

**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.:** Case No. 12-308

**Order on Respondents’ Motion for  
Reconsideration**

**I. Introduction**

This Order on Respondents’ Motion for Reconsideration addresses the discovery of digital information stored on back-up tapes of the New Hampshire Banking Department which is sought by the Respondents.

**II. Contextual and Procedural Background**

This case commenced with the New Hampshire Banking Department’s (“Department” or “NHBD”) filing of an Order to Cease and Desist against the Respondents on June 4, 2013. The Department’s Order to Cease and Desist seeks penalties and sanctions against the Respondents to stop them from making loans to New Hampshire consumers without a license and to impose penalties on the Respondents for their violations of the State of New Hampshire’s licensing requirements under RSA 399-A:2, I. While respondent CashCall, Inc. is licensed as a mortgage broker under N.H. RSA 397-A, it is not licensed as a payday loan lender under N.H. RSA 399-A.

In December, 2013, the Respondents filed two separate Motions to Dismiss, each of which remains pending. One, a Motion to Dismiss, or, in the Alternative, Stay Pending Arbitration, and the second, a Motion to Dismiss Based on an Unreasonable Warrantless Examination Under RSA 397-A. The Department timely filed objections to these Motions. The Respondents' Motions to Dismiss allege, among other arguments, that the Department engaged in an unconstitutional, pre-textual search when it commenced an examination of the Respondents under the provisions of N.H. RSA 397-A.

Also in December, 2013, the Respondents filed a Motion to Compel Production of Information Under JUS 811.02, to which the Department objected. On May 30, 2014, the Respondents submitted a new Motion to Compel Production of Information Under JUS 811.02, to which the Department again objected. The Respondents' Motion to Compel seeks information that they believe would be useful in presenting their arguments relative to their pending Motions to Dismiss. Such information, the Respondents assert, may exist in .pst files and Outlook folders that currently reside on the Department's back-up tapes.

On October 3, 2014, the Presiding Officer issued a Memorandum of Decision and Order on Respondents' Motion to Compel Production of Information Under JUS 811.02. On October 8, 2014, in response to the Respondents' request for clarification of the discovery order of the same date, the Presiding Officer issued an Order clarifying the October 3 Memorandum of Decision and Order. The parties then engaged in negotiations to resolve the discovery issues, but could not reach a resolution of the production of the .pst files and Outlook folders stored on the Department's back-up tapes. On December 12, 2014, the Department timely filed a Motion for Reconsideration of the October 8, 2014 Order, to which the Respondents timely objected. Upon review of the NHBD's Motion for Reconsideration, and Respondents' Objection, the Presiding

Officer on January 23, 2015 issued a Memorandum of Decision and Order on the NHBD's Motion for Reconsideration of Order on Motion to Compel Production of Information Under JUS 811.02 (the "ESI Order").

The Presiding Officer's ESI Order found and ordered (a) that the initial Order of October 8, 2014 granting the Respondents' production of information requests was based upon a mistaken understanding of the Presiding Officer that an agreement with regard to ESI had been reached between the parties as to the scope of discovery of ESI when in fact there had been no agreement reached, and (b) that under New Hampshire law as articulated by the N.H. Supreme Court in *New Hampshire Ball Bearings, Inc. v. W. Scott Jackson*, 158 N.H. 421 (2009), the search and review of the .pst files and Outlook folders found on fifty-nine (59) of the NHBD's separate back-up tapes would require a "strikingly significant time commitment of the Department's Information Technology ("IT") employee" because the total time necessary for its employee to engage in the search and review would require at a minimum six and a half months dedicated solely to the restoration and search. The Presiding Officer found that given this extensive time commitment, and taking judicial notice that the information technology needs of the Department would continue and could not be placed on hold for a six-month period, the production of the information at issue would be unnecessarily disruptive to the operations of the Department, and granted the Department's Motion for Reconsideration.

On February 23, 2015, the Respondents then timely filed a Motion for Reconsideration of the ESI Order, and the NHBD filed its objection on March 11, 2015. The Presiding Officer conducted a telephone conference on March 19, 2015 with the parties to assess whether alternatives to production of the information under Jus 811.02 could be attained and to inquire as to whether proposals specifying such alternatives could be provided. The Presiding Officer gave

leave for the parties to submit additional material concerning the discovery issues in an effort to explore alternative requests and to reconsider the scope of the discovery requests. The parties continue to remain at an impasse with regard to the production of the .pst files and Outlook folders of those individuals in the Department involved in the examination and investigation of the Respondents. The Respondents and the NHBD have filed additional memoranda and materials to support their respective positions. The Presiding Officer is not at present in receipt of circumscribed or narrowed alternatives to the discovery impasse concerning the .pst files and Outlook folders.

### **III. The Respondents' Motion for Reconsideration and NHBD's Response**

The Respondents argue in their Motion for Reconsideration that the Presiding Officer erred in granting the Department's Motion for Reconsideration and its request that it not produce the .pst files and Outlook folders of all the individuals associated with the examination, investigation, and enforcement of the Respondents stored on the back-up tapes held by the Department. Instead, the Presiding Officer should have exercised his discretion to refashion discovery requests through the imposition of alternatives, such as ordering a reduction in the number of individuals for whom NHBD must search the .pst files and Outlook folders or narrowing the relevant time period of the search to decrease the burden on the Department. Respondents' Motion for Reconsideration, p.3, paragraph 5.

Respondents have filed a Supplemental Brief in Support of their Motion and a Request for an Opportunity for Discussion or Deposition with an Information Technology representative of the NHBD ("Supplemental Brief"). In the Supplemental Brief, the Respondents claim that the Department's claims of undue burden and unnecessary disruption are "unverified and lack

adequate technical explanation.” The Respondents also cite their effort to arrange for the Department’s IT representative to engage in a telephone conference with Respondents’ information technology representative.<sup>1</sup> As part of their Supplemental Brief the Respondents also have provided portions of a report issued by the State of New Hampshire addressing the current and future difficulties that the State of New Hampshire and its agencies have in maintaining and managing the State’s technology systems and the need for the State government to address these deficiencies concerning information technology in both the short and long term.

The Department has objected to the Respondents’ Motion for Reconsideration and Supplemental Brief. The Department argues that the Presiding Officer made no mistake of law or misapprehended any points of law or fact in the ESI Order. In its response, the Department argues that the Respondents have not provided alternative proposals for the production of the information they seek but have continued to request the production of the .pst files and Outlook folders of the individuals involved with the examination and enforcement against the Respondents. The Department also has provided an affidavit of Janice Schultz, the NHBD Information Technology Manager, which addresses the time frame required for her to search only the Outlook folders of thirteen Department employees from one back-up tape (the “Schultz Affidavit”). In addition, the Department also has included in its response an affidavit of Michael Poulos, a Bank Examiner in the Department (the “Poulos Affidavit”) concerning the process by which CashCall, Inc. was scheduled for an examination under RSA 397-A in February, 2012.

On April 24, 2015, the Respondents filed a Second Supplemental Brief in Support of Their Motion for Reconsideration to Address New Affidavits Submitted by Department

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<sup>1</sup> In response, the Department has stated that it would reply to technical questions through questions presented by the Respondents in a written question and answer format.

(“Second Supplemental Brief”). The Respondents aver that the Poullos Affidavit itself demonstrates the need for the production of the ESI at issue (meaning the .pst files and Outlook folders) because in his affidavit Mr. Poullos states that he cannot recall discussions or email communications regarding the scheduling of CashCall, Inc. for an examination and, therefore, ESI of those Department employees involved with CashCall, Inc. may shed light on such reasons. Within their Second Supplemental Brief, the Respondents also have included a letter from Dana Connolly, Esq., designated as an expert in information technology and digital storage retrieval. Mr. Connolly’s letter presents a series of questions that he would pose to the Department with regard to its storage of back-up tapes and its IT system in general.

#### **IV. Law**

A motion for reconsideration allows a party to present points of law or fact that a court has overlooked or misapprehended. *Broom v. Continental Cas. Co.*, 152 N.H. 749, 752 (2005); *Webster v. Candia*, 146 N.H. 430, 444 (2001); Super Ct. R. 59-A (1). Absent an unsustainable exercise of discretion, a trial court’s decision on a motion for reconsideration will be upheld. To demonstrate that a decision is not sustainable, a party must show that the ruling was clearly untenable or unreasonable to the prejudice of his case. *Guyotte v. O’Neill*, 157 N.H. 616, 623 (2008); *see also, State v. Lambert*, 147 N.H. 295, 296 (2001).

Although discovery rules are to be given a broad and liberal interpretation, the trial court has discretion to determine the limits of discovery. *New Hampshire Ball Bearings, Inc. v. W. Scott Jackson*, 158 N.H. 421, 429-430 (2009). Decisions concerning pretrial discovery are within the discretion of the trial court. *In the Matter of Maynard & Maynard*, 155 N.H. 630, 636 (2007). Under Jus 811.02 (b), a moving party’s motion “shall set forth in detail those factors which it

believes justify its request for information and list with specificity the information it seeks to discover.” “When a party has demonstrated that the requests for information are necessary for a full and fair presentation of the evidence at the hearing, the presiding officer shall grant the motion.” Jus 811.02 (c).

Electronically stored information or electronic data (“ESI”) is within the scope of discoverable material. *New Hampshire Ball Bearings, Inc.*, at 430. Where a request to compel the production of ESI is unnecessarily disruptive to the operations of a party, the request may be considered overbroad and burdensome. *Id.* The N.H. Supreme Court has found “sensible and reasonable” federal courts’ guidance and limitations with respect to the discovery of ESI. *Id.* Circumscribed requests limited to specified individuals or computers expected to produce relevant information are often permitted. *Id.*

The Respondents have represented that the ESI they seek will serve as key evidence that the Department’s Cease and Desist Order allegedly was derived from information obtained illegally through an unconstitutional, pre-textual search, and therefore are necessary to their Motions to Dismiss. “The hearing” referred to in Jus 811.02 (c) includes the hearings on Respondents’ Motions to Dismiss. In reviewing the Motions to Dismiss against the Cease and Desist Order issued by the Department, the applicable standard of review is whether the allegations in the Department’s Cease and Desist Order are reasonably susceptible of a construction that would permit the imposition of penalties and sanctions. *See, Lamprey v. Britton Const., Inc.*, 163 N.H. 252 (N.H. 2012). In reviewing the Respondents’ Motions to Dismiss, the Presiding Officer assumes as true the Department’s allegations and construes all reasonable inferences in the light most favorable to the Department. *Id.*

## V. Analysis and Discussion of the ESI Order

The ESI Order held that the search of the back-up tapes for the .pst files and Outlook folders of the seven-named individuals listed by the Department who participated in the examination and investigation of the Respondents, and other individuals who may have participated in the enforcement action against the Respondents, would significantly disrupt the operations of the Department because a search of the fifty-nine (59) back-up tapes would require the full time attention of the Department's IT employee for approximately six (6) months. The ESI Order found that such a delegation of time would unnecessarily and significantly disrupt the Department's operations where the Department has a sole IT employee and because the Department's daily need for its IT employee would continue unabated. Thus, the ESI Order concluded that a search of the back-up tapes to produce the .pst and Outlook folders of the seven individuals and other individuals would unduly burden the Department.

### A. Points of Law

In their Motion and Supplemental Briefs, the Respondents point to federal decisions concerning ESI discovery and the examination entailed in addressing a discovery dispute involving ESI. In general, these cases neither contradict the holding in *New Hampshire Ball Bearings* nor question the tenet that a discovery request that unnecessarily disrupts the operations of a party or is expensive can be considered overly or unduly burdensome.<sup>2</sup> The cases cited by the Respondents describe a variety of approaches federal courts have taken to determine whether particular searches and production of data maintained in ESI formats are burdensome. *See, e.g., In re Coventry Healthcare, Inc. ERISA Litig.*, 290 F.R.D. 471, 476 (D. Md. 2013); *Zubulake v.*

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<sup>2</sup> The holding in *New Hampshire Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, (2009) remains the law in New Hampshire.



*UBS Warburg LLC.*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). *Zubulake* is instructive due to its holding that whether the production of ESI documents is unduly burdensome or expensive “turns primarily on whether it is kept in an accessible or inaccessible format . . .”, and whether ESI is accessible or inaccessible depends upon “the media on which it is stored.” *Zubulake*, 217 F.R.D., at 318.

The ESI Order did not examine in depth the case law in New Hampshire which holds that a trial court has the discretion to “refashion discovery requests” which the court considers unduly burdensome and to manage discovery requests. *See, e.g., J & M Lumber & Constr. Co. v. Smyjunas*, 161 N.H. 714, 723 (2011), cited in the Respondents’ Motion for Reconsideration. This discretion is useful particularly in the context of an analysis of an unduly burdensome information production request.

#### B. Points of Fact

The ESI Order found that fifty-nine (59) back-up tapes exist which may or may not contain ESI pertinent to the Respondents’ request. Fourteen (14) individuals in the Department have been associated with the examination, investigation, and enforcement actions against the Respondents in this matter. The ESI Order acknowledged the Department’s estimation that the search of the back-up tapes for the .pst files and Outlook folders of these fourteen individuals would require the Department’s IT employee to dedicate all of the IT employee’s time over at least six months to run the search of the back-up tapes.

## **VI. Additional Information for Consideration Provided by the Parties**

As a result of the Presiding Officer's request for alternatives, the parties have provided additional information for consideration as to whether the ESI Order overlooked or misapprehended any points of fact.

### **A. Affidavit of Janice Schultz**

The Schultz Affidavit describes the following: Janice Schultz is responsible for managing the Department's storage and restoration of server data from back-up tapes. The back-up tapes contain a digital copy of the Department's email and electronic file data as that data existed on the date each back-up tape was recorded. Ms. Schultz's affidavit refers to a "test restore" that she conducted for the Outlook files of thirteen Department employees from the back-up tape dated February 29, 2012, called the "restore job." The restore job did not include the .pst files of the thirteen employees. The restore job required three (3) business days to complete. The Department utilizes only one (1) back-up tape drive. Ms. Schultz needed to cease work on the restore job at the end of each business day in order to enable the regularly scheduled backup of the Department's servers to occur. The inclusion of .pst files and additional employees would require additional time.

### **B. Letter of Dana Connolly, Esq.**

In response to the Department's submission of the Schultz Affidavit, the Respondents have submitted a letter from Dana Connolly, Esq., a document retrieval specialist (the "Connolly Letter"). Mr. Connolly's letter questions the time required for Ms. Schultz to restore the tape during her restore job. As set forth in his letter, in Mr. Connolly's experience "the 'entire hands

on' time required by a professional to manage the entire process is limited to a few hours.”  
Respondents' Second Supplemental Brief, p. 2.

Without ceding the argument that the Department faces any burden in the production of ESI, the Respondents point to “alternatives [that] exist to lessen any burden alleged by NHBD.” Respondents' Second Supplemental Brief, p. 2. These alternatives include the purchase by the Department of a second tape drive and the outsourcing of the restoration project to a third party. The Connolly Letter also sets forth a series of questions concerning the Department's IT system and back-up storage system. Second Supplemental Brief, Exhibit A.

C. Report of the Governor's Commission on Innovation, Efficiency, and Transparency

The Respondents also have submitted with their Supplemental Brief portions of a report that addresses the New Hampshire State government's need to modernize its approach to information technology.<sup>3</sup> The report presents a strong statement that the State's governmental operations, including those of state agencies, face challenges in the information technology arena, and that these challenges should be addressed.

D. Affidavit of Michael Poullos

The Department has submitted in its Objection to the Motion for Reconsideration and Supplemental Brief an affidavit of Michael Poullos. Mr. Poullos is a Bank Examiner III in the Consumer Credit Division of the Department, and has been a Bank Examiner since 2003. The Poullos Affidavit states that the Consumer Credit Division maintains a database of all entities licensed by the Department. The Poullos Affidavit describes the manner in which a formula

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<sup>3</sup> Report of the Governor's Commission on Innovation, Efficiency, and Transparency – Delivering 21<sup>st</sup> Century Operating Performance, January 19, 2015, pages 25 and 26.

calculates when a licensee is due for an examination. Newly licensed entities are examined on a twelve month schedule. The Poulios Affidavit states that because CashCall, Inc. was originally licensed on February 9, 2011 and was thus a newly licensed entity, the formula calculated February, 2012 as the month for an examination of CashCall, Inc. Mr. Poulios in December, 2011 participated in a scheduling meeting with other Bank Examiners to schedule the examinations to be conducted in February, 2012. Mr. Poulios was assigned to act as the lead examiner for the examination of CashCall, Inc. The Poulios Affidavit asserts that CashCall, Inc.'s examination was scheduled in the normal course with all other similarly situated licensees. Mr. Poulios does not recall "particular discussions or email communications regarding the scheduling of CashCall, Inc. for an examination."

## **VII. Findings**

Based upon the pleadings and information submitted, I am not persuaded that the ESI Order overlooked or misapprehended any points of law. The guidance derived from the opinion of the N.H. Supreme Court in *New Hampshire Ball Bearings, Inc.* remains valid in evaluating discovery issues concerning electronically stored information and in employing discretion in the manner in, and the extent to which, it is produced.

With regard to the facts presented, the parties' pleadings and information demonstrate that the production of the .pst files and Outlook folders of the Department's employees involved in the examination, investigation, and enforcement of the Respondents would be disruptive to the

operations of the Department, and therefore I continue to find that such production is unduly burdensome.<sup>4</sup>

The Respondents have set forth proposals for the Department to purchase additional back-up tape storage capacity and/or to outsource the restoration and search of the back-up tapes to a third party. With regard to each, the Presiding Officer is not in a position to order the Department to expend funds on particular equipment or outside vendor services. Moreover, these proposals require additional resources and time of the Department and are not discovery requests that narrow in scope or time the requested information.

Mr. Connolly's expertise is not in question, but the Connolly Letter's suggestions appear to extend the time period for resolution of the instant discovery dispute, and not shorten it. In addition, the Respondents have chosen not to follow up on the Department's offer to respond in writing to the type of questions raised in the Connolly Letter. While disagreement exists between the parties over the total length of time required by the Department to restore the .pst files and Outlook folders of the individuals associated with the examination and enforcement action against the Respondents, I find that the operations of the Department would be significantly disrupted and therefore the Department would be unduly burdened if required to have its sole IT manager engaged in the restoration of the requested .pst files and Outlook folders.

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<sup>4</sup> Courts have determined that whether the production of documents is unduly burdensome may turn on whether the data is kept in an accessible or inaccessible format. In this matter, the .pst files and Outlook folders of the individuals involved with the examination, investigation, and enforcement of the Respondents reside in an inaccessible format because of the media – back-up tapes - on which it is stored. Zubulake v. UBS Warburg LLC et al., 217 F.R.D., at 318.

Judicial notice is taken that the information technology systems available to the Department could be more robust, but the alternatives suggested to complete the restoration and search of this information, such as the purchase of new systems or outsourcing of particular tasks, require expenditures of the Department over which I have no control. As noted previously, undue burden can exist if the production of the information requested results in disruption to the operations of the Department. The Department indeed may have limited resources that affect its information technology capabilities which prevent it from performing large-scale searches of back-up tapes without disrupting the Departments' daily operations. Taken at face value and in the context of the instant matter, I find that the report demonstrates the disruptive nature to the operations of the Department were its sole IT employee required to engage in a months' long search of the .pst files and Outlook folders of the individuals associated with the CashCall, Inc. matter.

The Respondents assert in their Second Supplemental Brief in response to the Poulios Affidavit that Mr. Poulios's lack of recollection of email discussions demonstrates why the production of the information of the back-up tapes is necessary. The Respondents assert that the lack of recollection "should not be construed as evidence that material email communications do not exist." Second Supplemental Brief, p. 4. The Respondents, however, have not listed with specificity the information they seek to discover pursuant to Jus 811.02 (b). The Respondents claim, however, that certain ESI may contain information that demonstrates the pre-textual nature of the February, 2012 examination of CashCall, Inc. and allege that this information could serve to demonstrate that the 2012 examination constituted an unconstitutional search, thereby requiring the dismissal of the Department's Cease and Desist Order. Without the parties' concrete suggestions to narrow the focus of the back-up tape search by limiting the number of individuals

and narrowing the period of time to be searched, the Presiding Officer must balance the finding that the production is unduly burdensome against the claims that evidence exists. I note that the Department already has provided the Respondents with substantial number of pages totaling almost 4000. I also note that the Respondents have not propounded interrogatories or requests for admissions regarding how the Department made the decision to commence an examination of CashCall, Inc. Department's Response to Respondents' Supplemental Brief, ps. 2 -3. I recognize that given other circumstances, I perhaps could use my discretion to narrow the restoration of the number of individuals whose .pst files and Outlook folders could be searched. Based upon the Respondents' claim that a number (fourteen) of individuals' .pst files and Outlook folders may yield evidence of this, however, and my finding that disruptions to the operations of the Department would occur as a result of the restore and search, for the purposes of the Motion under review, such discretion is unwarranted .

The Respondents' Motions to Dismiss are subject to the standard of review set forth in Section V, above. The Department's Cease and Desist Order states that it conducted a "routine examination" of CashCall, Inc. In evaluating a motion to dismiss, a trial court assumes as true the non-moving party's allegations and construes all reasonable inferences in the light most favorable to that party. *See, Lamprey v. Britton Const., Inc.*, 163 N.H. 252 (N.H. 2012). Viewed against this legal standard, the Poullos Affidavit and my continued finding of undue burden outweigh the benefits of ordering production of the .pst files and Outlook folders of those individuals involved with the examination, investigation, and enforcement of the Respondents.

### **VIII. Order**

It is ORDERED that:

- A. The Respondents' Motion for Reconsideration of the ESI Order is denied; and
- B. The Respondents' Request for Opportunity for Discussion or Deposition with a Department of Information Technology Representative is denied.

SO ORDERED,

6/25/15  
Date

/s/  
Andrew B. Eills, Esq.  
Presiding Officer  
State of New Hampshire  
Banking Department