

**STATE OF NEW HAMPSHIRE**

**BANKING DEPARTMENT**

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

**Docket No. 12-038**

**MEMORANDUM OF DECISION AND ORDER ON RESPONDENTS' MOTION TO COMPEL PRODUCTION OF INFORMATION UNDER JUS 811.02**

**I. INTRODUCTION**

This matter is before the Presiding Officer on Respondents' Motion to Compel Production of Information under Jus 811.02, filed initially on December 11, 2013 and again on May 30, 2014. By this motion, Respondents seek the production of the New Hampshire Banking Department's ("Department") entire file in a separate Department matter, *In Re Impact Cash* (Case No. 10-011). Respondents' motion also seeks all documents, "Electronically Stored Information" ("ESI"), and email communications related to the Respondents or to an entity named Western Sky Financial ("Western Sky") from January, 2010, through the present. Respondents also request all information shared between the Department and other state banking regulators concerning or related to the Respondents, Western Sky, and individuals and entities associated with Western Sky.

**II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

On June 4, 2013 the Department issued an Order to Cease and Desist against the following Respondents: CashCall, Inc. ("CashCall"), John Paul Reddam, President and CEO of CashCall ("Reddam"), and WS Funding, LLC ("WS Funding"). The Order to Cease and Desist alleges that the Respondents have 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 alleges that contractual and other relationships of CashCall and WS Funding with a non-party, Western Sky, have been employed as a mechanism by which the Respondents have sought to avoid becoming licensed under N.H. RSA 399-A, and that CashCall, although licensed as a mortgage banker under RSA 397-A, operates as the actual or de facto lender for payday or small loans for itself and on behalf of Western Sky.<sup>1</sup>

Prior to the Department's initiation of the Order to Cease and Desist against the respondents, the Department commenced an enforcement action against Western Sky, Martin Webb, and Impact Cash, LLC. *In re Impact Cash*, Case No. 10 -011 (Order to Show Cause and Cease and Desist, September 23, 2011). Western Sky has sought dismissal of this matter. As of this date, no action appears to have been taken concerning Case No. 10-011.

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<sup>1</sup> Order to Cease and Desist, In re CashCall, Inc., et al, Case No, 12-308.

CashCall is licensed as a mortgage banker under N.H. RSA 397-A. On or about February 21, 2012 the Department commenced an examination of CashCall under N.H. RSA 397-A: 12. As a result of this examination, the Department's examiner discovered that CashCall appeared to be engaged in the business of purchasing and servicing small loans or payday loans in association with Western Sky. 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 asserts that CashCall, or WS Funding, is the actual or de facto lender for the payday and small loans, and that Western Sky is merely a front for the Respondents' unlicensed activities.

The parties agreed to certain deadlines with regard to discovery.<sup>2</sup> Although the deadline for discovery ended on October 25, 2013, the Respondents initially filed a Motion to Compel Production of Information under Jus 811.02 on December 11, 2013. By this Motion, Respondents requested the then Presiding Officer to order the production of certain documents and information, including "[a]ll communications with other state regulators discussing Respondents in relation to Western Sky, all documents received by other state regulators related to Respondents and Western Sky," and the identification of "all NHBD staff [who had] participated in the examinations and investigation of CashCall."<sup>3</sup>

The Department responded with a "Partial Objection" to the respondents' Motion on January 21, 2014. The Department's Partial Objection referenced the correspondence and efforts that the parties had engaged in cooperatively and voluntarily to produce information sought by the Respondents notwithstanding the missed deadline. With respect to production of information concerning communications with other states' regulators, however, the Department objected.<sup>4</sup> In response, the Respondents submitted a Reply to the Department's Partial Objection on February 4, 2014.<sup>5</sup>

Between February and May, 2014 the parties attempted in good faith to resolve the discovery requests through the voluntary production of documents and information. Because, however, the parties could not resolve certain production requests, Respondents, by an updated Motion to Compel Production of Information under Jus 811.02 filed May 30, 2014, requested that the Presiding Officer compel the production of (1) the Department's entire file in *In re Impact Cash* (Case. No. 10-011) and (2) all documents, including Electronically Stored Information ("ESI"), and email communications related to the Respondents or to Western Sky from January 1, 2010, through the present.<sup>6</sup>

The Presiding Officer conducted a hearing on September 16, 2014, which the parties' counsel attended in person and telephonically. During the hearing, counsel for the Respondents stated that, in addition to communications between New Hampshire regulators and other states'

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<sup>2</sup> Clarified Notice of Scheduled Deadlines and Hearing, October 9, 2013.

<sup>3</sup> Respondents' Motion to Compel Production of Information under JUS 811.02, dated December 11, 2013.

<sup>4</sup> Department's Partial Objection to the Respondents' Motion to Compel Production of Information under JUS 811.02, January 21, 2014.

<sup>5</sup> Respondents' Reply to New Hampshire Banking Department's Partial Objection to Motion to Compel Production of Information Under JUS 811.02, February 4, 2014.

<sup>6</sup> Respondents' Motion to Compel Production of Information under Jus 811.02, May 30, 2014.

regulators, the Respondents also sought communications between other states' regulators concerning Western Sky. The Respondents had requested these communications in their initial Motion to Compel filed in December, 2013.

### III. ANALYSIS

Jus 811.02 provides that parties may move the Presiding Officer to order the parties comply with information requests, and that the motion shall be granted when a party has demonstrated that the request for information is necessary for a full and fair presentation of the evidence at the hearing. Jus 811.02.

In reviewing such requests, the Presiding Officer is constrained by the relevant statutory directives under which the Banking Department operates and the extent of the Presiding Officer's delegated authority.

#### A. *In re Impact Cash File (Docket No. 10-011)*

The Respondents have requested that the Presiding Officer order the Department to produce the entirety of its file in *In re Impact Cash*, Docket No. 10-011. The parties to the Impact Cash docket are Western Sky, Martin Webb, and Impact Cash, LLC. The Respondents have asserted, among other arguments, that the Department's file in the Impact Cash docket is material to this case because in that docket the Cease and Desist Order claims Western Sky is an alter-ego of Impact Cash.<sup>7</sup> Respondents deem it essential to their defense to review the Impact Cash file. The Respondents' assert that the Department discovered the alleged violations of N.H. RSA 399-A only after conducting a "pre-textual" and unconstitutional warrantless mortgage banker examination of the Respondents under N.H. RSA 397-A.

Respondents' request for this file is governed by N.H. RSA 383:10-b, "Confidential Information," that in pertinent part provides as follows:

"All records of investigations and reports of examinations by the banking department, including any duly authenticated copy or copies thereof in the possession of any institution under the supervision of the bank commissioner, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the commissioner, the ends of justice and the public advantage will be served by the publication thereof..." RSA 383:10-b.

Respondents argue that the third section of N.H. RSA 383:10-b, which states that "[o]n motion for discovery filed in any court of competent jurisdiction, in aid of any pending action, the court, after hearing the parties, may order the production of such records, investigations and reports for use in such action whenever it is found that justice so requires, subject to reasonable safeguards imposed by the court as necessary . . ." allows production of this file. By its terms, this provision allowing discovery applies only to motions for discovery filed in a court of competent jurisdiction. It has no application to administrative hearings.

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<sup>7</sup> Respondents' Motion to Compel Production of Information under Jus 811.02, May 30, 2014, page 3, paragraph 13.

There is no dispute that the Impact Cash docket is an on-going pending investigation. Therefore, to the extent that the Department has not produced information from the In re Impact Cash file, the information in that file is “confidential information” under RSA 383:10-b, and subject to release only at the discretion of the Bank Commissioner.

The discretion that the bank Commissioner is accorded by statute to release confidential information is not within the authority delegated by the Commissioner to the Presiding Officers.<sup>8</sup> My interpretation of RSA 383:10-b and the delegation provided hearings officers by the Bank Commissioner is that parties seeking such confidential information must directly petition the Bank Commissioner to make “... any determinations under RSA 383:10-b that the publication of records of investigations and reports of examinations serves the ends of justice and the public advantage.” Delegation to Hearing Officer of Bank Commissioner, dated June 17, 2014.

For these reasons, the Respondents’ Motion to Compel Production of the entirety of the file in *In re Impact Cash*, Docket No. 10-011 is denied.

## **B. All Documents, Electronically Stored Information, and Email Communications Related to Respondents or Western Sky from 2010 to the Present**

In paragraph 23 of their Motion to Compel, the Respondents also request that the Department be compelled “to produce all documents, Electronically Stored Information (“ESI”), and email communications related to the Respondents or Western Sky.” During the September 16, 2014 hearing on Respondents’ Motion to Compel Production of Information, the Respondents and the Department’s counsel each represented that, in addition to any documentation in paper form, the Motion to Compel included personal storage files (so-called “.pst files”) (the “Electronically Stored Information or “ESI”) and Outlook folders (containing email communications) housed on the Department’s data and computer system.

The Respondents have moved to require that the ESI and Outlook files of the following individuals be produced: (1) the seven individuals on the Department’s staff named by the Department who participated in the examination and investigation of CashCall (Docket No. 12-308) as well as any additions to that list; (2) all individuals the Department has identified as having participated in the post-examination investigation and enforcement action of the Respondents; (3) all individuals the Department has identified as having participated in the Impact Cash matter; and (4) current and former Banking Commissioners, Deputy Banking Commissioners, General Counsels and staff attorneys, Division Directors of the Consumer Credit Division (“CCD”), and CCD Directors of the Examinations Unit.<sup>9</sup>

The Department objects to what it characterizes as an overly broad and burdensome request based on the time-consuming difficulty of searching through the Department’s computer system for information responsive to the Respondents’ Motion for all of the individuals named in (1) through (4) immediately above. Specifically, the Department has represented that it has one (1) information technology employee on staff capable of performing the search necessary and that such a search would require between six and nine months of that person’s full time efforts.

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<sup>8</sup> Delegation to Hearings Officer effective June 17, 2014 in Docket No. 12-308, In the Matter of Cash Call, Inc., Jon Paul Reddam, President and CEO of CashCall, Inc., and WS Funding, LLC, dated June 17, 2014.

<sup>9</sup> Respondents’ Motion to Compel, May 30, 2014, page 8.

While I am sensitive to the Department's concerns, the standard in Jus 811.02 requires an evaluation as to whether the requests for information, *in toto*, are necessary for a full and fair presentation of the evidence at the hearing, and not whether such production is difficult or time-consuming.

I am cognizant of the delays in this matter, however, and aware of the time frames originally established by the Notice of Scheduled Deadlines and Hearing established in October, 2013.<sup>10</sup> The parties have in good faith engaged in several months of negotiations concerning discovery. The Department has represented that it has produced nearly 4,000 pages of discovery requested after the deadlines established in the original Notice of Scheduled Deadlines. While the Department has agreed to provide the Respondents with the .pst files and Outlook folders of seven (7) named individuals who participated in the examination and investigation of CashCall, the Respondents believe that other individuals also may have participated in a substantive manner, although no evidence exists to support this belief. The Department has represented that conducting a search of the .pst files and Outlook folders of all of the individuals named in (1) through (4), above, would result in information duplicative of that already produced.

I now turn to the four (4) specific categories of individuals listed in Respondents' Motion whose pst. files and Outlook folders may contain information related to the Respondents or Western Sky.

(1) "The seven individuals (and any additions to that list)."

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>11</sup> Excepting any information subject to the attorney-client privilege, the Department is hereby ordered to provide the ESI and Outlook files of these individuals. With respect, however, to any individual's ESI or Outlook folder that references Western Sky or *In re Impact Cash, LLC et al* (Docket No. 10-011) such information need not be produced as that is confidential under RSA 383:10-b.

(2) "[A]ll individuals [the Department] identifies as having participated in the post-examination investigation and enforcement action of the Respondents."

As noted immediately above, the Department will produce the search results of the ESI and Outlook files of the seven named individuals who participated in the examination or investigation of the Respondents. The request made in section (2) broadens the scope to include individuals who participated in the enforcement action against the Respondents. This request is granted and files shall be produced for any individual not named in (1), above, who participated in the enforcement action concerning the Respondents. With respect to any individuals' ESI or Outlook folder that references Western Sky or *In re Impact Cash, LLC et al* (Docket No. 11-011) such information need not be produced as that is confidential under RSA 383:10-b.

(3) "[A]ll individuals [the Department] identifies as having participated in the Impact Cash Matter."

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<sup>10</sup> Notice of Scheduled Deadlines and Hearing, October 3, 2014.

<sup>11</sup> The seven named individuals of the Department are Kathleen Sheehan, Michael Poullos, Emelia Galdieri, Michelle Kelleher, Kimothy Griffin, and Nancy Burke. Department's Partial Objection to the Respondents' Motion to Compel Production of Information under Jus 811.02, January 21, 2014, Exhibit 1, page 1.

Under N.H. RSA 383:10-b, this information is confidential information. The Respondents are not parties to the Impact Cash matter and for these reasons the Respondents' request for the .pst files and Outlook files of these individuals is denied.

- (4) “[C]urrent and former Banking Commissioners, Deputy Banking Commissioners, General Counsels and staff attorneys, Division Directors of the Consumer Credit Division (“CCD”), and CCD Directors of the Examinations Unit.”

The Department has provided to the Respondents the electronic file concerning the 2012 examination of CashCall. Given that much of the information already has been produced, the broad scope of this request, the burdensome nature of the search though all of the .pst files and Outlook folders of each group of individuals cited therein, and the strong likelihood based upon the request for information from “General Counsels and staff attorneys” that the information is subject to the attorney-client privilege, this request is denied.

### **C. Communications Between the NH Banking Department and Other States’ Regulators**

The Respondents also request “[a]ll communications with other state regulators discussing Respondents in relation to Western Sky [and] [a]ll documents received by other state regulators related to Respondents and Western Sky.”<sup>12</sup>

The Department asserts that the information requested is confidential under the provisions of RSA 383:10-b because communications and other information shared between the Department and other states’ regulators were made pursuant to an investigation of the Respondents.

The Department has provided as an exhibit a “Memorandum of Understanding between the Consumer Financial Protection Bureau, the Conference of State Bank Supervisors, and the Other Signatories Hereto, on the Sharing of Information for Consumer Protection Purposes” (the “MOU”).<sup>13</sup> The New Hampshire Banking Department entered into this MOU effective January 25, 2011. The MOU specifically delineates and describes the manner in which states’ regulators may rely upon the sharing of information regarding supervision or enforcement actions concerning institutions or persons engaged in the offering or provision of consumer financial products or services.

Based upon a review of the applicable statute, RSA 383:10-b, and the MOU, I find that any and all communications between the New Hampshire Banking Department and other states’ regulators relating to the Respondents and Western Sky are confidential. The Respondents’ request for this information is denied.

## **IV. CONCLUSION**

For the reasons set forth above, the Department is hereby ordered:

1. 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

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<sup>12</sup> Respondents’ Motion to Compel Production of Information under Jus 811.02, December 11, 2013, page 3.

<sup>13</sup> Exhibit 2 to the Departments’ Objection to Motion to Compel Production of Information, January 21, 2014.

Respondents, with the exception of information provided or received as attorney-client privileged information. With respect, however, to any of the seven individual's ESI or Outlook folder that references Western Sky or *In re Impact Cash, LLC et al* (Docket No. 10-011) such information need not be produced as that is confidential under RSA 383:10-b.

2. To the extent that any individual not named in (1), above, participated in the enforcement action concerning the Respondents, the Department is ordered to produce that individual's (or individuals') .pst files and Outlook folders after a search has been conducted. With respect, however, to any individuals' ESI or Outlook folder that references Western Sky or *In re Impact Cash, LLC et al* (Docket No. 10-011) such information need not be produced as that is confidential under RSA 383:10-b.
3. The remainder of Respondents' Motion to Compel Production of Information under Jus 811.02 is denied.

SO ORDERED

SIGNED,

Dated: 10/3/14

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Andrew Eills, Esq.  
Presiding Officer