

State of New Hampshire Banking Department

In re the Matter of:

State of New Hampshire Banking
Department,

Petitioner

and

CashCall, Inc., John Paul Reddam, President
and CEO of CashCall, Inc., and WS Funding,
LLC,

Respondents

Case No.: 12-308

**ORDER ON MOTION TO DISMISS, OR,
IN THE ALTERNATIVE, MOTION TO
STAY PENDING ARBITRATION**

ORDER

I. Introduction

The state of New Hampshire Banking Department (“Department”) issued an Order to Cease and Desist against CashCall, Inc. (“CashCall”), John Paul Reddam, President and CEO of CashCall, Inc. (“Reddam”), and WS Funding, LLC (“WS Funding”) (collectively, “Respondents”). The Respondents filed a Motion to Dismiss, or, in the Alternative, Motion to Stay Pending Arbitration. This Order addresses their Motion.¹

II. Background

On June 4, 2013, the Department commenced this adjudicative proceeding against the Respondents by issuing a Cease and Desist order. The Order alleged that the Respondents engaged in the business of making small loans or payday loans in New Hampshire without

¹ By separate Order issued on the same date as the instant Order, I have issued an Order on Respondents’ Motion to Dismiss Based On Unreasonable Warrantless Examination Under RSA 397-A.

obtaining a license to do so in violation of N.H. RSA 399-A.² This statute states that “no person shall engage in the business of making small loans, title loans, or payday loans in this state or with consumers located in this state, without first obtaining a license from the commissioner as provided in this chapter. (RSA 399-A: 1) In its order, the Department alleged that CashCall and WS Funding employed contractual and other relationships with a non-party, Western Sky Financial, LLC (“Western Sky Financial”) as a mechanism by which Respondents avoided becoming licensed under N.H. RSA 399-A, and that CashCall, while licensed as a mortgage banker under RSA 397-A, operated as the “actual” or “de facto” lender for payday or small loans for itself and on behalf of Western Sky.³

CashCall became licensed as a mortgage banker under N.H. RSA 397-A on or about February 11, 2011. Approximately one year later, on or about February 12, 2012 the Department commenced an examination of CashCall under N.H. RSA 397-A: 12. As a result of the Department’s examination, the Department’s examiner discovered that CashCall appeared to be engaged in the business of purchasing and servicing small loans or payday loans in association with Western Sky Financial. After analyzing and reviewing CashCall’s responses to an administrative subpoena *duces tecum* and reviewing the business relationships between the respondents CashCall and WS Funding, on the one hand, and Western Sky Financial, on the other, the Department issued an Order to Cease and Desist on June 4, 2013.⁴ The Order found that CashCall, or WS Funding, was the “actual” or “de facto” lender for the payday and small loans, and that Western Sky Financial was a front for the Respondents’ unlicensed activities. As a result, the Cease and Desist Order alleged that CashCall and WS Funding were being operated in violation of RSA Chapter 399-A.

The Respondents filed the instant Motion to Dismiss and an accompanying Memorandum of Law in support of the Motion on December 12, 2013 and the Department objected. The

² Effective January 1, 2016, RSA Chapter 399- was repealed and reenacted by HB 644, Chapter 73 (Laws of 2015). For the purposes of this Motion to Dismiss I review the matter under the statute, RSA Chapter 399-A, as it was in effect during the period as set forth in the Cease and Desist Order.

³ New Hampshire Banking Department’s Order to Cease and Desist, in re CashCall, Inc., et al, Case No, 12-308, June 4, 2013.

⁴ The parties have stipulated that Western Sky Financial ceased offering payday loans to New Hampshire consumers in September, 2013.

Motion seeks dismissal of the adjudicative proceeding on the grounds that, *inter alia*, (1) the Department has no subject matter jurisdiction over the Respondents because the payday loans are governed solely by the laws of the Cheyenne River Sioux Tribe (“CRST”); (2) the exercise by the Department over the payday loans violates the dormant Commerce Clause; (3) John Reddam is not subject to New Hampshire’s long-arm statute and therefore the Department lacks personal jurisdiction over him; and (4) the payday loan agreements that New Hampshire consumers entered into expressly contain binding arbitration provisions, and that pending arbitration, this matter should be stayed.

III. Standard of Review

My analysis and review of Respondents’ Motion to Dismiss is governed by the applicable standard of review. In general, the applicable standard of review in ruling on a motion to dismiss is whether the allegations in the Department’s pleadings are reasonably susceptible of a construction that would permit recovery. Perez v. Pike Indus., 153 N.H. 158, 159 (2005); *see*, Sanguedolce v. Wolfe, 164 N.H. 644, 648 (2013); Signal Aviation Servs. v. City of Lebanon, 164 N.H. 578, 582 (2013). When ruling on a motion to dismiss filed under RSA 541-A: 31 and PART Jus 806, the presiding officer considers the evidence in the light most favorable to the nonmoving party. City of Concord v. State of N.H., 164 N.H. 130,133 (2012). As a result, the presiding officer assumes the Department’s allegations to be true and construes all reasonable inferences in the light most favorable to the Department’s pleadings. *See, In the Matter of Cheryl Serodio and Arthur Perkins*, 166 N.H. 606, 609 (2104); *see, Signal Aviation Servs.*, 164 N.H., at 582.

The presiding officer need not assume the truth of statements in the Department’s pleadings that are merely conclusions of law. Tessier v. Rockefeller, 162 N.H. 324, 330 (2011), quoting Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611 (2010).⁵ The presiding officer must “engage in a threshold inquiry that tests the facts” in the Order to Cease and Desist

⁵ Federal case law also articulates the standard of review in a useful manner. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). “A plaintiff’s pleadings require more than mere conclusions; instead the facts alleged in the complaint must, if credited as true, be sufficient to ‘nudge[] [the plaintiff’s] claims across the line from conceivable to plausible.’” *Id.*, at 555, 570 (citation omitted).

“against the applicable law, and if the allegations constitute a basis for legal relief, the motion to dismiss will be denied.” See, Id. Where, as in the instant matter, a motion to dismiss raises the defense of subject matter jurisdiction, the presiding officer must determine, based on the facts, whether the Department has sufficiently demonstrated a right to relief. See, Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010) (quoting Provencher v. Buzzell-Plourde Assoc., 142 N.H. 848, 852-53 (1998) (“However, when ‘the motion to dismiss does not challenge the sufficiency of the plaintiff’s legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff’s unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief.’ ”).^{6 7} In short, the presiding officer must analyze the pleadings of the Department, including exhibits, to “engage in a threshold inquiry that tests the facts” against the applicable law to determine if the allegations constitute a basis for legal relief. Gen. Insulation Co., 159 N.H., at 611. Using this standard of review, I now turn to the Respondents’ arguments raised in their Motion to Dismiss.

IV. Respondents’ Assertion of Lack of Subject Matter Jurisdiction

A. Introduction

The Respondents’ Motion argues that the Department’s Cease and Desist Order should be dismissed because it unlawfully infringes on the sovereignty of a Native American tribe.⁸ The Respondents cite an established line of case law addressing tribal sovereignty to support their argument that the Department has no subject matter jurisdiction to issue the Cease and Desist Order. The Motion to Dismiss essentially claims that the Department’s Cease and Desist Order

⁶ I note that in one of the cases cited by the Respondents in support of their Motion, People v. Miami Nation Enterprise, 223 Cal.App.4th 21, 166 Cal. Rptr. 3d 800 (2014), discussed further infra, the California court held that “[o]n a motion asserting sovereign immunity as a basis for dismissing an action for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction exists” (citations omitted), and “[i]f resolution of the jurisdiction question depends on disputed issues of fact, we review the trial court’s findings for substantial evidence.” Id., at 32.

⁷ The reference to the quotation from Provencher in no way implies that the Respondents do not challenge the Department’s legal claims.

⁸ The Respondents commenced their arguments at the hearing on the Motion to Dismiss by stating that this is a case of first impression in New Hampshire, and I agree. My examination of New Hampshire Supreme Court case law reveals that no case addresses tribal sovereignty, let alone the legal effects of such sovereignty within the context of a New Hampshire regulatory agency seeking to enforce its statutory directives against non-tribal entities.

must be dismissed because it seeks to enforce New Hampshire statutory authority as set forth in RSA Chapter 399-A over a non-tribal person and non-tribal entities where such persons have business arrangements with a member of a recognized tribe and that member's tribal corporate entity. As a result, the Respondents argue, the Department lacks subject matter jurisdiction over Respondents and their activities.

The Respondents assert that the "tribal nature" of the Western Sky Financial loans precludes the Department's exercise of jurisdiction over them.⁹ They argue that the activities in which they have engaged cannot be regulated under New Hampshire law because they entered into contractual arrangements with Western Sky Financial, an entity wholly owned by a member of CRST, and that these arrangements are governed exclusively by tribal law. The Respondents assert that their business and contractual relationships with a sovereign tribe preclude the Department's regulation of non-tribal persons engaged in business in New Hampshire.

B. Tribal Sovereignty Jurisprudence in the Context of the Cease and Desist Order

For purposes of reviewing tribal sovereignty in the context of the Motion to Dismiss, the issue presented is whether the allegations in the Cease and Desist Order support the Department's claims of the extent to which, and the manner in which, CashCall and WS Funding participated as the actual or de-facto lenders in the making of payday loans, and whether the Department has alleged sufficient facts to demonstrate the likelihood that Respondents' arrangements with Western Sky Financial are a ruse designed to avoid regulation under RSA 399-A: 2.

The Respondents present in great detail the background to, and current jurisprudence concerning, the tribal sovereignty immunity doctrine. The case law and other authorities cited in Respondents' Memoranda, and my review of additional case law, set forth key concepts concerning tribal sovereignty. These include, among others, that Indian sovereignty depends entirely on whether Congress has recognized a tribe as a sovereign nation¹⁰; that, like any sovereign nation, Congressionally-recognized Indian nations are immune from suit, and that such nations can be sued in the courts of the United States or in any state courts only if Congress

⁹ Respondents' Reply Brief, p.2.

¹⁰ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)

expressly provides for such a suit or if the Indian nation has waived immunity and consents to the suit¹¹; that in the absence of congressional limitations on tribal immunity, federally-recognized Indian nations are immune from suit, whether the subject of the suit is activity on or off tribal lands¹²; and that a tribal entity engaged in business does not lose immunity by contracting with non-tribal operators of the business.¹³ The case law establishes that with respect to tribal members, as well as their corporate entities, Indian tribes retain “attributes of sovereignty over both their members and territory.” United States v. Mazuric, 419 U.S. 544, 557 (1975).

The Respondents’ memoranda cite to a number of cases in which the courts have held that tribal members are not subject to the jurisdiction of state law. For instance, in Confederated Tribes of Chehalis Reservation v. Thurston County Bd. Of Equalization, 724 F. 3d 1153 (9th Cir. 2013), the court held that permanent improvements made to land that was held in trust for an Indian tribe by the United States were immune from state and local government taxation. Id., at 1156-1157. Similarly, in McClanahan v. Ariz. State Tax Comm’s, 411 U.S. 164, 181 (1973), the U.S. Supreme Court held that a state may not tax a reservation Indian for income earned exclusively on the reservation.¹⁴ “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” Oklahoma Tax Comm’n v. Potawatomi Tribe, 498 U.S. 505, 509 (1991). In sum, the recognition of tribes as sovereigns in a government-to-government relationship with other sovereign nations has its source in the United States Constitution and is a well-established principle of federal Indian law. People v. Miami Nation Enterprises, 223 Cal. App. 4th 21, 32-33 (2014) (citing 25 U.S.C. § 3601: “The Congress finds and declares that – (1) There is a government-to-government relationship between the United States and each Indian tribe; (3) Congress, through statutes, treaties, and the exercise of

¹¹ Kiowa Tribe of Okla. V. Manufacturing Techs., Inc., 523 U.S. 751, 754 (1998); see also Washington v. Confederate Tribes of Colville Indian Reservation, 447 U.S. 134, 135 (1986).

¹² Id., at 745-55.

¹³ Native Am. Dist. v. Seneca-Cayuga Tobacco Co., 546 F. 3d 1288, 1296 (10th Cir. 2008).

¹⁴ The 1981 U.S. Supreme Court’s decision in Montana v. United States, 450 U.S. 544 (1981) addressed the issue of tribal sovereignty in the context of Montana’s ability to regulate non-tribal hunters on reservation land owned in fee by non-members of the tribe. In that case, the court held that the state could regulate such activity in such locations.

administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.”).

Respondents argue that historic and recent jurisprudence concerning tribal sovereignty expressly requires the dismissal of this matter because the payday loans made to New Hampshire consumers were made by an entity owned by a member of the CRST. Because Respondents claim the payday loans were “made” by Western Sky Financial, they assert that any attempt to exercise subject matter jurisdiction over the Respondents must fail. They argue that the Department’s exercise of its regulatory jurisdiction for payday loan activities is, in essence, an attempt to “veto” the manner in which Western Sky Financial and a member of the CRST have organized their business conduct. Because they claim that case law establishes that tribal entities such as Western Sky Financial should be able to arrange and to organize their business affairs under Indian law, the Respondents conclude that the Department is forbidden from seeking to regulate the activities of a non-tribal party with whom Western Sky Financial has a contractual relationship governed under Indian law.

Respondents cite a recent case, People v. Miami Nation Enterprises, 223 Cal. App. 4th 21 (2014) as support for their argument. In Miami Nation, a case concerning a “cash advance” lending business, the California court of appeals upheld the trial court’s decision granting a motion to quash filed by Indian tribes. In the Miami Nation case, the Commissioner of the California Department of Corporations had attempted to regulate five payday loan businesses owned by the economic development authority of the Miami Tribe of Oklahoma, a federally recognized Indian tribe, and a corporation owned by the Santee Sioux Nation, also a recognized Indian tribe. In the enforcement action, the Commissioner described facts demonstrating that non-tribal parties operated and controlled the actual cash advance and loan activities of the defendants, and that the tribal entities received one percent of the gross revenue from their cash advance/loan businesses while the non-tribal party’s company retained the net cash flow from the lending business. Miami Nation, 223 Cal. App.4th at 30-31.

Miami Nation is distinguishable from this case. Miami Nation involved an enforcement action of the California Commissioner brought directly against recognized federal tribes, not non-tribal parties. It concerned an action against the subsidiaries and related corporate entities of a recognized tribe, as opposed to an enforcement action brought solely against non-tribal

entities.¹⁵ In reviewing the trial court's decision granting the motion to quash, the California court of appeals analyzed whether the tribes' subsidiaries and related entities could be considered immune from state regulation because they were "arms of the tribes," an analysis that is only relevant in matters where the entities are indeed subordinate entities acting on behalf of the tribes or as "arms of the tribes." Miami Nation, 223 Cal. App. 4th, at 32-33.¹⁶

In a similar vein, the Respondents point to California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), a case in which the U.S. Supreme Court reaffirmed that state laws could apply to tribal members only with Congressional approval. In Cabazon Band the facts involved the state of California's efforts to regulate two recognized Tribes' management and operation of bingo games on the two reservations, and not activities of other non-related parties. Cabazon Band, 480 U.S., at 205-206.

The Cease and Desist Order, in contrast, is neither directed at the CRST nor any of its members. It concerns the conduct of the Respondents. Respondent Reddam is a resident of the state of California and is not a citizen of any tribe. CashCall is a California corporation and WS Funding is a Delaware corporation headquartered in California and wholly owned by CashCall. Neither is recognized as a tribal corporate entity nor has either been established by a member of any sovereign tribe.¹⁷ The Cease and Desist Order is directed solely at the activities of non-tribal entities. It should also be noted that the Cease and Desist Order does not represent an attempt to regulate the actions of Western Sky Financial or Martin A. Webb, nor does it adjudicate the relationship between Respondents and tribal members. The Respondents can only assert that their business relationship with Western Sky Financial is determinative of the issue of the Department's subject matter jurisdiction over them. In other words, the Respondents' claim that tribal sovereignty bars the Department's from exercising regulatory jurisdiction over them as non-tribal entities is based only on their economic association with Western Sky Financial, a member of the CRST.

¹⁵ Significantly, the decision in Miami Nation addresses and is determined by the "arm of the tribe" analysis. The California Commissioner had attempted to exercise state regulatory authority over entities created by and owned by a tribal nation.

¹⁶ The Respondents have expressly disclaimed any reliance upon an "arm of the tribe" theory. Respondents' Reply Memorandum, page 7.

¹⁷ Stipulation of Uncontested Facts in Case No. 12-308 ("Stipulation"), Dec. 12, 2013, ¶¶

C. The Stipulation of the Parties

The Stipulation that the parties entered provides a basis for reviewing the facts alleged in the Cease and Desist Order.¹⁸ As noted, with respect to the Respondents, neither CashCall, nor WS Funding, nor Mr. Reddam are tribal members or tribal entities. CashCall is a California lending corporation headquartered in Anaheim, California. While it holds a mortgage banking license under RSA 397-A, CashCall possesses no other licenses in New Hampshire. WS Funding is a wholly owned subsidiary of CashCall, and is a Delaware limited liability company with its principal place of business in Anaheim, California. Respondent Reddam is the President and Chief Executive Officer of CashCall and owns all of CashCall's corporate stock, and he also serves as the President of WS Funding.

Western Sky Financial, a non-party in this matter, is wholly owned by a non-party, Martin A. Webb, an enrolled member of the CRST. CRST itself is a sovereign Indian nation recognized by the United States Department of the Interior and located within South Dakota. CashCall and Western Sky Financial entered into an "Agreement for Service" on January 9, 2010. On or about February 1, 2010, WS Funding entered into an "Agreement for the Assignment and Purchase of Promissory Notes" (aka "WS Funding Assignment Agreement"). Between February, 2010 and September, 2013, CashCall paid Western Sky Financial \$10,000 per month in administrative fees pursuant to the WS Funding Assignment Agreement.

Between February, 2010 and September, 2013 CashCall reimbursed Western Sky Financial for the following: postage meter rental; bulk mailer standard software; a commercial printer contract; postage; miscellaneous administrative fees; a copy machine maintenance contract; office supplies; telephone and internet costs; utility costs; office construction and office customization costs; office furnishings; heating and cooling costs; security system installation and maintenance; office rental costs; snow removal costs; office repair costs; and parking costs.¹⁹ During this time CashCall also reimbursed Western Sky Financial for, among other items, half of the expense of computers and monitors, most payroll expenses for employees of Western Sky Financial, monthly advertising costs billed to Western Sky Financial, fees paid

¹⁸ Stipulation of Uncontested Facts, Dec. 12, 2013 ("Stipulation").

¹⁹ Stipulation, pages 2 and 3.

by Western Sky Financial to consumers loan lead generators such as KGM Direct, LLC and Little Big Mouth Consulting Leads, LLC. CashCall itself provided website hosting services for the internet address, www.westernsky.com website. CashCall designed a loan origination computer software system, referred to as the “Method” or CashCall system, which runs on CashCall’s servers. Borrowers’ information relative to making a loan was entered into CashCall’s “Method” system. From February, 2010 to September 3, 2013, CashCall provided Western Sky Financial employees with email accounts, services, and administration on CashCall’s Microsoft Exchange email servers.

The Stipulation also establishes that prospective borrowers who communicated with CashCall were informed that CashCall was assisting them with the loan application process on behalf of Western Sky Financial. For those applicants approved as borrowers, their loan agreements stated that, as borrowers, each loan agreement was “subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Association,” and that by executing the loan agreement the borrower consented to “the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court.”²⁰ Upon the assignment of the loan, which identified WS Funding as the purchaser, borrowers were directed to remit all payments to CashCall, and CashCall would initiate a “welcome call” to each borrower.²¹

D. The Facts Related to Respondents’ Activities in Payday Lending in New Hampshire

The Stipulation, the Cease and Desist Order and the Department’s Objection to the instant Motion to Dismiss set forth detailed facts concerning the manner in which the Respondents CashCall and WS Funding operate. For the purposes of ruling on the Motion to Dismiss, my task is to determine whether these facts establish the likelihood that Respondents have, indeed, engaged in payday lending and whether they have employed a “device or subterfuge” to engage in payday lending without a license.

The Department alleges that CashCall funded loans obtained through www.westernsky.com or a 1-800 telephone number and CashCall collected all payments on the

²⁰ Stipulation, page 3.

²¹ Stipulation, page 4.

loans. Potential borrowers applied for loans through the website or the 1-800 number and were connected to a “consumer loan agent” employed by CashCall.²² CashCall’s consumer loan agents interacted with potential borrowers, and input the applicants’ information into CashCall’s intranet system.²³ Consumer loans agents were instructed to inform borrowers that they worked for CashCall and that Western Sky Financial hired them to take applications on behalf of Western Sky Financial.²⁴

Upon completion of a borrower’s loan application, it was CashCall that provided “adverse action” notices required by the Fair Credit Reporting Act to those consumers denied loans.²⁵ Loan applications were transferred to a “loan queue” in the Method system software, designed by CashCall, on CashCall’s computer servers located in California.²⁶ CashCall reviewed potential borrowers’ credit reports, and its consumer loan agents were trained in reviewing credit reports and assessing the level of risk in making loans.²⁷ CashCall’s consumer loan agents submitted the loan applications to the underwriting department at CashCall through the Method system.²⁸ Upon the execution of loan documents by consumers, the loans were transferred to CashCall’s funding department, and CashCall employees checked references of consumers, reviewed employment verifications, and verified consumers’ bank account information.²⁹ CashCall’s Method system generated emails to consumers from servers located in CashCall’s offices in California. Significantly, the Department alleged that these emails appeared to have been designed to make consumers believe that the loan was being processed

²² Stipulation 13, Ex. B at 1: Exhibit 7, Doc. #CC-NH-0004043-0004045).

²³ Ex. 7, Doc #CC-NH-00003996.

²⁴ Ex. 7, Doc #CC-NH_00003988. As the Department also states, as part of their training consumer loan agents are provided with a quiz in which they are asked what to say when a potential borrower asks if she has reached Western Sky Financial. “The correct response is to say that ‘i work for CashCall, we were hired by Western Sky to process their [sic] applications.’ ” The quiz ‘s answer then states, in bold letters, “DO NOT MENTION ANYTHING ABOUT UNDERWRITING OR FUNDING – OFFER THE WESTERN SKY PHONE NUMBER IS ANY FURTHER QUESTIONS ARE ASKED.” Ex. 7, Doc #CC-NH-00004054.

²⁵ Ex. 7, Doc #CC-NH-00004004.

²⁶ Ex. 7, Doc #CC-NH-00004006.

²⁷ Ex. C – Consumer A, Doc #CC-NH-00003023-3036; Ex. 7, Doc #CC-NH-00004014. The department also points out that “CashCall uses the credit report as the major factor in assessing loan risk.”

²⁸ Ex. 7, Doc #CC-NH-00004031.

²⁹ Ex. 7, Doc #CC-NH-00004040.

and underwritten by Western Sky Financial.³⁰ After CashCall employees completed the processing and underwriting, funds were wired from Western Sky Financial's Wells Fargo Funding Account, and within a short period of time WS Funding sent notices to approved consumers that WS Funding has purchased the consumers' loans.³¹

In support of its Objection to the Motion to Dismiss, the Department provided a description of the representative and typical involvement of CashCall, through its subsidiary, WS Funding, to evaluate and then process the loans made to a consumer.³² A CashCall employee undertook to verify the consumer's personal information, including child-support garnishments, prior payday loans, and mortgage payment record.³³ CashCall then generated emails to the consumer to obtain signatures on the promissory note and disclosure on the www.westernsky.com.com website and notified the consumer regarding the status of the funding of the loan. Upon funding the loan, with an initial payment due January 1, 2013, CashCall withdrew payment from the consumer's account on January 8, 2013.³⁴

Based upon the facts submitted, not only did CashCall engage in the formalities of initiating and processing the loans and fund the loans, it paid Western Sky Financial 3.125% of the face value of each consumer loan.³⁵ In addition, and as noted above, CashCall provided the plethora of services to Western Sky Financial, assumed the risk of the loans, and indemnified

³⁰ Ex 7-, Doc. #CC-NH-00004054 ; Department's Memorandum in Support of Objection to Motion to Dismiss, p. 10 ; Stip. ¶ 28, Ex. C - Consumer A, Doc. #CC-NH-00003032 – 3-33(indicating that Western Sky Financial pulled the consumer's report), with Stip. ¶ 28, Ex. C – Consumer A, Doc. #CC-NH-00003023 – 3026 (demonstrating that CashCall actually pulled the consumer's credit reports).

³¹ Stipulation ¶ 12, Ex. A at 3, ¶ 7(c) . Also noted is that Western Sky Financial collected no payments from consumers.

³² Department's Memorandum in Support of its Objection to Motion to Dismiss, pages 10 -12.

³³ Stip. ¶ 28, Ex C. Consumer D, Doc. # CC-NH-00002856 – 2901.

³⁴ Stip. ¶ 28, Ex C. Consumer D, Doc. # CC-NH-00002936. In its Memorandum to its Objection, the Department also provides an indicia of the credibility of Respondents' representations to the Department. From March, 2010 until September, 2012, CashCall wired funds for each consumer loan to a Wells Fargo Account held by Western Sky Financial. Commencing in October, 2012 CashCall wired funds to a separate entity, Longwood Finance Management. CashCall stated that these funds were wired "in advance of loans being purchased and were booked as a note receivable on CashCall, Inc.'s books." CashCall's financial statements, however, did not reflect these note receivables. Department's Memorandum in Support of its Objection to Motion to Dismiss, page 12; Ex. 18, CashCall Financial Statements, December 31, 2012.

³⁵ Department's Memorandum in Support of its Objection to Motion to Dismiss, page 13; Ex. 14, Doc # CC-NH-00000094; Stip. 13, Ex. B, #CC-NH-00000011; Stip. 12, Ex. A, #CC-NH-00000005.

Western Sky Financial for all costs arising to any civil, criminal, or administrative claims or actions relating to the issuance of the payday loans.

E. The Department's Allegations Concerning Respondents as the "True Lender" Are Relevant to the Department's Subject Matter Jurisdiction

The Cease and Desist Order seeks to regulate the Respondent's conduct in the establishment of payday loans provided to New Hampshire consumers. As such, the Department's case against the Respondents must demonstrate facts that the Respondents, notwithstanding the formalities of the contractual arrangements with a third-party, directed how the loans were made and actually engaged in making them. I find that the Cease and Desist Order and the Department's Objection and Memorandum set forth facts that demonstrate that CashCall engaged in the business of making of payday loans in New Hampshire and that CashCall engaged in a pretense to avoid obtaining a license under RSA 399-A:2.

As the Department has noted, the substance of a transaction, rather than the formal loan documents, serves to identify the actual or de facto lender. Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190, 1196 (N.D. Cal. 2012).³⁶ In People ex rel. Spitzer v. County Bank of Rehoboth Beach, Delaware, 846 N.Y.S.2d 436, 45 A.D. 3d 1136 (N.Y. App. Div. 2007), a case involving an enforcement action against so called "rent-a-bank" arrangements, the New York Attorney General alleged that certain payday lenders were the "true lenders" and that contractual agreements with a Delaware "rent-a-bank" were designed to evade New York's usury laws. The

³⁶ The court in Ubaldi faced what it characterized as an issue of first impression, which was whether it could consider what entity was the actual "de facto" lender, when a national bank was listed on the loan documents, to decide whether the National Bank Act preempts state law. 852 F. Supp. 2d at 1196. The court determined that dismissal of the case would be improper, and, in dicta, stated that, "Generally, Plaintiff argues that the Court should allow her claims to proceed based on the economic reality rather than form of the loans, as courts do in other contexts such as challenges to 'pay day' loans under state usury laws where a bank is the lender in name only, while a non-bank entity is the true de facto lender. Defendant counters primarily that in the absence of direct authority for looking beyond the loan documents, form should trump substance, or the courts will be drawn into difficult line-drawing. Plaintiff responds that her allegations of a completely sham transaction are sufficient to overcome a motion to dismiss at this early stage of the litigation, especially because, in the absence of controlling authority, ' the court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.' McGary v. City of Portland, 386 F.3d 1259, 1270 (9th Cir.2004). " The Ubaldi court went on to cite further cases establishing that "[t]hus, where a plaintiff has alleged that a national bank is the lender in name only, courts have generally looked to the real nature of the loan to determine whether a non-bank entity is the de facto lender." Ubaldi, 852 F. Supp. 2d, id., at 1201.

court in Spitzer reviewed the manner in which the payday lenders operated: they purchased the bank's payday loans; assumed all the risks relating to the loans; agreed to indemnify the bank against all losses arising from the loan transactions; provided the Delaware bank with payment of \$4,000 per month; and operated without oversight by the Delaware bank. The facts as presented in this matter demonstrate a remarkably similar arrangement. Moreover, the Spitzer court employed a "totality of the circumstances" test to determine the identity of the "true lender," with the key factor being which entity held the "predominant economic interest." Spitzer, 45 A.D. 3d, at 1138. As the facts set forth above and alleged by the Department manifest, CashCall ultimately retained the "predominant economic interest," as well as the risk, in the payday loans provided to New Hampshire consumers.

The Respondents assert that the final act in actually "making" the payday loans was conducted "on the reservation" of the CRST, and as a result the Department may not interfere in the business relationships with non-tribal entities associated with the loans. I find that the allegations against the Respondents pertain to activities conducted by the Respondents in either California or New Hampshire.³⁷ Respondents' activities are precisely why the "true lender" test enunciated in Ubaldi v. SLM Corp. and People ex rel. Spitzer v. County Bank of Rehoboth Beach is relevant to the analysis of the Motion to Dismiss. Moreover, my review of the facts reveals that because CashCall's computer servers located in Anaheim, California hosted the www.westersky.com website, any of the borrowers' final acceptances of their payday loans were "provided" on those servers. Notwithstanding this finding, to the extent that there may be disagreement over the exact "location" that the final acts completing the loan process occurred, the actions of the Respondents, and not those of Western Sky Financial, are at issue. See, Ubaldi, 852 F. Supp. 2d, at 1196; Spitzer, 45 A.D. 3d, at 1138-39.

The Respondents take issue with the employment of a "true lender" test because they argue it permits the State of New Hampshire to "veto" tribal entities' business arrangement with non-tribal entities.³⁸ In this matter, I find that the use of a "true lender" in this matter is warranted because, as noted, the Cease and Desist Order seeks to oversee the activities of Respondents, and

³⁷ Again, as noted above, Respondents are neither Indians nor members or entities of a recognized tribal nation, and therefore cannot avail themselves of "sovereign immunity" granted to Indian tribes and their subsidiaries.

³⁸ Respondents' Reply Memorandum to Department's Objection to Motion to Dismiss, pages 7-8.

not the business relationships that the CRST may have with third-parties. Here again, the Respondents rely on The People of State of California v. Miami Nation Enterprises, et al., 223 Cal.App.4th 21 (2014) in support of their position that allowing the Department to proceed with its Cease and Desist Order effectively would permit improper state regulation over a tribal entity.

As described supra, Miami Nation Enterprises concerned an effort by the California Commissioner of Business Oversight to regulate subsidiary entities of Indian tribes that engaged in providing short-term, payday loans over the Internet to California residents in violation of California state law through business arrangements with those recognized Indian tribes, the Miami Tribe of Oklahoma and the Santee Sioux Nation. The Commissioner argued that the subsidiaries' engagement in payday lending, coupled with a third-party, non-tribal member's position in operating the subsidiaries, eliminated the tribes' ability to extend tribal sovereignty to the subsidiary payday loan companies. Miami Nation Enterprises, 223 Cal.App.4th, at 32. The court of appeals disagreed, and in doing so analyzed the relationships between the subsidiaries and their trade name businesses that were engaged in payday lending with the actual tribes, Miami Nation and Santee Sioux. The court found that the two tribes had established and owned the wholly-owned subsidiary businesses, which themselves owned wholly-owned subsidiaries operating the payday loan businesses. As a result, the California court of appeals concluded that the subordinate commercial entities of the tribes were acting as "arms of the tribes," and therefore were entitled to tribal sovereign immunity. 223 Cal.App.4th, at 38-42.

Miami Nation Enterprises does not support the Respondents' claim that the "true lender" test is invalid for two reasons. One is that the Respondents expressly have not sought to shield their activity under an "arm-of-the-tribe" theory. The second is that on its face, the Cease and Desist Order does not seek to order the CRST or Mr. Webb to do anything. As opposed to the California Commissioner, who targeted subsidiaries of Indian tribes, the Cease and Desist Order solely focuses on Respondents, who are connected to CRST through contract, and who, upon a review of the facts as pled, have demonstrated the likelihood that unlicensed payday loan lending occurred in New Hampshire.

F. Indian Commerce Clause Preemption of N.H. Regulation Over Respondents

The Respondents have asserted that the Indian Commerce Clause preempts the Department from seeking to exercise subject matter jurisdiction over them.³⁹ As noted supra, the Respondents cite to established case law that demonstrates a federal prerogative in favor of tribal self-sufficiency and self-regulation over Indian commercial affairs. The Respondents stress that the CRST has a significant interest in regulating its own business activity, and that the federal government has an acute interest in protecting CRST sovereignty, as well. The Department does not take issue with these tenets. The issue is whether, given the facts as pled and as presented in the parties' pleadings, the Indian Commerce Clause is applicable to the analysis of Respondents' Motion to Dismiss.

Unlike the facts as presented in Miami Nation and Cabazon Band, this case concerns non-tribal member activity. The facts as pled by the Department pertain to New Hampshire's interest in regulating the conduct of non-tribal persons engaged in an enterprise under which they made payday loans to New Hampshire consumers without obtaining a license required under RSA Chapter 399-A.

For the above reasons, I find that the Department has subject matter jurisdiction over the Respondents.

V. Respondents' Assertion of Dormant Commerce Clause Violation

The Motion to Dismiss contends that the application of RSA 399-A: 2, I to Respondents violates the dormant Commerce Clause.⁴⁰ Respondents aver that the New Hampshire consumers entered into the payday loan transactions and consummated them outside of New Hampshire, and as result the Department's attempt to regulate the conduct of Respondents outside of New Hampshire violates the dormant Commerce Clause.

³⁹ U.S. Const. art I, § 8. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."

⁴⁰ U.S. const. art. I, § 8, cl.3.

The Commerce Clause reserves to Congress the right to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause also has a "negative aspect" that "prohibits states from unjustifiably discriminating against or burdening interstate and foreign commerce." Eby v. State, 166 N.H. 321, 335 (2014), quoting Gen. Elec. Co. v. Comm'r, N.H. Dep't of Revenue Administration, 154 N.H. 457, 466 (2006). "This construction supports the Commerce Clause's purpose of 'preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole,' the likely result if it were 'free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" Eby, 166 N.H., at 335, quoting Smith v. N.H. Dep't of Revenue Admin., 141 N.H. 681, 691 (1997) (quotation omitted). "The core purpose of the dormant Commerce Clause is to prohibit economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Smith v. N.H. Dep't of Revenue Admin., 148 N.H. 536, 538 (2002) (quotation omitted).

As the Department and Respondents each note, a corollary to this tenet of the dormant Commerce Clause is that it also bars states from regulating wholly extraterritorial transactions. Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005). This restriction on the states "is not absolute and in the absence of conflicting legislation by Congress, 'the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.'" Pharm. Care Mgmt., 429 F.3d, at 311, quoting Maine v. Taylor, 477 U.S. 131, 138 (1986).

RSA 399-A: 2, I provides that "[n]o person shall engage in the business of making small loans, title loans, or payday loans in this state or with consumers located within this state, without first obtaining a license from the commissioner as provided in this chapter." RSA 399-A: 2, I is applicable to those persons engaged in making payday loans in New Hampshire with a New Hampshire consumer. The Cease and Desist Order and facts as pled in the Department's memorandum establish the likelihood that CashCall engaged in the business of making small loans without a license to New Hampshire consumers situated in New Hampshire. I find that the statute as applied through the Cease and Desist Order does not violate the dormant Commerce Clause.

VI. Jurisdiction over Respondent John Paul Reddam

The Cease and Desist Order names John Paul Reddam as one of the Respondents. The Motion to Dismiss seeks to have Respondent Reddam dismissed from this matter for lack of personal jurisdiction. As established, supra, the Department has subject matter jurisdiction over Mr. Reddam. See, Hemenway v. Hemenway, 159 N.H. 680, 683. “Subject matter jurisdiction is ‘[j]urisdiction over the nature of the case and the type of relief sought: the extent to which a court can rule on the conduct of the persons or status of things.’” (quoting *Black’s Law Dictionary* 931 (9th ed. 2009)) “In other words, “subject matter jurisdiction is a tribunal’s authority to adjudicate the type of controversy involved in the action.” Id. (quotations omitted).

Mr. Reddam is the Chief Executive Officer and President of CashCall. He is the sole owner and director of CashCall.⁴¹ Mr. Reddam is also President of WS Funding. While CashCall is not licensed as a small loan lender under RSA 399-A, it is licensed as a mortgage banker in New Hampshire under RSA 397-A and is subject to the department’s exercise of regulatory jurisdiction.

RSA 399-A: 18, “Penalties,” sets forth a number of subparagraphs that address the penalties the Department may levy on persons who violate provisions of RSA Chapter 399-A. The Department has asserted that it has subject matter jurisdiction over Mr. Reddam based on RSA 399-A: 18, VI,⁴² which provides as follows:

Every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer, or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in any act constituting a violation of this chapter, and every licensee or person acting as a common law agent who materially aids in any act constituting a violation of this chapter, either knowingly or negligently, may, upon notice and opportunity for hearing, and in addition to any other penalty provided for by law, be subject to suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal or civil penalties imposed. No person

⁴¹ Affidavit of J. Paul Reddam (“Reddam Affidavit”), ¶ 4.

⁴² I again note that effective January 1, 2016, HB 644, Chapter 73 (Laws of 2015) repealed and reenacted RSA Chapter 399-A. This Order references those sections of RSA Chapter 399-A in effect as of the dates described in the Cease and Desist Order.

shall be liable under this paragraph who sustains the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist.

The Department asserts that this statutory provision applies to Mr. Reddam because he is the Chief Executive Officer of CashCall and directly controls CashCall. The Department claims that Mr. Reddam, by virtue of his position, is by statute subject to the penalties as set forth in RSA 399-A: 18, VI for violations of RSA 399-A: 2, I. As discussed supra, the Department has pled facts sufficient to warrant denial of Respondents' Motion to Dismiss based upon lack of subject matter jurisdiction. In reviewing the facts as presented by the Department, the likelihood is strong that Respondents, including Mr. Reddam, have engaged in payday lending without a license in violation of RSA 399-A: 2, I by and through his use of CashCall as a subterfuge to avoid becoming licensed as a payday lender in New Hampshire.

The Department asserts that CashCall is licensed as a mortgage banker in New Hampshire pursuant to RSA 397-A: 3, and that Mr. Reddam, as President and CEO, also is subject to penalties levied pursuant to RSA 397-A: 21, V, against persons who control "directly or indirectly" persons liable for violations of the mortgage banking statute.⁴³ As established in both RSA chapters 397-A and 399-A, entities in violation of these chapters are subject to penalties, and persons in control of such entities are themselves subject to applicable statutory penalties.

Respondent Reddam argues that RSA 399-A: 18, VI does not give the department personal jurisdiction over him because he is domiciled in California.^{44 45} For personal

⁴³ Department's Memorandum in Support of Objection to Motion to Dismiss, page 30, footnote 7. RSA 397-A: 21, V provides: "Every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act constituting the violation, and every licensee or person acting as a common law agent who materially aids in the acts constituting the violation, either knowingly or negligently, may, upon notice and opportunity for hearing, and in addition to any other penalty provided for by law, be subject to suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or the imposition of an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal or civil penalties imposed. No person shall be liable under this paragraph who shall sustain the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist.

⁴⁴ Reddam Affidavit, ¶ 1.

jurisdiction to exist, Respondent Reddam contends that the Department's assertion of jurisdiction must satisfy New Hampshire's long-arm statute, RSA 510: 4, and the tests for due process as explained in Fellows v. Colburn, 162 N.H. 685 (2011) and Northern Laminate Sales, Inc. v. Matthews, 249 F. Supp.2d 130 , 137-138 (2003). Respondent Reddam claims that because the Department has neither demonstrated how assertion of personal jurisdiction satisfies the long-arm statute, nor shown how he could be afforded due process, the Cease and Desist Order against him must be dismissed.

When jurisdictional facts are challenged, the plaintiff need make only a prima facie showing of such facts to defeat the defendant's motion to dismiss. Vermont Wholesale Building Products, Inc. v. J. W. Jones Lumber Company, Inc., 154 N.H. 625, 628 (2006) (citing Brother Records, Inc. v. Harpercollins Publishers, 141 N.H. 322, 324-25, 682 A.2d 714 (1996), cert. denied, 520 U.S. 1103, 117 S.Ct. 1106, 137 L.Ed.2d 309 (1997)). The plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant. Id. at 628.

In Vermont Wholesale Building Products, Inc. v. J.W. Jones Lumber Company, Inc. 154 N.H., at 628, the New Hampshire Supreme Court set forth the standard for dismissing an action based on the absence of personal jurisdiction over the defendant. There the Court stated: "In determining whether the plaintiff has met its burden, we generally engage in a two-part inquiry. Staffing Network, Inc. v. Pietropaolo, 145 N.H. 456, 457, 764 A.2d 905 (2000). 'First, the State's long-arm statute must authorize such jurisdiction. Second, the requirements of the federal Due Process Clause must be satisfied.' Id. (citation omitted). Because we construe the State's long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause, see Alacron v. Swanson, 145 N.H. 625, 628, 765 A.2d 1043 (2000), our primary analysis relates to due process. See Dagesse v. Plant Hotel N.V., 113 F.Supp.2d 211, 215 (D.N.H.2000). Pursuant to the Federal Due Process Clause, a court may exercise personal jurisdiction over a nonresident defendant if the defendant has minimum contacts with the forum,

⁴⁵ Respondents' Reply Memorandum to Objection to Motion to Dismiss, page 12 – 13.

‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’ Alacron, 145 N.H. at 628, 765 A.2d 1043.”

Whether the department has personal jurisdiction over Mr. Reddam based upon the provisions of RSA 399-A: 18, VI depends upon whether the facts alleged in the Department’s Order to Cease and Desist establish that Mr. Reddam had sufficient minimum contacts with New Hampshire to meet the requirements of due process. Personal jurisdiction can be either general or specific. Vermont Wholesale, 154 N.H., at 628, citing Staffing Network, 145 N.H., at 458. “General jurisdiction exists when the litigation is not directly founded on the defendant’s forum-based contacts, but the defendant has nonetheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state.” Vermont Wholesale, at 628, citing Pritzker v. Yari, 42 F.3d. 53, 60 (1st Cir. 1994) (cert denied, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995)). Specific jurisdiction, on the other hand, is “narrower in scope” and may only be relied upon “where the cause of action arises out of or relates to the defendant’s forum-based contacts.” Vermont Wholesale, 154 N.H., at 628, citing Staffing Network, 145 N.H., at 458 (quotations omitted).

In determining whether the exercise of specific personal jurisdiction comports with due process, I examine whether: (1) Mr. Reddam’s contacts relate to the cause of action; (2) Mr. Reddam has purposefully availed himself of the protection of New Hampshire’s laws; and (3) it would be fair and reasonable to require Mr. Reddam to defend against the Cease and Desist Order and associated penalties in New Hampshire. Vermont Wholesale, 154 N.H., at 628. All three factors must be satisfied in order for the exercise of jurisdiction to be constitutional, id., citing Dagesse v. Plant Hotel N.V., 113 F.Supp. 2d 211, 216 (D.N.H. 2000), and each factor is evaluated on a case-by-case basis. Id., citing Phelps v. Kingston, 130 N.H. 166, 171 (1987).

I first examine whether the Department has met its burden of proof with respect to the first two factors. The Cease and Desist Order has established that Mr. Reddam is the sole owner and director of CashCall. This is verified by Mr. Reddam’s affidavit. The Cease and Desist Order demonstrates facts that CashCall is licensed as a mortgage banker under RSA 397-A, is not licensed as a payday lender under RSA 399-A, and that it is highly likely that CashCall has

engaged in payday lending in New Hampshire without a license. As alleged by the Department and confirmed by his affidavit, Mr. Reddam is the Chief Executive Officer and President of CashCall. He is the sole owner and director of CashCall and is also the President of WS Funding. In his capacity as owner, director and chief executive, Mr. Reddam directed, organized and structured CashCall's transactions in such a manner as to avoid New Hampshire licensing and regulatory requirements for payday lending. The organization and structure of CashCall allowed Mr. Reddam to target New Hampshire consumers with payday loans that violated New Hampshire law. As the sole owner and director of CashCall, Mr. Reddam's contacts with the state of New Hampshire through the activities of CashCall relate to what the Department has pled in the Cease and Desist Order and in its pleadings. I find that the Department has satisfied the first factor.

Satisfaction of the second factor requires a determination as to whether Mr. Reddam has established minimum contacts with New Hampshire. The New Hampshire Supreme Court has stated that minimum contacts "must have some basis in some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws . . . Jurisdiction is proper where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State." Metcalf v. Lawson, 148 N.H. 35, 38 (2002), quoting Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 108-09 (1987) (quotations and brackets omitted) "The focus of this inquiry, therefore, is not merely whether ... the defendant[s] contacts might have caused injury in New Hampshire, but whether these contacts should have given [the] defendant notice that ... [he] should reasonably have anticipated being hailed into court in this State." Alacron v. Swanson, 145 N.H. 625, 628, (2000). Often this inquiry focuses upon whether the defendant has purposefully directed its activities at residents of the forum. Vermont Wholesale, 154 N.H., 628, citing Skillsoft Corp. v. Harcourt General, 146 N.H. 305, 309 (2001).

CashCall, whose sole owner and director is Mr. Reddam, applied for and received a mortgage-banker license pursuant to RSA chapter 397-A. The license provides privileges and protections to both CashCall, as the licensee, and Mr. Reddam, as its sole owner. In particular, it allows CashCall to conduct business in New Hampshire in the highly regulated business of

mortgage-banking. At the same time, RSA chapter 397-A serves as notice to Mr. Reddam that in return for the protections and privileges that CashCall possesses as a licensee, as its President and sole owner, Mr. Reddam is subject to the requirements of the chapter, as well as its statutory penalties, when he engages in conduct that evades the requirements of the law. RSA 397-A: 21, V.⁴⁶

The Department's Cease and Desist Order and pleadings manifest a likelihood that CashCall engaged in activities that violate New Hampshire law under RSA 399-A, and that under RSA 399-A: 18, VI, Mr. Reddam permitted these activities to occur. As the sole owner of an entity licensed to engage in mortgage banking in New Hampshire, Mr. Reddam is statutorily subject to, and is deemed to have notice of the applicable licensing laws. e.g., RSA 397-A: 2, III ("Persons subject to or licensed under this chapter shall abide by . . . the laws and rules of this state...Any violation of such law, regulation, or rule is a violation of this chapter . . ."). Thus, Mr. Reddam's status is unlike that of the defendants in Fellows v. Colburn, 162 N.H., at 693 – 694, where the defendant-trustees in no manner purposefully availed themselves of the protection of New Hampshire's laws. I find that Mr. Reddam has purposefully availed himself of the protections and privileges of the laws of New Hampshire, and therefore the second factor is satisfied.

The third factor requires me to determine whether it would be fair and reasonable to require Mr. Reddam to defend against the Cease and Desist Order and associated penalties in New Hampshire, by reviewing the so-called "gestalt factors," as enunciated in Phelps v. Kingston, 130 N.H., at 171. "Once it has been decided that a defendant purposefully established

⁴⁶ RSA 397-A: 21, V provides: "Every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act constituting the violation, and every licensee or person acting as a common law agent who materially aids in the acts constituting the violation, either knowingly or negligently, may, upon notice and opportunity for hearing, and in addition to any other penalty provided for by law, be subject to suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or the imposition of an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal or civil penalties imposed. No person shall be liable under this paragraph who shall sustain the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist."

minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' Thus courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Phelps, 130 N.H., at 172, quoting Burger King v. Rudzewicz, 471 U.S. 462, 476-77 (1985). "Thus, where litigation relates to the defendant's activities purposely directed at the forum State, the sufficiency of these activities or contacts reasonably to forewarn him of the possibility of suit in the forum, weighed in combination with other factors relevant to affording substantial justice, will determine whether the State may constitutionally exercise personal jurisdiction over the defendant." Id.

The "gestalt-factors" as set forth in Phelps require me to weigh each against the others. With regard to the burden on Mr. Reddam to defend the Cease and Desist Order in New Hampshire, I find burden exists, in light of the distance he would be required to travel and that, at least as of the time he executed his affidavit in late 2013, he had not visited the state in over a year. I give substantial weight to this conclusion.

I find that the state of New Hampshire, through the Department, has a significant interest in adjudicating the dispute in New Hampshire, and that the Department has a statutorily heightened interest in obtaining convenient and effective relief. My evaluation of these two "gestalt-factors" is based on the comprehensive regulatory scheme established in RSA Chapter 397-A that governs mortgage banking, and RSA Chapter 399-A, that governs the business of making small loans, title loans, and payday loans with consumers in New Hampshire. RSA 399-A: 2, I. See, Frost v. Commissioner, New Hampshire Banking Dept., 163 N.H. 365, 375 (2012) (in context of reviewing trial court's decision to enjoin the Department from seeking penalties against an individual, the court noted that RSA 397-A: 2, I grants jurisdiction "only over persons that engage in the business of making or brokering mortgage loans"; see also, Lynn, J.,

dissenting for other reasons, “At all times pertinent to this case, RSA chapter 397-A established a comprehensive regulatory scheme for ‘persons that engage in the business of making or brokering’ certain mortgage loans.” Frost, 163 N.H., at 382.) As a result of the comprehensive regulatory scheme established in RSA chapter 399-A, I find this to be “an appropriate case” for the “gestalt-factors” to favor the constitutional exercise of personal jurisdiction over Mr. Reddam.

Under the comprehensive licensing and regulatory scheme of RSA 397-A, CashCall is a licensed mortgage-banker, and its President and CEO, Mr. Reddam is subject to the requirements applicable to him under the chapter, as well as its statutory penalties, when he engages in conduct that evades the requirements of the law. RSA 397-A: 21, V.⁴⁷ The comprehensive regulatory scheme established under RSA chapter 397-A applies to the actions of both licensed and unlicensed persons engaged in the business of mortgage- banking. Similarly, RSA 399-A: 18, VI establishes a comprehensive licensing and regulatory scheme that applies to both licensed and unlicensed persons and entities. RSA 399-A: 18, VI subjects persons such as Mr. Reddam to penalties associated with particular acts, in this case using Cash Call to make payday loans without obtaining a license.

Through the State’s imposition of comprehensive licensing requirements on payday lending, a person (licensed or unlicensed) who engages in payday lending, accepts the regulatory jurisdiction of the Department. The statutory regime is constructed to regulate those who obtain a license, and penalize those who engage in payday lending without obtaining a license. Under the regulatory regime at issue, persons who fall within the purview of RSA 399-A: 18, VI are

⁴⁷ RSA 397-A: 21, V provides: “Every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act constituting the violation, and every licensee or person acting as a common law agent who materially aids in the acts constituting the violation, either knowingly or negligently, may, upon notice and opportunity for hearing, and in addition to any other penalty provided for by law, be subject to suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or the imposition of an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal or civil penalties imposed. No person shall be liable under this paragraph who shall sustain the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist.”

subject to the jurisdiction of the department, and by extension are subject to the penalties of the statute. Under the plain language of the statute, persons who directly control corporate entities or licensees or who use corporate entities as an alter-ego are deemed themselves to be engaged in the business of making payday loans without a license, are subject to the statutory penalties. I ascribe substantial weight to the language of the statute.

With regard to the factor concerning “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” because the Cease and Desist Order is based upon a New Hampshire statute I find that the forum state of New Hampshire provides the most efficient venue for resolution of the instant matter, and accord substantial weight to this consideration. With regard to the “gestalt-factor” concerning the “shared interest of the several States in furthering fundamental substantive social policies,” I find that the comprehensive regulatory scheme in RSA 399-A addresses regulatory measures that apply to the business of small loans and payday loans. I have no basis to determine whether, or the extent to which, the adjudication of this matter in New Hampshire may reflect New Hampshire and other states’ interest in substantive social policies, and I therefore ascribe no weight to this particular factor.

The Cease and Desist Order relates to Mr. Reddam through CashCall’s activities expressly directed at consumers in New Hampshire. For the reasons above, in assessing the weights attributable to each “gestalt-factor,” I find that the state of New Hampshire’s interest in adjudicating the dispute and the Department’s interest in obtaining convenient and effective relief afforded it through a comprehensive regulatory scheme outweigh the burden of travel of Mr. Reddam. I therefore find that the Department, through its Cease and Desist Order, may constitutionally exercise personal jurisdiction over Mr. Reddam and deny Respondents’ Motion to Dismiss as it relates to Mr. Reddam.

VII. Arbitration Provisions in Contracts with Consumers

The Respondents seek to have these proceedings stayed pending arbitration of the Department’s claims against Respondents. Because the payday loan agreements entered into by New Hampshire consumers contains a mandatory arbitration provision, the Respondents assert

that the Department must proceed with arbitration in lieu of this proceeding under the Cease and Desist Order.

The Cease and Desist Order has been issued because the Department has reasonable cause to believe that the Respondents have engaged in violations of RSA 399-A: 2, I by offering and making payday loans without a license. Under RSA 399-A: 8, I, the Department may issue a Cease and Desist Order against any licensee or person who it has reasonable cause to believe has violated RSA chapter 399-A. The Department may seek administrative fines up to \$2,500 for each statutory violation of RSA chapter 399-A pursuant to RSA 399-A: 18 III, IV, V, and VI. The commissioner of the Department may by order, upon due notice and opportunity for a hearing, assess penalties for violations of RSA chapter 399-A if it is in the public interest. RSA 399-A: 7, I. As noted above in section VI, supra, RSA chapter 399-A constitutes a comprehensive regulatory scheme by which the Department is statutorily charged with the oversight and regulation of small loan and payday loan activity.

Respondents have pointed to and rely upon a Superior Court decision in State of New Hampshire v. Cross Country Bank & Applied Card Systems, Docket No. 2002-E-0203 (Merrimack County, 2003) to argue that this proceeding should be stayed and submitted to binding arbitration.⁴⁸ ⁴⁹ This case involved collection activities of the Cross Country Bank, which engaged in extending credit to consumers through the issuance of credit cards. The consumers had entered into binding arbitration provisions with Cross Country Bank. The issue in Cross Country Bank relevant to Respondents' argument that the Department must engage in binding arbitration concerned whether the state of New Hampshire, through the Attorney General's Office, could seek remedies in court for violations of RSA 358-A, the Consumer Protection Act, under the doctrine of parens patriae. In ruling for the defendants, the Superior Court stated that because the State articulated only that its quasi-sovereign interest was to protect the well-being of its citizens, allowing the lawsuit to proceed in Superior Court would permit the State to file a lawsuit against anyone merely on the basis of protecting its citizens. As a result, the Superior Court required arbitration.

⁴⁸ Respondents' Motion to Dismiss, Ex. A.

⁴⁹ Respondents' Memorandum in Support of Motion to Dismiss, p. 43.

The Department has cited EEOC v. Waffle House, 534 U.S. 279 (2002) for the proposition that the Department's statutory authority to issue the Cease and Desist Order and to have it adjudicated does not bind it to the arbitration provisions in the loan agreements executed by New Hampshire consumers. This case concerned an EEOC enforcement action for violation of the Americans with Disabilities Act brought against an employer for employee-specific relief where the employee had entered into an agreement to arbitrate. Waffle House, 534 U.S., at 282. The Supreme Court examined the Federal Arbitration Act and the relevant statutes governing the ADA and the EEOC. It found no language in the statutes that suggested that the existence of an arbitration agreement between an employer and employee materially altered the EEOC's statutory function or the remedies that were otherwise available. Id., at 288. The Court recognized that the EEOC had never agreed to arbitrate its statutory claim. Id., at 294. The Court held that the "proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." Id.

The Department also points to the Minnesota Court of Appeals' decision in State ex rel. Hatch v. Cross Country Bank, Inc., 703 N.W. 2d 562, 569 (Minn. Ct. App. 2005), which cites to and relies upon the decision in Waffle House. Id., at 761. The Minnesota Court of Appeals held that the state of Minnesota, in seeking remedies through a court action on behalf of individuals who had signed contracts containing arbitration provisions with a credit card issuer, was acting as an independent party and not merely "stepping in the shoes of" Minnesota consumers. Id., at 570. As with the matter at issue, and as the Minnesota court recognized in State ex rel. Hatch, the Department, similar to the Minnesota Attorney General, is not a party to the contract between CashCall and New Hampshire consumers. Id., at 569. Moreover, the Minnesota Court of Appeals also relied upon Waffle House in its holding that the FAA only requires arbitration when there is an agreement to arbitrate. As was the case for the state of Minnesota in State ex re. Hatch, the Department is not a party to or bound by the consumers' agreements to arbitrate.

This is not a question of standing; the Department clearly has standing to bring an enforcement action under RSA 399-A: 8. My review of RSA chapter 399-A yields neither a reference to the FAA nor to binding arbitration. The statutory scheme sets forth actions,

including a Cease and Desist Order, that the commissioner may initiate based upon violations of the highly regulated industry of payday lending, and such actions do not appear precluded by private contracts that New Hampshire consumers have signed. Unlike the facts as presented in Cross Country Bank, where the Superior Court found that allowing the lawsuit to proceed would permit the state to seek remedies in the public interest for anything, the Cease and Desist Order emanates from the express statutory authority provided the Department specifically to regulate small loan and payday lending. See, e.g., RSA 399-A: 2, I; 7; 10, IV.

For these reasons, I deny the Respondents' Motion to stay these proceedings and to submit this matter to arbitration.

VIII. Order

Based upon the foregoing, the Respondents' Motion to Dismiss Or, in the Alternative, Stay Pending Arbitration is denied.

SO ORDERED.

(date) April 29, 2016



Andrew B. Eills, Esquire
Presiding Officer
State of New Hampshire
Banking Department

CERTIFICATE OF SERVICE

I, Doreen F. Sheppard, hereby certify that on April 29, 2016, a copy of the attached Order on Motion to Dismiss, or, in the Alternative, Motion to Stay Pending Arbitration in the Matter of CashCall, Inc., et al., Docket No. 12-308, was sent to the following parties:

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