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 BASED ON UNREASONABLE WARRANTLESS EXAMINATION UNDER RSA 397-A**

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., and WS Funding, LLC (collectively, "Respondents"). The Respondents filed a "Motion to Dismiss Based On Unreasonable Warrantless Examination Under RSA 397-A," (the "Motion") to which the Department objected. This Order addresses the Motion.[1]

II. Background

The Department commenced this adjudicative proceeding against the Respondents by the issuance on June 4, 2013 of an Order to Cease and Desist. The Order to Cease and Desist alleged that the Respondents engaged in the business of making small loans or payday loans in New Hampshire without obtaining a license to do so in violation of N.H. RSA 399-A. The Department alleged that contractual and other relationships of CashCall and WS Funding with a

[1] By separate Order issued on the same date as the instant Order, I have issued an order on Respondents' Motion to Dismiss, or, in the Alternative, Motion to Stay Pending Arbitration.

non-party, Western Sky Financial ("Western Sky"), were employed as a mechanism by which the Respondents sought to avoid 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. [2]

Prior to the Department's initiation of the Order to Cease and Desist against the respondents, the Department had commenced an enforcement action against Western Sky, Martin Webb, and Impact Cash, LLC.[3] Western Sky then sought dismissal of that matter. As of this date, the Department has taken no further action concerning Case No. 10-011.

CashCall became licensed as a mortgage banker under N.H. RSA 397-A on or about February 11, 2011. 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 bank 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. After analysis and review of CashCall's responses to an administrative subpoena *duces tecum* and review of the business relationships between the respondents CashCall and WS Funding, on the one hand, and Western Sky, on the other, the Department initiated its Order to Cease and Desist. The Order to Cease and Desist asserted that CashCall, or WS Funding, was the actual or de facto lender for the payday and small loans, and that Western Sky was merely a front for the Respondents' unlicensed activities.

The Respondents filed the instant Motion and an accompanying Memorandum of Law in support of the Motion on December 12, 2013, to which the Department objected. The Motion challenges the constitutionality of RSA 397-A: 12 on its face and as-applied by the Department to the Respondents.

Requests for discovery and orders related to the production of information have been extensive; the parties have engaged in discovery discussions and also have filed pleadings with

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[2] Respondents Exhibit (hereinafter "Tab") NN, Order to Cease and Desist, In re CashCall, Inc., et al, Case No, 12-308, June 4, 2013.

[3] Tab EE, In re Impact Cash, Case No. 10 -011 (Order to Show Cause and Cease and Desist, September 23, 2011).

respect to the production of documents and information. The Respondents filed a "Motion to Compel Production of Information Under Jus 811.02," which I denied in part and granted in part. Specifically, I determined that the Respondents' Motion to Compel the production of particular information retained and stored on the Department's computerized file storage system would require a minimum of several months of the time of the Department's information technology specialist and thus was unduly burdensome. In contrast, I ordered that particular information exchanged between the Department and out-of-state regulators be produced for the Respondents to review.[4] In addition, Respondents moved for an evidentiary hearing with respect to the instant Motion, which I granted.[5] Because the evidentiary hearing on the instant Motion would involve information, including testimony, the Department deemed "confidential" under RSA 383:10-d, I granted the Department's request for a protective order relating to such information. I conducted an evidentiary hearing on the Respondents' Motion commencing February 9 and concluding February 10, 2016.[6]

III. Standard of Review

A. Motion to Dismiss

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

[4] Order on Respondents' Motion for Reconsideration, June 25, 2015; Order on Respondents' Direct Petition to Provide Communications Between N.H. Regulators and Out-of-State Regulators, July 8, 2015; Order on Respondents' Motion to Enforce the Order on Respondents' Direct Petition to Provide Communications Between N.H. Regulators and Out-of-State Regulators, January 15, 2016.

[5] While this case commenced in June, 2013, the Bank Commissioner delegated me Presiding Officer by Delegation dated June 17, 2014.

[6] I also note that because these proceedings are governed by the confidentiality provisions of RSA 383: 10-d, I, the hearing on the instant Motion was closed to the public at certain points when confidential information was introduced. To the extent, therefore, that the exhibits referenced in this Order are those that were subject at the hearing to RSA 383: 10-d, I, they will remain so pending a further decision, but of course will be retained as part of the record.

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 (2014); 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).[7] The presiding officer must "engage in a threshold inquiry that tests the facts in the Order to Cease and Desist against the applicable law, and if the allegations constitute a basis for legal relief, the motion to dismiss will be denied. See, Id.

B. Constitutionality of Statute

In assessing the facial and as-applied challenges presented, the presiding officer follows the analysis of the New Hampshire Supreme Court with respect to examining constitutional claims. The analysis examines the statute under the State Constitution and only will address federal constitutional issues to the extent that the United State Constitution provides greater constitutional protection. State v. Ball, 124 N.H. 226, 232 (1983); see, State v. Gness, 166 N.H. 1, 9 (2014).

Where, as in this case, a party presents a constitutional challenge to a legislative act, the presiding officer will presume the act to be constitutional and "will not declare it invalid except on inescapable grounds; that is, unless a clear and substantial conflict exists between the act and the constitution." Eby v. State of New Hampshire, 166 N.H. 321, 327 (2014), *quoting* City of Concord v. State of N.H., 164 N.H. at 134.

"A party may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both." Eby, 166 N.H. at 327, quoting Huckins v. McSweeney, 166 N.H. 176 (2014). "A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications."

[7] 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.

Huckins, 166 N.H., at 179. To prevail on a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the Act would be valid. Id. "An as-applied challenge, on the other hand, concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." Id.

IV. Respondents' Facial Challenge to the Constitutionality of N.H. RSA 397-A: 12

The Respondents' Motion to Dismiss argues that RSA 397-A:12 does not provide a constitutionally adequate substitute for a warrant under part I, article 19 of the New Hampshire State Constitution and the fourth amendment of the United State Constitution. The Respondents assert that the statutory scheme under RSA 397-A:12 does not provide sufficient restraint on arbitrary action, and that "taken as a whole, the statute does not place any reasonable limitations on the time, place and scope of [mortgage banker/broker] examinations."[8]

The starting point of the facial challenge analysis rests in part I, article 19 of the New Hampshire Constitution which pertains to the regulation of searches and seizures:

> "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places ... are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation ... and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law."

The New Hampshire Supreme Court's jurisprudence establishes that part I, article 19 of the N.H. Constitution guarantees citizens the right to be free from unreasonable searches and seizures, and accordingly, "a warrantless search is per se unreasonable and evidence derived from such a search is inadmissible unless the State proves that the search comes within one of the recognized exceptions to the warrant requirement." State v. Gness, 166 N.H. 1, 4 (2014), quoting State v. Turmelle, 132 N.H. 148, 152 (1989). New Hampshire explicitly recognizes an administrative search exception designed to enforce regulatory statutes. Appeal of Morgan, 144 N.H. 44, 49 (1999); State v. Turmelle, 132 N.H. at 152, citing New York v. Burger, 482 U.S. 691 (1987). New Hampshire law requires, however, that in order for the administrative search exception to be valid, the statutory scheme by which the exception is permitted must satisfy three

[8] Respondents' Memorandum in Support of Motion to Dismiss Unreasonable Warrantless Examination Under RSA 397-A, pages 2, 4.

criteria. State v. Gness, 166 N.H., at 4-5; Appeal of Morgan, 144 N.H., at 49; State v. Turmelle, 132 N.H., at 152. "First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be necessary to further the regulatory scheme. Finally, the implementation of the statutory inspection program must provide a constitutionally adequate substitute for a warrant." State v. Gness, 166 N.H. at 4-5, quoting Appeal of Morgan, 144 at 49. The Respondents do not contest that the statutory scheme set forth in RSA 397-A:12 satisfies the first two criteria. Rather, the sole issue presented by Respondents' facial challenge is whether the statutory scheme by which the Department conducts its examinations under RSA 397-A:12 provides a constitutionally adequate substitute for a warrant.

The statutory scheme set forth in RSA 397-A:12, in terms of the certainty and regularity of its application, must be sufficiently limited in time, place, and scope as to constitute an adequate substitute for a warrant. Appeal of Morgan, 144 N.H., at 50; Burger, 482 U.S., at 703. The statutory scheme under RSA 397-A:12 must perform the two basic functions of a warrant; it must advise the licensee that the examination is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers (in this case, the bank examiners). See, Burger, 482 U.S., at 703.

The standard enunciated by the U.S. Supreme Court in New York v. Burger and subsequently under New Hampshire case law requires that the statute be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Burger, 482 U.S., at 713. "An administrative statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed." Id., at 712 - 713.

Title XXXV and Title XXXVI of the Revised Statutes Annotated set forth the comprehensive laws under which banks, banking, and moneylenders are regulated. RSA Chapter 397-A is but one of several chapters under which the Bank Commissioner and the Department administer and regulate "banks and banking activity" in New Hampshire. RSA Chapter 397-A pertains to the licensing of non-depository first mortgage bankers and brokers,

and a review of the chapter demonstrates that mortgage banking is, and has been for a substantial period of time, a well-regulated industry.

Under this chapter, the Legislature has directed the Department to regulate "persons that offer, originate, make, fund, or offer a mortgage loan from the state of New Hampshire or a mortgage loan secured by real property located in the state of New Hampshire." RSA 397-A; 2, I. The statutory scheme requires that, by virtue of acquiring a license as a non-depository mortgage banker or broker, such person must comply with applicable state and federal law. "Persons subject to or licensed under [RSA 397-A] shall abide by applicable federal laws and regulations, the laws and rules of this state, and the orders of the commissioner. Any violation of such law, regulation, order, or rule is a violation of [RSA 397-A]." RSA 397-A:2, III. To engage in this activity, a license is required, although explicit statutory exceptions to this requirement exist. RSA 397-A:3, 4. RSA 397-A:5 sets forth detailed and extensive requirements to obtain a license. The licensing application process is expansive and consists, in part, of measures designed to protect the public and to ensure the solvency of the prospective licensee. See, e.g., RSA 397-A:5, II (background investigation and criminal history records check on applicant's principals required); and RSA 397-A:5, III, (c) (applicant or licensee shall demonstrate and maintain a minimum positive net worth; net worth statements provided in connection with a license application shall be subject to review and verification during the course of any examination or investigation). If the Bank Commissioner determines that an applicant has met the requirements of RSA 397-A, the Commissioner shall issue a license "permitting the applicant to act as a mortgage originator, mortgage banker, or mortgage broker in accordance with the laws of this state." RSA 397-A:6, I.

Licenses granted under RSA 397-A are renewed annually. RSA 397-A:8, I. Licensees are required to maintain specific records "as will enable the department to determine whether the licensee's business is in compliance with the provisions of this chapter and the rules adopted pursuant to it." RSA 397-A:11. I. The records must be stored in such a manner as to "enable the commissioner to determine whether the licensee is complying with the provisions of this chapter, and rules adopted under it, and any other law, rule, or regulation applicable to the conduct of business for which it is licensed under this chapter. " RSA 397-A:11, IV.

Respondents' Motion, accompanying memoranda, and presentation at the hearing argue that the statutory scheme, "taken as a whole," in paragraphs I, II, and III of RSA 397-A:12, "Examinations," on its face does not provide licensees with a constitutionally adequate substitute for a warrant. RSA 397-A:12 sets forth the manner in which, and the circumstances by which, the Department examines licensed non-depository mortgage bankers and brokers.

RSA 397-A:12, I provides:

The banking department may examine the business affairs of any licensee or any other person, whether licensed or not, as it deems necessary to determine compliance with this chapter and the rules adopted pursuant to it and with the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 et seq.). In determining compliance, the banking department may examine the books, accounts, records, files, and other documents or matters of any licensee or person. The banking department shall have the power to subpoena witnesses and administer oaths in any adjudicative proceedings, and to compel, by subpoena duces tecum, the production of all books, records, files, and other documents and materials relevant to its investigation. (emphasis added.)

RSA 397-A:12, II provides:

For the purpose of discovering violations of this chapter, the banking department may examine, during business hours, the records of any licensee and of any person by whom any such loan is made, whether such person shall be licensed to act, or claim to act, as principal, agent, or other representative, or under, or without the authority of this chapter; and for that purpose, the banking department shall have access to the books, papers, records, files, and vaults of all such persons. The banking department shall also have authority to examine, under oath, all persons whose testimony it may require relative to such loans or business. (emphasis added.)

RSA 397-A:12, III provides:

The affairs and records of every licensee shall be subject at any time to such periodic, special, regular, or other examination by the banking department with or without notice to the licensee. All books, papers, files, related material, and records of assets of the licensee shall be subject to the banking department's examination. (emphasis added.)

In assessing whether the statutory scheme provides a constitutionally adequate substitute for a warrant these paragraphs must be read as a whole, and not in isolation from either each other, the remainder of RSA 397-A (IV through XV), RSA Chapter 397-A, or other statutes applicable to the examination process. Appeal of Local Gov't Ctr., 165 N.H. 790, 804 (2014) (New Hampshire Supreme Court construes all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result; words and phrases are not considered in isolation, but rather within the context of the statutory language in light of the policy or purpose sought to

be achieved by the statutory scheme); see, General Insulation Co. v. Eckman Const., 159 N.H. 601, 606 (2010) (a statute is interpreted in the context of the overall statutory scheme and not in isolation; court does not consider words or phrases in isolation but in the context of the statute as a whole in order to better discern the legislature's intent and to interpret statutory language in light of the policy sought to be advanced by the statutory scheme); Nenni v. Commissioner, New Hampshire Ins. Dept., 156 N.H. 578, 581 (2007) (court does not read words or phrases in isolation, but rather in the context of the entire statute).

Paragraph I provides guidance as to the scope of the examination (or what the Department may examine), which consists of "the business affairs of any licensee or any other person, whether licensed or not" to determine "compliance" with RSA 397-A.[9] In determining "compliance," the Department "may examine the books, accounts, records, files, and other documents or matters of any licensee or person." Paragraph I provides licensees and non-licensees engaged in the well-regulated industry of mortgage banking with explicit notice that their "business affairs" are subject to examination.

Paragraph II states the time of the examination, and in addition places a limit on the circumstances under which certain examinations may take place. "For the purposes of discovering violations of this chapter, the department may examine, during business hours, the records of any licensee and of any person . . . whether such person shall be licensed to act, or claim to act, as principal, agent, or other representative, or under, or without the authority of this chapter..." An examination thus may be undertaken for the explicit purpose of discovering violations of RSA 397-A in addition to the annual or 18 month examination intervals sets forth in

[9] As to the place of the examination, RSA 397-A: 12, V together with RSA 383: 9, II provide that an examination occur at the location of the licensee. Since the licensee's location is its business location, the place of examination is the business location of the licensee. Respondents have characterized their facial challenge as encompassing the "time, place, and scope" requisites for a constitutionally adequate substitute for a warrant. The "place" of examination, however, has not been addressed and was not emphasized either in the memoranda or during the hearing; indeed, no evidence was presented that the "place" of the examination was ever anything but the offices of the New Hampshire Banking Department, although under the statute it could have occurred at the business location of CashCall. Moreover, the evidence and testimony presented indicated that CashCall, through its representatives, responded to requests for information pursuant to RSA 397-A: 12 by email directly to the Bank Examiner, Michael Poulios. See discussion, infra.

RSA 383: 9, I.[10] Taken together, Paragraphs I and II inform licensees - and those acting as mortgage bankers and brokers without a license - that the examinations will be made of their "business affairs" during "business hours." The statutory scheme advises licensees and non-licensees under RSA Chapter 397-A that an examination (search) is being made pursuant to law (RSA 397-A: 12), the time of such examination ("business hours"), and the scope of the examination (the "business affairs" of the licensee and non-licensees of their "books, papers, records, files, and vaults of all such persons.") I find that RSA 397-A: 12, I and II satisfy the standards required for an administrative search articulated in State v. Trumelle and Appeal of Morgan, and are therefore constitutional on their face. Burger, 482 U.S., at 703; State v. Turmelle, 132 N.H., at 152-153.

Paragraph III is more narrowly tailored than I and II in that it applies only to licensees. The "scope" of an examination conducted under this section, nevertheless, is primarily the same as in paragraphs I and II. Paragraph III, moreover, must be read in conjunction with and with reference to other sections in RSA 397-A: 12 and the provisions of RSA Chapter 397-A.[11] See, General Insulation, 159 N.H., at 606. I interpret the use of the term "affairs and records" in paragraph III as "business affairs" and note that section IV of RSA 397-A: 12 permits an agent of the Department to examine the "business affairs" of any licensee. RSA 397-A: 12, IV.[12]

As opposed to those persons who may be acting as mortgage bankers without a license, licensees regulated under RSA 397-A are subject to the possibility of an examination at any time. "The affairs and records of every licensee shall be subject at any time … to examination," and an examination of a licensee may be "with or without notice." RSA 397-A: 12, III. With regard to "time," paragraph III explicitly informs licensed mortgage bankers and brokers that the Department may conduct examinations on a "periodic, special, regular, or other" basis. It should

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[10] [The commissioner] "... shall examine the condition and management of all such institutions every 18 months, and more often when necessary in his or her judgment ..." RSA 383: 9, I.

[11] I again note that under RSA Chapter 397-A, licensees are also on notice that their businesses shall be examined not less than every 18 months (RSA 383:9, I) and that any violation of a state or federal law will be considered a violation of RSA Chapter 397-A (RSA 397-A: 2, III).

[12] Certainly, during the hearing no testimony was elicited either from Bank Examiner Poulios or Maryam Torben Desfosses, Hearing Examiner, that described information sought in examinations conducted under RSA 397-A: 12 as anything other than the business affairs and records of licensees subject to examination.

be noted that only licensees, as opposed to those who have not subjected themselves to the application process under RSA 397-A: 5, may be subject to examination at any time. Licensees are therefore on notice that the statutory scheme over the highly regulated industry of mortgage banking provides the Department with the capacity, when necessary, to conduct an examination of their business affairs and records without notice.

Respondents' claim that paragraph III on its face provides the Commissioner with the unconstitutional ability to access the records of licensees is misplaced. The statutory scheme is in keeping with the settled law that "administrative searches are allowed without probable cause precisely because of the character of the activity being regulated and the need for randomness and surprise to make such schemes effective." United States v. Gonsalves, 435 F. 3d 64, 68 (2006); see, Burger, 482 U.S., at 710.[13] The statutory scheme provides guidance to the Department's examiners of what to review (the business affairs) of licensees, provides that the Department may conduct examinations at licensees' business locations,[14] provides that for both licensees and non-licensees, examinations will take place during business hours, and provides notice to licensees that examinations may occur without notice and at any time.[15] I find that the statutory scheme as set forth in RSA 397-A: 12, I, II, and III, viewed against the backdrop of the purposes of RSA Chapter 397-A, provides a constitutionally adequate substitute for a warrant.

V. Respondents' "As-Applied" Challenge to the Constitutionality of the N.H. Banking Department's Administrative Search Conducted Under RSA 397-A: 12

Given that I find paragraphs I, II, and III of RSA 397-A: 12 constitutional as enacted, I now turn to the section of Respondents' Motion in which they argue that, "as applied" to the Respondents, the Department's examination conducted under RSA 397-A: 12 was unconstitutional. An as-applied constitutional challenge to a statute concedes that the statute

[13] The court in Burger also emphasized that administrative searches often require an element of surprise in order to actually find violations of a comprehensive regulatory mechanism, and directly quoted from U.S. v. Biswell, 406 U.S. 311, 316 (1972), "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." Burger, 482 U.S., at 710.

[14] Again, I note that the examination occurred at the offices of the N.H. Banking Department.

[15] Licensees also know that an agent of the Department will conduct the examination. RSA 397-A: 12, IV.

may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case. Huckins, 166 N.H., at 178-179.

A. **Order to Cease and Desist**

The Department's Order to Cease and Desist is based upon violations of RSA Chapter 399-A.[16] The Department's Order to Cease and Desist alleges the following facts. On February 12, 2012, the Department conducted a routine examination of CashCall pursuant to RSA 397-A: 12, and that during "the course of the examination, the examiner discovered that CashCall appeared to be in the business of purchasing and servicing small loans and/or payday loans in association with Western Sky Financial, LLC."[17] An individual tribal member of the Cheyenne River Sioux Tribe owns all of Western Sky Financial, LLC ("Western Sky"), which itself operates within the exterior boundaries of the Cheyenne Sioux Reservation, a sovereign nation, located in South Dakota. The Order to Cease and Desist describes the contractual business relationship between CashCall and Western Sky.[18] Through this business relationship, CashCall bears the risk of loss on loans to consumers that the contractual relationship requires CashCall to purchase from Western Sky, CashCall indemnifies Western Sky for any liability associated with their relationship, CashCall itself reviews all consumer applications for underwriting requirements, and CashCall receives payments from consumers for their loans. As a result of these arrangements, the Department's Order alleges that CashCall is the actual, or "de-facto" small loan or payday lender, and that Western Sky is but a front for CashCall's unlicensed small loan activity.

B. **RSA Chapter 399-A**

RSA Chapter 399-A regulates "small loans, title loans, and payday loans." In order to engage in the business of making small, title, or payday loans, a license is required.[19] RSA 399-A: 2, I. RSA 399-A: 2, VI provides that the provisions of RSA 399-A "shall apply to any person who seeks to evade its application by any device, subterfuge, or pretense, including, without

[16] Tab NN.
[17] Tab NN, Order to Cease and Desist, page 2.
[18] Id., pages 3 through 4.
[19] A statutory exception exists not relevant to this matter, and is described in RSA 399-A: 2, III.

limitation... (b) [u]sing any agents, affiliates, or subsidiaries in an attempt to avoid the application of the provisions of this chapter." RSA 399-A: 8, I provides that the Department "may issue a cease and desist order against any licensee or person who it has reasonable cause to believe has violated or is about to violate the provisions of this chapter . . ."

With regard to examinations and investigations of such payday lenders, under RSA 399-A: 10, I the commissioner or the commissioner's representative "may at any time, and shall periodically, with or without notice to the licensee or person, examine the business affairs of any licensee or any other person subject to [RSA 399-A], whether licensed or not, as the commissioner deems necessary to determine compliance with [RSA 399-A]..."

C. **Respondents' "As-Applied" Constitutional Challenge and Standard of Review**

Respondents' "as applied" constitutional challenge is based upon the claim that the Department's examination of CashCall conducted under the provisions of RSA 397-A: 12 in February, 2012 was but a "ruse" for obtaining information about activities of Respondents related to payday loans regulated under the provisions of RSA 399-A. Respondents claim that the Department's examination conducted under the auspices of RSA 397-A: 12 was entirely "pre-textual" in nature, meaning that the Department misused its warrantless administrative examination authority under RSA 397-A: 12 to commence a "targeted" payday loan investigation under RSA 399-A: 10.

To reiterate, in reviewing a motion to dismiss, the presiding officer considers the evidence in the light most favorable to the non-moving party, and in doing so assumes the Department's allegations to be true and construes all reasonable inferences in the light most favorable to the Department's pleadings. Perez, 153 N.H., at 159; see, Sanguedolce, 164 N.H., at 648; Signal Aviation, 164 N.H., at 582; City of Concord v. State of N.H., 164 N.H., at 133. While the presiding officer need not assume the truth of statements in the Department's pleadings that are merely conclusions of law, the presiding officer must "engage in a threshold inquiry that tests the facts in the Order to Cease and Desist against the applicable law, and if the allegations constitute a basis for legal relief, the motion to dismiss will be denied." Tessier, 162 N.H., at 330.

This standard of review on a motion to dismiss requires that I accept the allegations set forth in the Order to Cease and Desist as true. The Respondents argue, however, that notwithstanding this standard, the evidence demonstrates that the Department's warrantless examination did not provide a constitutionally adequate substitute for a warrant. Specifically, the Respondents assert that, as applied by the Department in this case, (i) the examination at issue was not "routine," (ii) the Department's prior knowledge of CashCall obtained through complaints against CashCall and other entities served to arm the Department with the reason for a targeted, pre-textual examination, (iii) the timing of the examination of CashCall demonstrates its pre-textual motive, and (iv) that the Bank Examiner for the Department conducted his examination pursuant to neither guidelines nor policies and procedures otherwise necessary to serve as an adequate substitute for a warrant.

D. **Introduction of the Evidence**

The Respondents assert that the February, 2012 examination of CashCall was not "routine," and was based upon the Department's desire, not to unearth information about CashCall's mortgage banking activities, but to obtain information related to CashCall's involvement with small or payday loans. Respondents assert that routine examinations under RSA 397-A: 12 require a "heightened constitutional analysis" to insure that the routine process is, indeed, routine. The Department stated that the examination of CashCall was due to take place because of its status as a newly licensed mortgage banker and that the scope of the examination itself was within the purview of the regulatory scheme set forth in RSA 397-A: 12. See, Turmelle, 132 N.H., 154.

The Respondents have submitted an extensive number of exhibits in their effort to demonstrate that the Department's examination of CashCall was a ruse to uncover illegal payday loan activity and not mortgage banking compliance issues. Respondents also called two witnesses to testify, Michael Poulios and MaryAnn Turban Desfosses.

1. Exhibits Presented at the Hearing

I consider the exhibits in the manner and order that the Respondents presented: (1) Pre-Licensee CashCall, Inc. Complaints; (2) In re Impact Cash Complaints; and (3) Post-License/Pre-Examination CashCall, Inc. Complaints.[20]

(a) Pre-License CashCall, Inc. Complaints

These exhibits reflect complaints filed in 2008 and 2009 against CashCall by three New Hampshire consumers. As a result of each of these complaints, First Bank & Trust, a South Dakota bank, responded to the Department and the NH Attorney General's office by letter stating that CashCall was not the lender but only the servicer of the loans made, and that under federal law, First Bank & Trust was permitted to charge interest rates permissible under the laws of its home state. The Department sent letters to at least two of the complainants in January, 2011, in which it stated that it had found no evidence that CashCall, Inc. "materially violated any applicable law in this matter," and that the complaint file was closed.

(b) In re Impact Cash, Inc. Complaints

These exhibits consist of complaints filed by four New Hampshire consumers in 2008 and 2009 against an entity called Impact Cash, Inc. as well as documents detailing the Department's investigation of Impact Cash. They reveal that Michael Poulios, the Bank Examiner, commenced an investigation on or about July, 2008. These exhibits also consist of internal Department emails from November and December 2009 in which it was recommended that an Order to Show Cause and Cease and Desist be issued against Impact Cash, Inc.

The exhibits also consist of an investigation checklist and consumer complaint dated October, 2010 against an entity named "Big Sky Cash" relating to a payday loan and subsequent "Legal Investigation Checklist" in which Big Sky is characterized as an entity doing business as "PayDay Financial, LLC," with Martin Webb as the sole member.

[20] In order that the record is clear, I describe herein the exhibit lists provided. The Respondents introduced a set of exhibits and accompanying Exhibit List. The Respondents also submitted these three "Complaints," which are themselves lists, as organizational aids in their presentation. These three lists reflect many of the exhibits in the Exhibit List, although not all of them.

In addition, these exhibits include a consumer complaint of January, 2011 against an entity named "Spot on Loans" and the Department's research findings concerning Spot on Loans dated January 24, 2011. The exhibits also contain letters from the Department to the consumer who submitted a complaint about Spot on Loans and to two consumers who submitted complaints concerning Impact Cash, Inc. In each of these letters dated May 19, 2011 the Department stated that "the entity at issue [Spot on Loans and Impact Cash] appears to be an arm of a Native American tribe and as such, there is a jurisdictional issue concerning the sovereignty of a Native American nation," and that as a result the Department would not act against these entities.

The *In re Impact Cash Complaints* also contain four identical letters dated September 23, 2011 from the Department to the three consumers who had filed complaints against Impact Cash, Inc. and the consumer who complained against Spot on Loans. These letters communicate to the four complainants that the Department had issued an Order to Cease and Desist against Impact Cash, LLC a/k/a Spot on Loans, among other d/b/a's. There is no documentation concerning, nor did any of the witnesses testify regarding, why the Department chose to file an Order to Cease and Desist in September, 2011 after writing to three of the complainants in May, 2011 that "jurisdictional" issues prevented the Department from continuing with its investigation. The evidence submitted by the Respondents concerning the *In re Impact Cash Complaints* includes a "Special Appearance to Seek Dismissal for Lack of Jurisdiction," dated October 27, 2011 and filed by counsel for certain of the respondents in In re Impact Cash, LLC et al., Complaint No. 10-01.[21] The Special Appearance asserted that the Department possessed no personal or subject matter jurisdiction over the respondents in In re Impact Cash, LLC et al.

(c) Post-License/Pre-Examination CashCall, Inc. Complaints

These exhibits pertain to four consumer complaints, all of which were submitted to the Department between March 2011 and July, 2011 and each of which concerns CashCall and Western Sky.[22] The complaints describe complainants' communications with CashCall,

[21] I note that the Special Appearance did not appear, on its face, to include an appearance on behalf of Impact Cash, LLC although it did list most, but not all, of the named respondents.
[22] Tabs V, Z, AA, BB.

information concerning its relationship with Western Sky Financial, LLC, and Western Sky's consumer loan agreements with complainants. The complaints also describe the contractual arrangement by which Western Sky sells its loans to CashCall immediately after consumers obtain them, and the high rates of interest charged on these loans.[23] In addition, the *Post-License/Pre-Examination CashCall, Inc. Complaints* include four letters dated June 12, 2013 from the Department to each of the complainants. In these letters the Department communicated that it had concluded its investigation of the complaint and had issued on June 4, 2013 the instant Order to Cease and Desist.[24]

Part of the evidence submitted with one of these complaints encompasses two emails dated September 15, 2011 from Maryam Torben Desfosses, a Hearings Examiner of the Department. The first email is to Michelle Kelleher and Ryan McFarland, each at that time Department attorneys.[25] The email states that the complaint should be returned to the NH Attorney General, from whence it originated, because "CashCall is a secondary market company; not the payday lender." It goes on to state that when Attorney McFarland "writes the Order to Show Cause and Cease and Desist against Western Sky," he "will include all of the direct and indirect consumer complaints." The email continues: "We have already opened another docket (docket #11-200) is already opened for this same consumer for Western Sky. Reference to this docket number of 11-202 should be included with its resolution (i.e. refer back to AG re: cashcall) in the 11-200 docket..." The second email is from Ms. Desfosses to Denise Costello, in which Ms. Desfosses writes, "We are re-referring this back to you. CashCall is not the original lender for this consumer and therefore, not within our jurisdiction . . . We have one open now on the original lender for this same consumer, which the original lender is Western Sky."[26]

2. Testimony of Witnesses Poulios and Desfosses

The Respondents also called two witnesses, each a current employee of the Department. The first witness, Michael Poulios, a Bank Examiner in the Department's Consumer Credit

[23] Id.
[24] Id.
[25] At the hearing on the Motion, the Department objected to the introduction of this exhibit, which objection I overruled.
[26] The Respondents submitted other exhibits into evidence, and I address these where relevant.

Division, testified that as an employee of the Department since 2003 he has conducted at least 36 exams a year for a total of approximately 360 examinations in the past decade. He stated that in his experience the scope of an examination can change after it has commenced, and that, with respect to licensed mortgage bankers, examinations are conducted every 18 months, although new licensees are examined within 12 months of attaining a license. Through Mr. Poulios, evidence was introduced that the Department has in place "Job Information" template forms that are part of the Department's database and which are filed out by examiners. The Department also produces for examiners and others within the Department schedules of licensed entities due for examinations.[27] Mr. Poulios testified that on occasion he deals "informally" with complaints, and sometimes handles audits as well as complaints.

Mr. Poulios testified that a list of licensees due for examination is generated depending upon when such licensees obtained a license. With regard to CashCall, he testified that CashCall was selected because as a new licensee it was subject to an examination after 12 months, and that CashCall became a licensed mortgage banker on February 9, 2011. Mr. Poulios testified that he was the examiner in charge of the CashCall examination, and that in proceeding with an examination, he can review the database of complaints maintained in both electronic and paper form.

Maryam Torben Desfosses also was called to testify by the Respondents. Ms. Desfosses has been employed by the Department for ten years and is a Hearing Examiner. In her role, she reviews and responds to complaints and drafts enforcement orders based upon certain activities. These include Orders to Show Cause and Cease and Desist Orders. She testified that she did not have any role concerning the In re Impact Cash docket. With respect to the letters dated May 19, 2011 from the Department to complainants regarding the jurisdictional issues associated with the investigation of Spot on Loans and Impact Cash, LLC, Ms. Desfosses testified that she would not have had the authority to make such a jurisdictional decision. When questioned about her emails of September 15, 2011, Ms. Desfosses testified she did not know who made the determination to return the complaint to the NH Attorney General but it would not have been made by her.

E. **Discussion**

[27] E.g., Tab HH, "Job Information" (input screen) and "Examination Schedule of Active Licensees."

Respondents assert that the Department's February, 2012 examination was not "routine." To demonstrate this assertion, Respondents' place great emphasis on the dates and timelines of the Department's receipt of complaints regarding CashCall and other entities, as well as subsequent decisions of the Department either to commence investigations or to forestall them. As the Order to Cease and Desist itself explicitly states, CashCall had been the subject of complaints prior to licensure.[28] These complaints commenced in 2008. The Department in January, 2011 then determined based on information provided by counsel to First Bank & Trust that as an FDIC insured bank federal law permitted it to charge interest rates allowed in its home state.[29] The evidence also demonstrates that the Department, after receiving complaints regarding Impact Cash, LLC and its various d/b/a's, made the decision in the spring of 2011 that Impact Cash, LLC was an arm of a Native American tribe and thus did not have jurisdiction over it. The Department in September 2011 then proceeded with an Order to Show Cause and Cease and Desist against Impact Cash, LLC, which action apparently has lain dormant since the respondents in that matter filed a Special Appearance contesting the jurisdiction.[30]

In addition, Respondents point to several complaints received by the Department after CashCall had acquired its license as a mortgage banker in February, 2011 but before the examination at issue in February, 2012. These complaints, which concerned Impact Cash, LLC and Spot on Loans, were filed in the early spring of 2011. As noted, although the Department sent letters to the complainants that jurisdictional issues prevented it from acting on the complaints, the Department did initiate an Order to Show Cause and Cause and Desist against Impact Cash, LLC and its d/d/a's in September, 2011.[31] I draw no conclusions from the Department's change of course concerning the Impact Cash, LLC docket.

It is clear, therefore, that prior to the examination at issue the Department had received complaints and, pursuant to its statutory mandate, had investigated and made certain decisions with respect to the complaints, whether they directly involved CashCall or others. These events,

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[28] Tab NN.

[29] The letters from counsel for First Bank & Trust to the Department responding to the complaints, it should be noted, emphasized the application of specific federal laws applicable to FDIC insured institutions and did not raise any issues concerning Native American tribal sovereignty. Tab A, 412; Tab B, 465; Tab H, 494.

[30] Tab GG.

[31] Tab EE.

however, do not in and of themselves contradict the essential fact, as the testimony of Mr. Poulios demonstrated, that after an entity obtains its license as a mortgage banker, the Department's normal course of procedure is to conduct a statutory examination under RSA 397-A: 12 at the 12 month license anniversary. This is what occurred in this case.

Respondents' Motion asserts that "how" the examination of CashCall was conducted manifests the unconstitutional nature of the examination. Of particular relevance to Respondents' instant Motion, therefore, is the alleged manner in which CashCall was selected for an examination in February, 2012. As a licensed mortgage broker under RSA Chapter 397-A, CashCall was on notice of the applicable statutory requirements for examinations of licensees. As a result, the Department could initiate an examination at any time if it so chose.[32] Moreover, I find the testimony of Mr. Poulios credible with respect to the manner in which decisions are made to examine institutions, particularly with regard to this examination. The evidence introduced and the testimony of Mr. Poulios supports the Department's assertion that it conducted a routine examination of CashCall. This evidence includes the "Examination Schedule of Active Licensees" database form and the "Pre-Examination Module" for CashCall, which Mr. Poulios testified are commonly employed in examinations of mortgage brokers.[33] He testified that CashCall came up for an examination given that it was a new licensee, and the database form and the "Pre-Examination Module" validate that CashCall was examined in the same manner and on the same schedule as any other new licensee.[34]

The Respondents suggest that the Department's prior receipt of complaints against CashCall and the Department's subsequent determinations to withdraw from investigations somehow served to poison its statutorily mandated examination process. The Respondents' Motion attempts to link the Department's knowledge of activities relating to unlicensed payday lending with its statutorily appropriate and mandated examination of CashCall. In essence, the Respondents suggest that the examination under RSA 397-A: 12 never would have occurred "but for" consumer complaints received relating to CashCall's involvement with payday lending. The Respondents point to Mr. Poulios' email exchanges with CashCall's representative at the

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[32] See Section IV, infra.

[33] Tab HH, 101; Tab II, 902.

[34] Tab HH, "job Information"; Tab II, "CashCall, Inc. Pre-Examination Review."

commencement of the examination in which he requested information concerning personal loans from 2008 forward as evidence that "but for" the information gleaned from complaints and from previous investigations, the Department would not have chosen to examine CashCall under RSA 397-A: 12 at the time it did.[35] [36] I find the examination of CashCall was due to take place because of its status as a newly licensed mortgage banker and that the scope of the examination itself was within the purview of the regulatory scheme set forth in RSA 397-A: 12. See, Turmelle, 132 N.H., 154. I find that the constitutional statutory scheme concerning examinations under RSA 397-A: 12 permitted the bank examining team off Mr. Poulios and Ms. Mailhot to make inquiries of the licensee to determine compliance with RSA 397-A: 2, III.

I find that evidence of an examination in which the activities of CashCall with respect to both its mortgage banking and small/payday lending were reviewed demonstrates that CashCall was not unconstitutionally "targeted." Under questioning by Respondents' counsel, Mr. Poulios testified that he was the examiner-in-charge and that as part of his duties he could inquire about other areas, including small or payday lending. He also testified that he worked in conjunction with another employee of the Department on the examination, Alicia Mailhot, who reviewed CashCall's mortgage banking issues. His testimony is corroborated by several exhibits, including emails between Mr. Poulios and Ms. Mailhot in which they exchanged information concerning mortgage banking loans, and emails between counsel for CashCall, Jordana Gilden, and Mr. Poulios in which examination questions concerning mortgage banking were delivered and answered.[37] I note also that the Department produced as a result of its examination a "Report of Examination."[38] The Report of Examination lists several "Observations," pertaining to a number of issues related to mortgage banker compliance (file retention; incorrect disclosures; record keeping under RSA 397-A: 11; lending practices under RSA 397-A: 14; trade name concerns; borrowers' rights under RSA 397-A; 15; and Gramm-Leach Bliley Act compliance). The examination revealed several areas of non-compliance with the mortgage banking statute, RSA 397-A. One observation pertains to unlicensed small loan activity under

[35] It is possible that the Department received information from out-of-state regulators but no evidence was submitted to demonstrate this.
[36] Tab KK.
[37] Tab KK.
[38] Tab MM, 91-97, "Consumer Credit Administration Division, Report of Examination," completed March 26, 2012.

RSA 399-A. Taken together, these emails and the Report of Examination serve to establish that the examination was conducted in a comprehensive, scheduled, and lawful manner pursuant to RSA 397-A: 12.

The Respondents also argue that Mr. Poulios' testimony, in which he said that he is not aware of "policies and procedures" as well as any specific guidelines relating to examinations conducted under RSA 397-A: 12, reveals that the examination at issue did not serve as a constitutionally adequate substitute for a warrant. This argument lacks merit. By his account, which I find credible, Mr. Poulios described the process of how licensees are selected for examination and the process of examination. He also testified as to how he utilizes the various forms and templates that guide an examination.[39] These tools were employed in this case, and served as a means of directing the examination in a normal, regular manner.

I do not find that the testimony of Ms. Desfosses offered any contradiction to the Department's assertion in its Order to Cease and Desist that the examination was conducted in a routine manner pursuant to RSA 397-A: 12. While Ms. Desfosses' emails on their face show that the Department had received complaints about CashCall and considered, as of the fall of 2011, that it could not regulate it, I do not find her emails manifest an intent to conduct a "pre-textual" examination of CashCall.

In reviewing the Motion to Dismiss, I evaluate the facts as pled in the Order to Cease and Desist against the applicable law. See, Tessier, 162 N.H., at 330. If the allegations constitute a basis for relief, the motion to dismiss will be denied. Id. In reviewing the totality of the pleadings, the exhibits, and the testimony, the latter of which I especially deem credible, I find the Department's examination of CashCall to have been conducted constitutionally and lawfully pursuant to RSA 397-A: 12.

VI. **Order**

Based upon the foregoing, the Respondents' Motion to Dismiss Based On Unreasonable Warrantless Examination Under RSA 397-A is denied.

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[39] Tab HH; Tab II; Tab JJ.

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 Based on Unreasonable Warrantless Examination Under RSA 397-A in the Matter of CashCall, Inc., et al., Docket No. 12-308, was sent to the following parties:

VIA HAND DELIVERY AND E-MAIL
Ms. Emelia A.S. Galdieri, Esq., Legal Counsel
State of New Hampshire Banking Department
53 Regional Drive, Suite 200
Concord, NH 03301

VIA US MAIL AND E-MAIL
Mr. Michael A. Delaney, Esq.
McLane, Graf, Raulerson & Middleton, P.A.
PO Box 326
Manchester, NH 03105

Joseph L. Barloon, Esq.
Austin K. Brown, Esq.
Jennifer Z. Gindin, Esq.
1440 New York Avenue, N.W.
Washington, DC 20005-2111

Mr. David W. Weichert, Esq.
Ms. Jessica Munk, Esq.
Ms. Jahnavi Goldstein, Esq.
Law Office of David W. Wiechert
115 Avenida Miramar
San Clemente, CA 92672

Doreen F. Sheppard
Banking Division
State of New Hampshire Banking Department