnibus Answers)*.
7 Dargon also contracted with a consultant to provide a call center at
8 Dargon's law office to receive calls from prospective clients. *Id.*

9 The Dargon website advertised mortgage experts and attorneys who
10 understood the loan modification process, "if [the prospective client] is
11 serious about saving your house." *Ex. 114*. The website requested that the
12 potential client call today and explain the situation. *Id.*

13 A solicitation letter stated in bold print that the Dargon firm
14 contains "foreclosure prevention and loan modification experts." *Ex. 107*.
15 The letter solicited a free consultation and provided a phone number. *Id.*
16 Solicitation letters stated that they were sent because a major credit
17 bureau had listed the potential client as a homeowner with late mortgage
18 payments. *Id.* In two cases, the letter stated that Dargon had received
19 property information and determined that the homeowner may be eligible for a
20 loan modification. *Id.* The letters were variously described as generated by
21 the Legal Services Department, the Loan Modification Department, and the
22 Debt Analysis Department. *Id.*

23 When a homeowner contacted the call center, sales consultants were
24 tasked to "market and sell potential clients on loan modification,
25 bankruptcies and general litigation services," *Ex. 110*. The sales

1 consultants had access to various scripts to use to market and sell
2 potential clients. *Ex. 109.* The scripts sought application information to
3 determine whether the homeowner qualified for a loan modification. *Id.* One
4 script, dated May 12, 2010, referenced the completion of a "Qual Sheet
5 (lender, rate, balance, home value, arrearages, other debt, income)." *Id.*

6 If a determination based on the application information was made that
7 a homeowner was qualified, then a flat rate was negotiated and a contract
8 was sent. *Id.* Flat fee agreements between Dargon and individuals with loans
9 secured by real property in New Hampshire are marked as Exhibits 1-103.⁴

10 At the time that an executed client Flat Fee Agreement was received by
11 Dargon, Dargon had recorded and received the borrower's application
12 information in writing. The information included pay stubs, tax returns,
13 checking and savings account statements, and social security numbers. *Ex.*
14 *26.*

15 While there are some minor differences in the documents used by Dargon
16 in the transactions under review, there are certain documents that generally
17 describe the scope of work and the relationship between Dagon and the
18 homeowner. See Exhibit 110 (Loan Modification Procedure). These documents
19 are:

- 20 a. Cover letter
- 21 b. Client Flat Fee Agreement
- 22 c. Client Authorization Form/ Power of Attorney
- 23 d. Payment Arrangement (check by phone, credit card, etc...)

24
25 ⁴ On December 5, 2010, the Department withdrew Exhibits 16, 18, 24, 27, 32,
37, 45, 50, 58, 68, and 85.

- 1 e. Hardship Affidavit Form
- 2 f. Modification Income Form
- 3 g. Modification Expense Form
- 4 h. Welcome letter (upon receipt of executed documents)

5 See *Exhibit 26*. Less frequently used forms relate to a mortgage
6 forensic audit analysis and a Bankruptcy Fee Agreement. The Client Flat Fee
7 Agreement and the Client Authorization Form reveal the nature of Dargon's
8 activities.

9 A. The Client Flat Fee Agreement

10 This document described the general relationship between Dargon and a
11 borrower. See e.g. *Exhibit 26*. Dagon agreed to provide "law-related
12 services." Dargon did not, however, provide any services until the borrower
13 "pays the requisite fee." The agreement required advance fees for loan
14 modification.

15 The Scope of services in *Exhibit 26* offers three options: loan
16 modification, debt settlement, and other. Loan modification is checked and
17 listed under "other." The flat fee in *Exhibit 26* is \$2,700.00 broken into
18 three \$900.00 payments. For Loan Modification Clients, Dargon agreed to
19 prepare and submit a request to the borrower's "mortgage (lender)" and if
20 accepted, negotiate reasonable terms of the modification.

21 If the borrower wanted Dargon to litigate any issue with the Lender or
22 wanted to use Dargon to provide bankruptcy services, separate contracts were
23 required. See e.g. *Exhibit 26*.

24 The agreement states in bold that Dargon is not applying state law to
25 the facts and is only representing the client in a negotiation capacity with

1 the lender. The agreement also states that Dargon will not enter an
2 appearance or represent the borrower in any mediation, foreclosure or other
3 court proceeding. *Id.*

4 Under the agreement, The Loan Modification representation will
5 conclude:

- 6 1. if the Lender denies the modification because no programs are
7 available; or
- 8 2. the lender and client have agreed to a particular program.

9 If a borrower complies with a trial period agreement but is not
10 offered a permanent modification, Dargon will make "reasonable, good faith
11 efforts" to negotiate an alternative modification. *Id.*

12 A majority of the agreements are exclusively for loan modifications.
13 The Agreement states that Dargon's fee is earned:

- 14 a. one-third (1/3) for client intake and processing
- 15 b. one-third (1/3) for analysis of debt
- 16 c. one-third (1/3) for submission to Lender of Proposal

17 After an agreement was executed and payment was received, Dargon
18 employees filled out loan modification requests. In some cases, the request
19 was successful. In some cases, the fee was refunded. In other cases, the
20 modification request was not completed or was denied. As a factual matter,
21 it is not relevant whether the modifications were completed or successful if
22 a license was required and the exemption did not apply. In any event, the
23 agreement constitutes a best efforts contract.

1 In some cases, debt adjustment as governed by RSA Chapter 399-D was
2 part of the agreement and the service was provided by Larkowich. See *Ex. 23,*
3 *47, 56, and 100.*

4
5 B. Client Authorization Form

6 The Client Authorization Form ("Authorization") supports the
7 Department's position that Dargon was engaged in loan origination in
8 violation of RSA Chapter 397-A. Exhibit 33 contained a representative
9 authorization.

10 The Authorization signed by a client grants Dargon power of attorney
11 to discuss, negotiate, and accept or reject negotiations for all aspects of
12 the client's debts.⁵ It also authorizes Dargon to obtain and retain a copy
13 of the client's credit report from a licensed credit reporting agency.

14 Use of the authorization established that Dargon engaged in gathering
15 application information from a borrower for use in a credit decision.

16
17 C. Borrowers' Records

18 In regard to all of these records, the testimony established that
19 borrowers' records were left unattended in an unlocked, unoccupied office
20 after September, 2010.

21
22 [Remainder of Page Intentionally Left Blank]
23
24

25

⁵ The Authorization is universal, applying to debt adjustment information and was used, in the main, to negotiate mortgage loan modifications.

1 V. DISCUSSION

2 The following is a legal analysis of the law applicable to the facts.
3 This case does not test the limits of RSA Chapter 397-A because Dargon was
4 not aware of its existence.

5
6 A. Due Process

7 Dargon argues that RSA Chapter 397-A, as interpreted and applied by
8 the Department, is a violation of Part 1, Article 14 and the 14th Amendment
9 of the United States Constitution: A deprivation of substantive and
10 procedural due process to the citizens of New Hampshire.

11 Dargon raises a creative but ultimately unavailing argument that the
12 Department has violated due process by interpreting RSA Chapter 397-A to
13 require licensure of attorneys under some circumstances.

14 As discussed *infra*, the Department's interpretation of RSA Chapter
15 397-A is accurate as applied to the facts of the case.

16 The Presiding Officer interprets Dargon's argument to be that the
17 Legislature's enactment of RSA Chapter 397-A, with a limited exemption for
18 attorneys, violates due process.

19 Having raised the argument, Dargon does not assert that it has been
20 deprived of due process. The argument raised is that "citizens of New
21 Hampshire" have been deprived of due process because lawyers are required by
22 RSA Chapter 397-A to be licensed under some circumstances. No citizens have
23 an interest in this case. Dargon does not have standing to raise federal or
24 state due process arguments on behalf of citizens.

1 Assuming arguendo, that Dargon could raise this issue, it fails.
2 Dargon has failed to identify any property right to hire a person who is not
3 authorized to perform services under RSA Chapter 397-A. Any citizen may hire
4 a lawyer who is authorized under RSA Chapter 397-A or a person, including a
5 lawyer, who is licensed. There is no evidence that there is a shortage of
6 qualified individuals.

7 Dargon does not raise a due process right on its own behalf. This is
8 understandable given the process that has been provided by the Superior
9 Court and the Department.

10 B. RSA Chapter 479-B

11 In general, a preemption argument applies when a federal law has been
12 enacted thus preempting or preventing a state from enacting a contradictory
13 law. Dargon cites no persuasive authority for the argument that a New
14 Hampshire statute can preempt another New Hampshire statute.

15 The Presiding Officer accepts that an analysis of one statute may
16 require consideration of another statute in order to understand the
17 legislature's intent. The statutory framework must be read as a whole. The
18 more recent and more specific statute controls. Legislative history is not
19 relevant unless that statute is ambiguous.

20 The Decision in this case requires an analysis of the application of
21 RSA Chapter 397-A and its interplay with RSA Chapter 479-B. RSA Chapter
22 479-B was added by Chapter 322 of the Laws of 2007. During all relevant
23 times to this action, it has not been amended. It is in Title XLVIII:
24 Conveyances of Mortgages of Realty. Chapter 322:2 requires the Department,
25 among others, to look for any foreclosure rescue scams or schemes not

1 covered by RSA Chapter 479-B. No other statute is repealed or amended by
2 Chapter 322. It is stand alone legislation exercising the police power
3 specifically to regulate activities regarding foreclosures.

4 This statute provides a process for foreclosure consulting services,
5 certain requirements for foreclosure consulting contracts, and pre-
6 foreclosure conveyances. It mandates that a foreclosure consultant has a
7 fiduciary duty to the homeowner and limits certain actions of a foreclosure
8 consultant. The provisions of RSA Chapter 479-B do not apply to a duly
9 licensed attorney at law acting on behalf of a client. *RSA 479-B:11.*

10 Some of Dargon's activities meet the definitions in RSA 479-B:1,
11 III(a), (c), (d), or (e). Other activities of Dargon are contrary to the
12 requirements of RSA Chapter 479-B. See *RSA 479-B:2* (Requirements of a
13 foreclosure consulting contract, Notice of Cancellation); *RSA 479-B:4* (Right
14 of Cancellation, homeowner pays only out-of-pocket expenses.); *RSA 479-B:5,*
15 *II(b)* (foreclosure consultants may not receive any compensation until all
16 services are fully performed; foreclosure consultant may not take any power
17 of attorney for any purpose except to inspect documents as provided by law,
18 may not induce a homeowner to enter into a foreclosure consulting contract
19 that not comply with RSA Chapter 479-B); *RSA 479-B:10* (form of contracts and
20 notes).

21 In 2007, the legislature decided that RSA Chapter 479-B shall not
22 apply to a duly licensed attorney at law acting on behalf of a client. *RSA*
23 *479-B:11.* As a result, in general, RSA Chapter 479-B does not apply to
24 Dargon.

1 As an aside, there may be evidence, however, that two individuals who
2 were not licensed to perform services as defined by RSA 479-B:1, III or
3 licensed as attorneys in New Hampshire failed to comply with the provisions
4 listed above. For example, in Exhibit 3, Peter Larkowich identified himself
5 as the attorney for homeowners. Mr. Larkowich was not licensed at the time
6 to practice law. Moreover, the agreements and authorization do not comply
7 with RSA Chapter 479-B. *Ex. 21 (same); Ex. 23 (same); Ex. 87 (same).*
8 Exhibit 38 involves Attorney Patricia M. Ellis representing a homeowner.
9 Ms. Ellis was not licensed at the time to practice law in New Hampshire.
10 The agreement and authorization do not comply with RSA Chapter 479-B.

11 The Department does not enforce RSA Chapter 479-B. Therefore, the
12 potential violations of RSA Chapter 479-B are given no weight in this order.

13 While Dargon may have been exempted by the Legislature from the
14 provision of RSA Chapter 479-B, this exemption does not prevent the
15 Legislature from regulating Dargon and other attorneys through RSA Chapter
16 397-A.

17
18 i. RSA Chapter 397-A

19 RSA Chapter 397-A was enacted in 1987; however, relevant amendments
20 were effective in 2009 and thereafter. *2008 Ch. 333; 2009 Ch. 290; 2010 Ch.*
21 *234.*

22 The relevant amendments were enacted as a result of passage of the
23 federal Secure and Fair Enforcement Mortgage Licensing Act of 2008 ("SAFE
24 Act"). *P.L. 110-289, Title V - SAFE Act, eff. July 30, 2008.*

1 The purpose of the SAFE Act is to increase uniformity, reduce
2 regulatory burden, enhance consumer protection, and reduce fraud. *Id.* at
3 sec. 1502. The method for establishing a mortgage licensing system and
4 registry is left to the states, with the help of the Conference of State
5 Bank Supervisors and the American Association of Residential Mortgage
6 Regulation ("National Organization") to establish a nationwide licensing
7 system and residency for the residential mortgage industry. *Id.* The ten
8 specific objectives of the SAFE Act are listed in sec 1502. The Parties do
9 not challenge any aspect of the SAFE Act.

10 None of the Parties challenge any aspect of the model law which was
11 written to regulate persons that engage in the business of offering,
12 originating, making, funding, or brokering mortgage loans from a state or
13 mortgage loans secured by real property located in a state. The model law
14 was considered and modified by the New Hampshire Legislature and resulted in
15 a number of acts that were signed into law by the governor as amendments to
16 RSA Chapter 397-A. 2008 Ch. 205; 2009 Ch. 290; 2010 Ch. 234.

17 Chapter 290, Laws of 2009 ("Ch. 290") contains sweeping changes
18 relevant to this matter. In enacting Ch. 290, the Legislature found *inter*
19 *alia* that:

- 20 1. The activities of mortgage loan originators have a direct,
21 valuable, and immediate impact upon New Hampshire consumers;
- 22 2. Reasonable standards for licensing and regulation of mortgage
23 loan [originators] is essential for the protection of New
24 Hampshire's citizens;

1 3. The obligation of mortgage loan [originators] to consumers
2 are such as to warrant regulation of the process; and

3 4. The purpose of [Ch. 290] is to protect consumers seeking
4 mortgage loans and to ensure that the mortgage lending
5 industry is operating without unfair, deceptive, and
6 fraudulent practices on the part of mortgage loan originators
7 and the mortgage industry. *Ch. 290, sec. 1.*

8 Prior to Ch. 290, an originator was defined as an individual who is
9 employed or retained and supervised by a mortgage banker or mortgage broker
10 required to be licensed under RSA Chapter 397-A and who, for compensation or
11 gain, negotiates, solicits, arranges or finds a mortgage loan. *RSA 397-A:1,*
12 *XVII (2006).*

13 Also prior to Ch. 290, RSA 397-A:4, IV exempted from RSA Chapter 397-A
14 a person licensed to practice law in this state, not actively and
15 principally engaged in the business of negotiating first mortgage loans
16 secured by real property, when such person renders services in the course
17 of practice by an attorney at law.

18 RSA Chapter 397-A (2006) focused on licensure of mortgage bankers and
19 mortgage brokers. *RSA 397-A:1, X, XII, XIII; RSA 397-A:3.*

20 Once a license was issued, it entitled the licensee to utilize
21 originators. *RSA 397-A:6, IV. (Licensee other than a natural person.); V*
22 *(licensee is a natural person).*

23 Prior to Ch. 290, the Department had the authority to examine the
24 business affairs of any licensee or any other person, whether licensed or
25 not as it deemed necessary to determine compliance with this chapter. *RSA*

1 397-A:12, I. The power to examine was very broad and set forth in RSA 397-
2 A:12, I-X (2006).

3 Licensees were also required to file annual reports, additional
4 regular or special reports, and reply promptly to any written inquiry. RSA
5 397-A:13 (2006).

6 In sum, prior to Chapter 290, the Department licensed brokers and
7 bankers. An originator was not separately licensed. The licensee's
8 business was subject to examination, inquiry, and the submission of annual,
9 regular and special reports.

10 A licensed attorney [without a RSA Chapter 397-A license] could render
11 services in the course of practice as an attorney that were regulated by RSA
12 397-A if the attorney was not actively and principally engaged in the
13 business of negotiating first mortgage loans secured by real property.

14 Conversely, the services of an originator could be provided by a
15 person who was not licensed under RSA Chapter 397-A and was not an attorney.
16 As discussed below, originator services⁶ in and of themselves do not
17 constitute the practice of law.

18 Some of the applicable changes are as follows:

19 As added by Chapter 290, Laws of 2009, RSA 397-A:14, IV(b) prohibits a
20 person subject to RSA 397-A from soliciting or entering into a contract with
21 a borrower that provides that the person subject to this chapter may earn a
22 fee or commission through "best efforts" to obtain a loan even though no
23 loan is actually obtained for the borrower.

24
25 ⁶ An originator negotiates, solicits, arranges or finds a mortgage loan for
compensation or gain.

1 RSA 397-A:14, IV (m) prohibits collecting an advance fee for a loan
2 modification. RSA 397-A:16, IV allows only mortgage brokers, bankers, and
3 originators licensed under RSA Chapter 397-A to retain commissions for
4 services rendered.

5 Similar to the Model Act, RSA 397-A:4,V contains an exemption for a
6 licensed attorney who negotiates the terms of a residential mortgage loan on
7 behalf of client as an ancillary matter to the attorney's representation of
8 the client. This exemption does not apply if the attorney receives direct
9 or indirect compensation from specific entities. There is no allegation in
10 this case that the Respondents received compensation that would eliminate
11 the exemption.

12 Dargon argues that the work performed was outside the scope of RSA
13 Chapter 397-A, alternatively, that it fell within the exemption contained in
14 Section 4.

15 As defined by RSA Chapter 397-A, an originator records or receives the
16 borrower's application information for use in a credit decision.

17 Nothing in the HUD commentary to the SAFE Act Model State legislation
18 could serve to narrow the definition of "mortgage loan originator" under RSA
19 397-A:1.

20 First, The HUD commentary regarding the Attorney exemption from the
21 statute simply reiterates that an attorney whose negotiation of loan terms
22 is merely "ancillary" to the attorneys' representation of that client is not
23 an originator. There is no language in the commentary about attorneys whose
24 sole business is helping clients renegotiate their mortgage loans.

25

1 Second, the commentary reinforces that the Model Act is meant to sweep
2 broadly: "HUD considers the definition of loan originator to encompass any
3 individual who, for compensation or gain, offers or negotiates pursuant to a
4 request from and based on the information provided by the borrower" in the
5 borrower's communications to the person taking an "application."

6 Although the HUD commentary could be read to suggest that only an
7 originator must be one who is negotiating actual mortgage loan products
8 ("HUD interprets 'taking an application' to mean receipt of an application
9 for the purpose of deciding whether or not to extend the requested *offer of*
10 *a loan* to the borrower." (*emphasis added*)), there is no language that
11 distinguishes the "offer of a loan" from the "offer to renegotiate a loan."
12 Furthermore, there is nothing in the commentary about the language regarding
13 "credit decisions" that would limit "credit decisions" to "decisions to
14 extend new credit to a consumer."

15 More importantly, though, the New Hampshire statute makes it clear
16 that the term "loan" includes "forebearance of a loan." R.S.A. 397-A:1, XI
17 ("'loan' means any ... forbearance of money"). Accordingly, as the HUD
18 commentary supports a broad reading of the model act, and as the NH
19 legislation makes it clear that a person who negotiates a mortgage
20 forbearance is a covered loan originator. Compare RSA 397-A:1, XVII (a)
21 ("'loan originator' means an individual who for . . . gain, takes a
22 mortgage application *or offers, negotiates, solicits, arranges or finds* a
23 mortgage loan" or advises consumers on "loan" terms, etc.) with Id at
24 subsection XI ("loan" means forbearance). Essentially, as Dargon has, for
25

1 gain, negotiated and taken applications for loan forbearance or alteration,
2 they have a covered "originator."

3 The sales consultants screened out unqualified applicants by using the
4 Modification Eligibility Guidelines provided by Dargon. *Ex. 118 (Omnibus*
5 *answers)*. Only homeowners with a mortgage were qualified, as a result, the
6 applicants meet the definition of "borrowers" contained in RSA 397-A:1, III.

7 The information was used to determine whether the borrower's financial
8 situation met the federal criteria or bank specific criteria for a loan
9 modification. This constitutes a credit decision.

10
11 C. Exemption

12 The exemption in RSA 397-A:4, V is client specific. An attorney is
13 exempt from RSA Chapter 397-A only if the negotiation of the terms of a
14 residential mortgage on behalf of a client is an ancillary matter to the
15 attorney's representation of the client. *Id. Emphasis added.* The exemption
16 does not apply where negotiation of the terms of a residential mortgage is
17 the only matter handled by the attorney. Such is the case here. The
18 Agreement is quite explicit that the only "law-related service" is the loan
19 modification. Any other law related service requires the negotiation of
20 separate representation agreements. The borrower is solicited by Dargon
21 because he/she is unable to comply with the terms of his/her residential
22 mortgage. The service offered by Dargon is "loan modification" or, as set
23 out in the Agreement and Authorization, the authority to discuss, negotiate.
24 . . all aspects of the borrower's home loan. Put more succinctly, Dargon
25 negotiates the terms of a residential mortgage loan on behalf of a client.

1 D. Ancillary Matter

2 The exemption in RSA 397-A:4, V only applies in this case⁷ to a
3 licensed attorney who negotiates terms of residential mortgage loan on
4 behalf of a client as an ancillary matter to the attorney's
5 representation of the client.

6 The exemption must be reviewed through an analysis of the
7 representation of each client. The representation may be ancillary
8 regarding some clients. The word "ancillary" is not defined in RSA Chapter
9 397-A nor is there a helpful definition in the RSAs. See e.g. RSA 72-B:2,
10 pursuant to RSA 21:2, the word shall be construed according to the common
11 and approved usage of the language.⁸

12 Black's Law Dictionary defines ancillary as supplementary,
13 subordinate. *Black's Law Dictionary 95 (8th ed.) (2004)*. Its opposite is
14 "primary" or "chief."

15 There are some Dargon clients who may have been provided
16 representation on matters other than loan modification. Attorney Don Lader
17 testified at the Hearing that he has a bankruptcy practice which begins with
18 a loan modification for a client and may extend to representation in a
19 bankruptcy proceeding. There was no evidence that any other licensed (or
20 unlicensed) attorney at Dargon represented a client in any matter other than
21 loan modification.

22
23 _____
24 ⁷ The exemption does not apply where certain methods of compensation are
used. These methods do not apply to this case.

25 ⁸ The Parties have not argued that "ancillary" has a peculiar and appropriate
meaning in law, but, see RSA 547:3-1, ancillary to an excavation is "related
to the excavation."

1 Dargon argues that the performance of loan modification by Attorney
2 Lader was ancillary to his primary representation if the client is in
3 bankruptcy proceedings. The argument has theoretical merit but it has no
4 application to the clients in this case.

5 The Parties produced on January 13, 2010 and January 14, 2010 a list
6 of the client exhibits involving Attorney Lader.⁹ The Documents have been
7 marked as Petitioner's Exhibit 129 and Respondents' Exhibit U. Exhibit 129
8 identifies clients by exhibit number. Exhibit U identifies clients by name
9 and is confidential unless redacted.

10 RSA 397-A:4, V is based on the concept that primary representation of
11 a client by a licensed attorney may involve as an ancillary matter the
12 negotiation of the terms of a residential mortgage loan. There may be many
13 application of the exemptions including primary representation in
14 bankruptcy. The issue is not reached in this case because the contractual
15 language and practice supports the Department's contention that client loan
16 modification was the primary representation performed by Dargon.

17 The Flat Fee Agreements uniformly state that a separate contract must
18 be negotiated to retain Dargon for bankruptcy proceedings. Exhibit 23 is
19 illustrative. A Flat Fee Agreement was executed on November 3, 2009. The
20 Agreement offers bankruptcy representation in the scope of services and if
21 that election is made in the legal fees section. Bankruptcy is not checked
22 off in the scope of services in Exhibit 23. Under the Loan Modification
23 section, a separate agreement is required for Dargon to litigate any matter.

24
25 ⁹ There is a separate proceeding involving alleged violations of RSA Chapter
397-A by Attorney Lader. The analysis in this Order is confined to whether
Dargon violated RSA Chapter 397-A.

1 The charge for services was \$3,000. On January 21, 2010, the Client
2 expressed an interest in exploring bankruptcy. On the same day, Attorney
3 Lader responded that the Client had not contracted for bankruptcy. The
4 Client immediately stated that he understood the \$3,000.00 fee included
5 bankruptcy. No bankruptcy work was performed. Mr. Larkowich filed a loan
6 modification request on February 22, 2010.

7 From the foregoing, it is evident that even where the agreement
8 potentially contemplated representation in bankruptcy, no bankruptcy work
9 was performed.

10 Based on the above analysis, RSA 397-A:4, V does not apply to Dargon
11 in this matter.

12 13 E. Unlicensed Attorneys

14 Assuming for the sake of argument that Dargon's negotiations were
15 ancillary to the representation of a client, the exemption only applies to a
16 "licensed attorney". RSA 397-A:4, V. The uncontroverted evidence is that
17 one individual, Patricia Ellis¹⁰, was not licensed in New Hampshire but held
18 herself out as an attorney and engaged in negotiations for borrowers
19 solicited by Dargon on real property located in New Hampshire. See Ex. 38.
20 (E-mail from "Patricia Ellis, Esq." dated March 28, 2010.) Also
21 uncontroverted is that an individual, Peter Larkowich¹¹, who is not licensed

22 _____
23 ¹⁰ It appears that Attorney Ellis is licensed to practice law in
Massachusetts but not in New Hampshire.

24 ¹¹ It appears that Mr. Larkowich was never licensed in New Hampshire and his
25 license in Massachusetts is suspended. Ex. 105.

1 to practice law in New Hampshire, held himself out to be an attorney and
2 performed negotiations for borrowers solicited by Dargon on real property in
3 New Hampshire. *See, e.g. Ex. 3, 17, 21, 23, 26, 76, 87.*

4 There is no evidence that Attorney Ellis or Mr. Larkowich were being
5 supervised by a New Hampshire attorney. In fact, although it involves
6 property in Idaho, Exhibit 115 reveals the unsupervised nature of Mr.
7 Larkowich's negotiations and the numerous representations by Dargon that Mr.
8 Larkowich was an attorney.

9 Mr. Larkowich also provided debt adjustment services in violation of
10 RSA Chapter 399-D. *See Ex. 23, 47, 56, and 100.*

11
12 F. Separation of Powers

13 Dargon argues that the interpretation and application of RSA Chapter
14 397-A's requirement that an attorney be licensed under some circumstances is
15 a violation of Part 1, Article 37 of the New Hampshire Constitution.

16 **[Art.] 37. [Separation of Powers.]** In the government of this
17 state, the three essential powers thereof, to wit, the
18 legislative, executive, and judicial, ought to be kept as
19 separate from, and independent of, each other, as the nature
20 of a free government will admit, or as is consistent with that
21 chain of connection that binds the whole fabric of the
22 constitution in one indissoluble bond of union and amity. *June*
23 *2, 1784.*

24 Part 1, Article 37 of the New Hampshire Constitution ("Pt. 1, Art.
25 37") recognizes that separation of powers in a workable government cannot be

1 absolute. New Hampshire Health Care Association v. Governor, ___ NH___
2 (January 21, 2011). As a practical matter, there must be some overlap among
3 the three branches of government. *Id.* Pt. 1, Art. 37 is only violated when
4 one branch usurps an essential power of another. *Id.* Moreover, Pt. 1, Art.
5 37 must be given a practical construction. *Id.*

6 The constitutionality of a legislative act must be presumed. Petition
7 of New Hampshire Bar Association, 151 NH 112, 115 (2004). The Judicial
8 Branch retains ultimate authority to regulate the practice of law. *Id.* at
9 116. The Judicial Branch has the power to regulate the New Hampshire Bar
10 Association (the "Bar") to ensure that the Bar is qualified and ethical. *Id.*
11 at 118. Citing In Re Tocci, 137 NH 131, 135 (1993).

12 Regulation of the conduct of attorneys, however, has been dealt with
13 as an area of shared responsibility between the Legislative and Judicial
14 Branches. Petition of New Hampshire Bar Association, 151 NH at 118. The
15 Legislature, under the police power, may act to protect the public interest
16 so long as it does not supersede or detract from the power of the courts.
17 *Id.*

18 RSA 397-A:4, V contains a limited exemption for licensed attorneys
19 negotiating the terms of a residential mortgage on behalf of a client as an
20 ancillary matter to the representation of the client. A somewhat obvious
21 point is that RSA Chapter 397-A does not usurp an essential power of the
22 Judicial Branch, or any power whatsoever, to the extent the members of the
23 bar are exempt.

24 The issue, therefore, is whether, RSA Chapter 397-A usurps an
25 essential power of the Judicial Branch under the circumstances of this case

1 where a licensed attorney engages in the activities regulated by the Act but
2 not as an ancillary matter to the representation of a client.

3 The Court has struck down laws which have materially obstructed the
4 Court from fulfilling its constitutionally mandated duties. A number of
5 these cases relate to control of court proceedings. See Merrill v.
6 Sherbourne, 1 NH 199 (1818) (Legislative petition to overturn appellate
7 court decision.); Opinion of the Justices, 141 NH 562 (1997) (Legislative
8 bill directly in conflict with judicial evidentiary rule); State v.
9 LaFrance, 124 NH 171 (1983) (Statute unconstitutional where it authorizes
10 law enforcement officer to wear firearms in the courthouses); Petition of
11 the Judicial Conduct Commission, 151 NH 123 (2004) (Statute unconstitutional
12 where it regulates conduct of judges); Petition of Mone 143 NH 128 (1998)
13 (Statute regarding court security unconstitutional insofar as it applies to
14 areas of courthouse where trials or adjudicative functions take place).

15 With these cases as guide points, the recording and receiving of loan
16 modification information is not a court proceeding. In fact, the Flat Fee
17 Agreement specifically excludes court appearances. The recording and
18 receiving of loan modification information does not affect an essential
19 power of the Judicial Branch. On the contrary, the Act is an exercise of
20 the police power to regulate residential mortgage loans. The limited
21 exemption for attorneys reflects a policy decision made by the drafters of
22 the model law and endorsed by the New Hampshire Legislature.

23 The Legislature's public policy decisions do not impose a
24 constitutional limitation on the Legislature itself. The Legislature has
25 chosen to exempt licensed attorneys from certain regulations. See RSA 399-

1 D:4, I (Debt Adjustment Services) but not from others. See RSA 332-J
2 (Athlete Agents). These public policy decisions are well within the
3 Legislature's police powers.

4 Under the circumstances of this case, the Legislature has acted to
5 protect the public interest without superseding or detracting from the power
6 of the courts. Petition of New Hampshire Bar Association, 151 H at 118. RSA
7 Chapter 397-A does not violate Pt. 1, Art. 37.

8
9 G. Gramm-Leach-Bliley Act

10 An examination of the Gramm-Leach-Bliley Act, Public Law 106-102, 15
11 U.S.C. § 6801, et seq ("GLB") and the Federal Trade Commission ("FTC")
12 regulations which are enabled thereby reveals that the Dargon was subject to
13 the Privacy Provisions of GLB. An analysis of the pertinent statutory and
14 regulatory framework is laid out below:

15 The GLB Privacy Provision imposes "an affirmative and continuing
16 obligation to respect the privacy of [a financial institution's] customers
17 and to protect the security and confidentiality of those customers' non-
18 public personal information." 15 U.S.C. § 6801. Jurisdiction to promulgate
19 regulations regarding, and to enforce, the Privacy provision, is meted out
20 to a number of agencies according to the types of entities they regulate.
21 See 15 U.S.C. 6805(a)(1)-(7). There are six enumerated types of entities
22 assigned to different regulators, *Id.* at §§ (1)-(6), and the FTC has
23 enforcement and regulatory authority over entities who are not specifically
24 covered elsewhere in the statute. *Id.* at §§ (7). It is into this latter

1 category of regulation that Dargon fits, as it was not one of the
2 specifically regulated entities. *See id.*

3 The FTC regulations regarding who is regulated under the authority of
4 GLB make it clear that "financial institutions" and certain "other persons"
5 are covered. 16 C.F.R. 313.1(b). The "financial institutions" are those
6 who "engage in 'financial activity,'" as defined by the Bank Holding Company
7 Act (12 U.S.C. 1843(k)) and its accompanying regulations. *See* 12 C.F.R. §
8 211.5(d) (relating to so-called "Edge Corporations") and § 225.28 (relating
9 to businesses so closely related to banking that a bank holding company may
10 conduct such business). There are a number of ways Dargon could be
11 considered to fall under FTC jurisdiction by reference to these
12 provisions. From the record, Dargon "provided financial . . . advisory
13 services," *see* 12 U.S.C. 1843(k)(4)(C), inasmuch as it "furnished general
14 economic information and advice" and/or "provid[ed] education courses, and
15 instructional materials to consumers on individual financial management
16 matters." *See* 12 C.F.R. §§ 225.28(b)(6)(ii) and (v). Dargon also "brokered
17 . . . loans," *id.* at §§(b)(1), and performed "activities related to
18 extending credit," namely, "maintaining information related to the credit
19 history of consumers and providing the information to a credit grantor who
20 is considering a borrower's application for credit or who has extended
21 credit to the borrower." *Id.* at §§ (b)(2)(v).

22 In addition to the above points, entities "other" than "financial
23 institutions" are clearly covered by the GLB privacy provisions, pursuant to
24 the statute and FTC regulations. GLB makes it clear that "any other
25 financial institution or other person that is not [otherwise] subject to the

1 jurisdiction of any agency or authority" may be subject to the FTC's
2 jurisdiction. 15 U.S.C. § 6805(a)(7) (emphasis added). The FTC has
3 clarified that its jurisdiction extends to "third parties that are not
4 financial institutions, but that receive nonpublic personal information from
5 financial institutions with whom they are not affiliated." 16 C.F.R. §
6 313.1(b).

7 From the record Dargon acknowledges receiving nonpublic personal
8 information about borrower's mortgages from banks and mortgage lenders, who
9 are plainly "financial institutions" within the purview of GLB. See 15
10 U.S.C. 6805(a)(1)(A)-(D) (banks); 12 C.F.R. 225.28(b)(1) (mortgage
11 lenders). This information was exchanged in the course of Dargon's
12 negotiations for loan modifications. Accordingly, Dargon is subject to FTC
13 regulations on the protection of its customers' non-public private
14 information. On the record before me, Dargon failed to do so by leaving
15 non-public private information unattended in an unlocked office.
16 Consequently, Dargon has violated GLB's privacy provisions, which in turn
17 means that it has violated R.S.A. 397-A:14, IV(f).

18 19 VI. STATUS OF ORDER

20 RSA Chapter 541 and New Hampshire Administrative Rule Jus. 813.03 set
21 out the thirty-day period to file a motion for rehearing from a Department
22 decision. The Presiding Officer takes the position that this matter will
23 not be decided until an order issues following the show cause hearing. Under
24 this view, the thirty-day period will not begin to run until a final order
25 is issued. The Presiding Officer cautions the Parties that the Presiding

1 Officer's view may have little or no weight when a court interprets RSA
2 Chapter 541. The Presiding Officer is willing to hold the show cause hearing
3 and issue a final order as expeditiously as possible so that either or both
4 parties may file a motion for rehearing within thirty days of this order.

5 In order to expedite this matter, the Parties are instructed to
6 contact Banking Division Paralegal Rebekah Becker in order to schedule a
7 status conference.

8
9 **VII. FINDINGS OF FACT**

10 Based on the testimony and exhibits received during the course of the
11 hearing, I hereby:

- 12 1. GRANT Petitioner's Findings of Fact at paragraphs 1, 2, 3, 4, 5, and
13 6.
- 14 2. GRANT Petitioner's Findings of Fact at paragraph 7 at the second
15 sentence only. The first sentence is a Conclusion of Law and is
16 DENIED.
- 17 3. GRANT Petitioner's Findings of Fact at paragraphs 8 and 9 that no
18 evidence was presented at hearing.
- 19 4. GRANT Petitioner's Findings of Fact at paragraph 10.
- 20 5. GRANT Petitioner's Findings of Fact at paragraph 11 to the extent that
21 financial data was left in an unlocked, unoccupied office.
- 22 6. GRANT Petitioner's Findings of Fact at paragraphs 12, 13, and 14.
- 23 7. ACCEPT Petitioner's Finding of Fact at paragraph 15: NEITHER GRANTED
24 NOR DENIED.
- 25 8. GRANT Respondents' Findings of Fact at paragraphs 1, 2, 3, and 4.

1 9. DENY Respondents' Findings of Fact at paragraphs 5, 6, 7, 8, 9, 10,
2 11, 12, 13, and 14. Department witnesses testified in support of the
3 identified propositions and exhibits were also presented. The issue
4 is not whether the witnesses testified but whether the identified
5 propositions were established by the record. They were.

6 10. GRANT Respondents' Findings of Fact at paragraph 15.

7 11. DENY Respondents' Findings of Fact at paragraph 16.

8 12. GRANT Respondents' Findings of Fact at paragraph 17 to the extent that
9 legislative history was presented but DENIED to the extent that the
10 statutes are ambiguous and that the history supports the proposition
11 that RSA Chapter 479-B controls RSA Chapter 397-A.

12 13. GRANT Respondents' Findings of Fact at paragraph 18.

13
14 **VIII. CONCLUSIONS OF LAW**

15 1. GRANT Petitioner's Conclusion of Law at paragraphs 16, 17, and 18.

16 2. GRANT Petitioner's Conclusion of Law at paragraph 19 at the first and
17 third sentences only. The second sentence is DENIED but the RSA
18 Chapter 479-B exemption does not apply to RSA Chapter 397-A.

19 3. GRANT Petitioner's Conclusion of Law at paragraphs 20 and 21.

20 4. GRANT Respondents' Conclusions of Law at paragraph 1 to the extent
21 that two individuals engaged in the unauthorized practice of law and
22 that the primary representation of clients was as loan originators.

23 5. DENY Respondents' Conclusions of Law at paragraph 2. Loan origination
24 is not a core judicial function.

1 6. DENY Respondents' Conclusions of Law at paragraph 3. There was no
2 violation of due process; Dargon has no standing to raise a due
3 process argument for citizens of New Hampshire.

4 7. DENY Respondents' Conclusions of Law at paragraph 4.

5 8. DENY Respondents' Conclusions of Law at paragraph 5. The exemption in
6 RSA Chapter 479-B, where applicable, does not exempt Dargon from the
7 application of RSA Chapter 397-A.

8 9. DENY Respondents' Conclusions of Law at paragraph 6. Dargon's RSA
9 Chapter 397-A activities regarding each of the clients in question was
10 its primary representation. The representation was not ancillary. RSA
11 Chapter 397-A applies to Dargon and no exemption applies.

12 10. DENY Respondents' Conclusions of Law at paragraph 7. Petitioner
13 established a prima facie case and proved that Dargon violated RSA
14 Chapter 397-A and RSA Chapter 399-D by a preponderance of the evidence.

15
16 **IX. CONCLUSION**

17 For the foregoing reasons, the Petition is GRANTED IN PART and DENIED
18 IN PART.

19 Based on the record and the preceding discussion of law and facts, the
20 Presiding Officer DENIES the claim that Dargon acted as an unlicensed
21 mortgage broker. Any remaining claim that Dargon failed to facilitate a
22 bank examination is DENIED.

23 The claim that Dargon acted as a loan originator and was not exempt
24 from licensure under RSA Chapter 397-A is GRANTED. The claims that Dargon
25 collected advance fees and entered into best efforts contracts is also

1 GRANTED. The claim that Dargon did actual work as an unlicensed loan
2 originator is GRANTED. The alternative claim regarding misleading
3 communications is DENIED.

4 The claim regarding the violations of Gramm-Leach-Bliley Act is
5 GRANTED.

6 The claim that the activities of Larkowich and Ellis violated RSA
7 Chapter 399-D and that Dargon knew or should have known that they were not
8 licensed New Hampshire attorneys is GRANTED.

9 The claims regarding forensic audits is DENIED.

10 The Department's request for a show cause hearing is GRANTED. The show
11 cause hearing shall encompass:

- 12 1. The requested ban of Dargon from office as a New Hampshire Loan
13 Originator;
- 14 2. Whether refunds should be ordered, and, if so, in what amount;
- 15 3. Whether Dargon should be ordered to pay the Department the cost
16 of the investigation;
- 17 4. Whether there were profits, and, if so, what amount should be
18 disgorged. ¹²
- 19 5. The number of violations of RSA Chapter 397-A (not to exceed 92)
20 and/or RSA Chapter 399-D (not to exceed 29); and
- 21 6. Any other matter at the discretion of the Presiding Officer.

22
23
24
25 ¹² In the Order, the Presiding Officer has identified exhibits regarding
Larkowich and one exhibit regarding Ellis.

