

**STATE OF NEW HAMPSHIRE**

**BANKING DEPARTMENT**

**In Re CashCall, Inc. Et Al**

**Docket No. 12-038**

**MEMORANDUM OF DECISION AND ORDER ON THE NEW HAMPSHIRE BANKING DEPARTMENT'S MOTION FOR RECONSIDERATION OF ORDER ON MOTION TO COMPEL PRODUCTION OF INFORMATION UNDER JUS 811.02,**

This matter comes before the Presiding Officer after the October 3, 2014 issuance of a Memorandum of Decision and Order on Respondents' Motion to Compel Production of Information Under JUS 811.02 (the "Order"). The New Hampshire Banking Department (the "Department") timely filed two assented-to Motions for Extension of Time to file a Motion for Reconsideration of the Order on Respondents' Motion, the first on October 31, 2014, and the second on December 2, 2014. During the periods afforded by the extensions it is the understanding of the Presiding Officer that the parties engaged in good faith settlement negotiations.

The Department filed its Motion for Reconsideration of the Order on December 12, 2014, to which the Respondents objected by Objection to the Motion for Reconsideration filed on December 24, 2014.

For the reasons set forth herein, the Department's Motion for Reconsideration is granted.

1. The Order must be reconsidered because it was based upon an agreement that did not exist.

The Department takes issue with and seeks reconsideration of two specific aspects of the Order issued on October 3, 2014. The first addresses the order to produce "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, with the exception of information provided or received as attorney-client privileged information." The second addresses the production of ". . . the .pst files and Outlook folders after a search has been conducted" for any individual who participated in the enforcement action concerning the Respondents.

In its Motion for Reconsideration the Department correctly asserts that the Presiding

Officer based his Order regarding these specific points upon his misperception that the Department had agreed to provide this information when, in fact, the parties merely had engaged in negotiations, through correspondence, emails, and telephone conferences, and had not reached an agreement. The production of the .pst files and Outlook files requires searching the back-up tapes. The parties never reached agreement as to the production of information available only through a search of these back-up tapes.<sup>1</sup> Upon review of the pleadings and exhibits, it is apparent that the Department indeed did not agree to produce the .pst files and Outlook folders of any of the individuals who may have participated in the examination or investigation. Therefore, to the extent that the Order relied upon an agreement that did not exist concerning the production of information, such Order must, at the least, be reconsidered.

2. Under the standards enunciated by the New Hampshire Supreme Court, compelling the production of the information that is the subject of the Department's Motion for Reconsideration would unduly burden the Department.

The Department has made the following uncontroverted assertions with respect to production of the information requested through the search and review of the back-up tapes for the production of information located within the .pst files and Outlook folders. Fifty-nine (59) back-up tapes exist that may or may not contain information pertinent to the request. Each of the back-up tapes would have to undergo a search. Fourteen individuals have been associated with the examination, investigation, and enforcement action against the Respondents. The Department also has represented that the search and restoration of information germane to the request would require at least three and a half hours per back-up tape per individual. The Department has pled that the time necessary for its IT employee to engage in the search and review would require "approximately 40 weeks of full time work by the Department's IT employee to run the search required by the Order."<sup>2</sup> Moreover, since the initial filing of the Respondents' Motion to Compel,

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<sup>1</sup> A comparison of the statements within the pleadings filed by the parties and the language of the Order is instructive in demonstrating that the parties had not attained an agreement. Compare, for example, both the Department's Objection to Motion to Compel, page 7 ("Recently, without waiving any objections or privileges, the Department proposed to limit the search to seven individuals on the Department's staff who participated in the examination or investigation. The respondents rejected this limitation and instead proposed to limit the request to: those seven individuals and "any additions to that list...,") and the Respondents' Motion to Compel Production of Information under JUS 811.02, filed May 30, 2014, paragraph 29, ("During the December 27 telephone conference, NHBD also requested that Respondents limit their request to restore personal storage folders (.pst files) and Outlook folders of the people involved in [the] RSA 397-A:12 investigation to the seven individuals provided in an earlier correspondence . . . Respondents subsequently expressed concern that this list of seven individuals was incomplete . . .") with the Order, page 5 ("The Department has agreed to provide the ESI and Outlook files of the seven individuals who participated in the examination or investigation of the Respondents.")

<sup>2</sup> In the Department's Objection to the Respondents' Motion to Compel filed on June 30, 2014, the Department represented that approximately thirty-six back-up tapes" would require review, requiring between six and nine months of full-time effort, while in its Motion for Reconsideration the Department has revised the number of back-up tapes subject to review to 59 and states that ten months (40 weeks) of the full-time attention of its IT employee would be required. This difference does not affect the analysis herein.

the Department has provided the Respondents with approximately 4000 pages of discovery including the electronic file related to the 2012 examination of CashCall, Inc. *See*, NHBD's Objection to Respondents' Motion to Compel Production of Information Under Jus 811.02, page 6.

In *New Hampshire Ball Bearings, Inc. v. W. Scott Jackson*, 158 N.H. 421 (2009), cited by the Department in its Motion for Reconsideration, the New Hampshire Supreme Court reviewed federal courts' decisions for guidance concerning discovery of electronic data. Electronic data is subject to discovery. The New Hampshire Supreme Court found that the limitations as expressed in federal courts' decisions are sensible. The guidance cited by the Supreme Court is that in some instances "circumscribed requests limited to specific individuals or computers expected to produce relevant information" may be permitted, but also that such discovery can easily become "broad and intrusive," and that a party may not undertake a "drastic discovery measure" such as imaging "all of an opponent's electronic media data" (*New Hampshire Ball Bearings*, 158 N.H., at 430). The central component of the guidance from federal courts cited by the Supreme Court and employed in the latter's analysis in *New Hampshire Ball Bearings* concerned whether an "overbroad and burdensome" examination of every hard drive and server would be "unnecessarily disruptive" to the opposing party's operations.

While the factual background in *New Hampshire Ball Bearings* is silent concerning the exact amount of time required in that case for production, both the concept and effect, as expressed by the Supreme Court, of a request for information that significantly disrupts the operations of a party are applicable to the instance matter. The Department has represented that a search and review of the .pst files and Outlook folders found on the fifty-nine (59) separate back-up tapes would require a strikingly significant time commitment of the Department's IT employee. The Department's information technology needs presumably would not lessen or be any less important during the period required for the complete attention of the Department's IT employee.<sup>3</sup>

In view of the significant amount of attention and time required of the Department's IT employee to search and review the .pst files and Outlook folders on the back-up tapes, I find that production of the information at issue would be unnecessarily disruptive to the operations of the Department. The Department's Motion for Reconsideration is granted as to 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' .pst files and Outlook folders who may have participated in the enforcement action against the Respondents.

SO ORDERED.

Dated: 1/23/15

/s/  
Andrew Eills, Presiding Officer

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<sup>3</sup> The Department has asserted that at a minimum six (6) months would be required for the IT employee's search and review of the fifty-nine (59) back-up tapes.