

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' Direct Petition to
Provide Communications Between New
Hampshire Banking Department and Out-
of-State Regulators**

Introduction

This Order addresses the Respondents' Direct Petition to Bank Commissioner to Produce Communications between the New Hampshire Banking Department and Out-of-State Regulators (the "Petition"). While the Respondents' Petition originally had been directed to the Bank Commissioner, the Commissioner has remanded the Petition to the Presiding Officer for determination. The Respondents' Petition seeks communications between the New Hampshire Banking Department ("Department") and out-of-state regulators discussing Respondents in relation to Western Sky Financial, LLC ("Western Sky").

Procedural History

CashCall, Inc., John Paul Reddam, President and CEO of CashCall, Inc., and WS Funding, LLC (collectively, "Respondents") filed a Motion to Compel Production of Information Pursuant to JUS 811.02 on December 13, 2013.¹ The Motion sought the production of

¹ A full recitation of the procedural history concerning the Respondents' Motion to Compel Production of information Under JUS 811.02 is set forth in Section II of my Order on Respondents' Motion, dated June 26, 2015, and where necessary is incorporated herein and made a part hereof by reference. This Order addresses the

information of, among other things, communications between the New Hampshire Banking Department (the “Department” or “NHBD”). The Department timely objected to the Motion by partial objection filed on January 21, 2014. In May, 2014 the Department provided some information to the Respondents that the Respondents had requested. Thereafter, the Respondents again filed a second Motion to Compel Production of Information Under JUS 811.02, to which the Department again timely filed an objection.²

By Order issued October 3, 2014, revised by Order dated October 8, 2014 (the “October Order”) the Presiding Officer issued a Memorandum of Decision and Order on Respondents’ Motion to Compel Production. The October Order referred to the Delegation Order of the Commissioner appointing the Presiding Officer dated June 17, 2014. In the October Order the Presiding Officer had determined that the Delegation Order required the Respondents to petition the Commissioner directly for a determination as to whether information provided between out-of-state regulators and the Department should be produced in light of RSA 383:10-b and the “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 “Information Sharing MOU”).

In response to the October Order, the Respondents directly petitioned the Bank Commissioner with its Petition dated January 20, 2015 to provide all communications between the Department and out-of-state regulators discussing Respondents in relation to Western Sky.³ The Department filed a Response to the Direct Petition, which included a proposed order to the

procedural history as it pertains and relates to the Respondents’ Petition to the Bank Commissioner to Produce communications between the Department and out-of-state regulators.

² By declaration of appointment dated June 17, 2014, the Bank Commissioner appointed me as the Presiding Officer in this matter; Exhibit J to Respondents’ Direct Petition.

³ Respondents’ Direct Petition to Bank Commissioner to Provide Communications between Banking Department and Out-of-State Regulators with regard to CashCall, Inc., et al, Case No. 12-308, January 20, 2015.

Bank Commissioner to remand this matter back to the Presiding Officer. By Order dated March 19, 2015, the Commissioner issued an Order remanding this matter to the Presiding Officer for determination of the instant Petition.

Law

There are two statutes at issue in evaluating the instant Petition.

N.H. RSA 383:10-b, "Confidential Information," provides:

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 subserved by the publication thereof. The commissioner may furnish to the federal supervisory authorities and to independent insuring funds which he deems qualified such information and reports relating to the institutions under his supervision as he deems best. On 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 such reasonable safeguards imposed by the court as may be necessary to prevent use by unauthorized persons or publicity of irrelevant portions thereof. (Emphasis added.)

RSA 399-A: 16, VII provides:

In adopting rules, preparing forms, setting standards, and performing examinations, investigations, and other regulatory functions authorized by the provisions of this chapter, the commissioner may cooperate, and share information pursuant to confidentiality agreements, with regulators in this state and with regulators in other states and with federal regulators in order to implement the policy of this chapter in an efficient and effective manner and to achieve maximum uniformity in the form and content of applications, reports, and requirements for small loan lenders, where practicable.

The Information Sharing MOU is an agreement entered into between the Department and out-of-state regulators pertaining to the sharing of information between them. The MOU entered into between the Department and Out-of-State Regulators provides, in pertinent part:

“Nothing in this [Memorandum of Understanding] shall prevent a party from complying with a legally valid and enforceable order of a State court or a court of the United States or, if compliance is deemed compulsory, a request or demand from a duly authorized committee or one of the established entities of the United States Senate or House of Representatives, or disclosing Nonpublic Information to the extent required by law.”

The MOU defines “Nonpublic Information” as “Confidential Supervisory Information or Personal Information or both.” “ ‘Confidential Supervisory Information’ means any information collected or maintained and owned by a party to [the] MOU which relates to the supervision of, or any enforcement action involving, an institution or other person engaged in the offering or provision of consumer financial products or services.” “Personal Information” means the name, address, or other personally identifiable information relating to any consumer, including without limitation any information so designated by the Provider of the information.

Discussion

The Department commenced this matter with the issuance of an Order to Cease and Desist against the Respondents for violations of the State of New Hampshire’s licensing requirements under RSA 399-A: 2, I. The Respondents have filed two Motions to Dismiss, each of which remains pending. The Respondents have alleged in the instant Petition (as well as in other pleadings, including the Motions to Dismiss), that the Department conducted a warrantless, “pre-textual” administrative search of CashCall, Inc. and that, as a result, evidence obtained as a result of the examination of CashCall, Inc. may not be employed by the Department in its Order to Cease and Desist against the Respondents. The Respondents have asserted that the production of certain communications between the Department and out-of-state regulators will enable the

Respondents to demonstrate that the examination of CashCall, Inc. constituted a warrantless, “pre-textual” administrative search, and thus such information is vital to their Motions to Dismiss.

The Department has responded that after review it has found five (5) documents responsive to the Respondents’ request in the period from July 31, 2012 through May 13, 2013. In addition, the Department has reviewed communications it has with out-of-state regulators and has found other communications that occurred after June 3, 2013. The Department maintains that the Respondents have access to “all the publicly available documents transmitted to the Department” as well as consumer complaints and documents provided to the Department by Respondents themselves. Department’s Response to Direct Petition, p. 4.

While the instant Petition, which has been delegated to me as Presiding Officer to determine, has been presented as a petition to the Bank Commissioner, it is for all intents and purposes a motion to compel. As a result, I must balance the provisions of Chapter Jus 800 with the statutory language of RSA 383:10-b.⁴ For the purposes of applying Jus 811.02 and

⁴ **§ Jus 801.01. Purpose**

The purpose of this chapter is to provide model rules of practice and procedure for adjudicative proceedings conducted by agencies that have not adopted effective rules governing the conduct of administrative hearings. The provisions of these rules are intended to supplement the procedures established by RSA 541-A and procedures established under any statute relating to the agency conducting the hearing.

§ Jus 801.02. Applicability

- (a) The rules in this chapter shall apply to any adjudicative proceeding conducted by an agency that has not adopted rules for adjudicative proceedings.

exercising the discretion called for in RSA 383:10-b, I am guided by the general discovery principles set forth in New Hampshire law and court rules.

Trial courts enjoy broad discretion in determining the limits of pretrial discovery. *Petition of Stomper*, 165 N.H. 735, 742 (2013); *see also N.H. Ball Bearings v. Jackson*, 158 N.H. 421, 429 (2009). The Department possesses communications with out-of-state regulators that are “records” of an investigation. RSA 383: 10-b authorizes the release of “records of investigations and reports of the examinations by the banking department” if “in the judgment of the [C]ommissioner, the ends of justice and the public advantage will be subserved by the publication thereof.” Respondents have asserted that these communications have a “direct bearing on” the Respondents’ constitutional claims of a pre-textual examination of CashCall, Inc. under RSA 397-A for alleged violations of regulations governing small loans.” Respondents’ Reply to Department’s Response to Direct Petition, para. 3. RSA 383:10-b allows the Bank Commissioner to exercise his or her discretion to release “records” where doing so will serve the “ends of justice and the public advantage.”

The Information Sharing MOU anticipates that Nonpublic Information could be ordered to be produced pursuant to a “valid and enforceable order” of a State court or court of the United States. In this case, the communications at issue are exempt from the Right-to-Know Law, RSA 91-A, because they are “confidential, commercial, or financial information,” and thus will not be

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- (b) The rules in this chapter shall also apply to an adjudicative proceeding conducted by an agency that has adopted rules governing the conduct of administrative hearings only to the extent that the agency's rules do not address a practice or procedure addressed in the model rules. An agency rule that addresses a specific procedure shall control that procedure, and the model rule shall not apply even if the agency rule conflicts with, is narrower than, or is broader than these model rules.

available to the general public. RSA 91-A: 5, IV. In this matter, the “ends of justice” require that the communications be produced because the Respondents’ claims are based upon important constitutional issues.⁵

The communications at issue indeed may have some bearing on the efficacy of the Respondents’ claims, or they may not. Respondents have asserted that the communications at issue are necessary for a full and fair presentation of the evidence at the hearings on their Motions to Dismiss, while the Department maintains that none of the communications post-June 3, 2013 support the constitutional challenge to the pre-textual search “nor will such communications demonstrate ‘fact-intensive concepts such as motive.’ ” Furthermore, the content of communications, more than the date on which such communications were made, could be useful to the Respondents’ claims. To the extent that communications exist and are relevant, it will be up to the parties to demonstrate their effect, or lack thereof.

While a statutory basis exists for protecting communications with other regulators from disclosure (see, e.g. RSA 397-A:12, V-a; 399-A:10, I; and RSA 399-A:16, VII), RSA 383:10-b provides distinct statutory grounds for the production of these types of communications. In this matter, moreover, a concern with avoiding a duplication of investigations has not been articulated. The Petition for communications between the Department and out-of-state regulators concerning discussions of Western Sky and the Respondents seeks a narrow band of information. Moreover, the information appears to have been reviewed by the Department and is

⁵ While the facts in *Appeal of Portsmouth Trust Company, et al.*, 120 N.H. 753 (1980) are different from those raised in the instant Petition, the case is useful in evaluating the application of RSA 383:10-b. *Appeal of Portsmouth Trust Company, et al.* addresses RSA 383:10-b in the context of a claim of confidentiality by the Board of Bank Trust Corporation with regard to its investigation and resulting findings which approved the opening of a new branch by the former New Hampshire Savings Bank in Portsmouth. The protesting banks claimed that their due process rights were infringed by the refusal of the Board of Bank Trust Corporation to release its findings concerning NHSB’s application. The N.H. Supreme Court found that notwithstanding the confidentiality provisions of RSA 383:10 -b, the release of such information was essential in affording the protesting banks due process. *Appeal of Portsmouth Trust Company, et al.*, at 758.

readily available for production.⁶ The Respondents have agreed to enter into a Protective Order with respect to the information received.

Order

It is ORDERED that:

- A. The Department produce all five (5) communications between the Department and out-of-state regulators referenced on page 2 of the Department's Response;
- B. To the extent that they have not yet been produced, the Department produce the communications (1) through (4) as set forth on page 4 of the Departments' Response;
and
- C. Prior to such production, the Department and Respondents enter into a Protective Order concerning the communications produced by the Department for the Respondents for the Presiding Officer's review and approval.

SO ORDERED.

Dated: 7/8/15

/s/
Andrew Eills, Presiding Officer

⁶ The Department has not pled or raised as an issue any burden that it may have in producing the communications at issue; in contrast, *see*, Order on Respondents' Motion to Compel Production of Information Under JUS 811.02, issued June 26, 2015.