

MERRIMACK, ss.

STATE OF NEW HAMPSHIRE

029176

SUPERIOR COURT

No. _____

SUPERIOR COURT

CashCall, Inc.
One City Boulevard West, Suite 102, Orange, CA 92868

2018 JUN 26 PM 2 11

WS Funding, LLC
One City Boulevard West, Suite 102, Orange, CA 92868

and

John Paul Reddam
One City Boulevard West, Suite 102, Orange, CA 92868

v.

The State of New Hampshire, Banking Department
53 Regional Drive, Suite 200, Concord, NH 03301

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. CashCall, Inc. ("CashCall"), WS Funding, LLC ("WS Funding"), and John Paul Reddam ("Reddam") (collectively, the "CashCall Parties") bring this action for declaratory judgment and injunctive relief against the State of New Hampshire, Banking Department (the "Department") to prevent the Department from violating the CashCall Parties' constitutional right to a jury trial by pursuing an administrative enforcement action against them for penalties up to \$1,967,500 (\$2,500 for each alleged violation) and disgorgement and restitution in an unknown amount.

2. The CashCall Parties seek a declaration from this Court that the Department's proposed method of adjudication deprives them of their right to a jury trial under the New Hampshire Constitution. Further, the CashCall Parties seek injunctive relief from this Court to

enjoin the Department from pursuing its pending administrative enforcement action against them.

3. This matter is appropriate for the Court's consideration and does not require administrative exhaustion because it concerns questions of law and an agency's jurisdiction rather than an agency's exercise of administrative discretion. *See Frost v. Comm'n, N.H. Banking Dep't*, 163 N.H. 365, 373-74 (2012).

PARTIES

4. CashCall is a California corporation with its principal place of business at One City Boulevard West, Suite 102, Orange, CA 92868.

5. WS Funding is a Delaware limited liability company with its principal place of business in California. WS Funding is a wholly owned subsidiary of CashCall.

6. Reddam is an individual who resides in California. Reddam is the sole owner and director of CashCall and the president of WS Funding.

7. The Department is a duly-constituted administrative agency of the State of New Hampshire, having its principal office at 53 Regional Drive, Suite 200, Concord, NH 03301.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to RSA 491:7 and 491:22.

9. Venue is proper in this Court pursuant to RSA 507:9.

FACTUAL BACKGROUND

10. CashCall is a lending and loan services corporation located in California.

11. CashCall, at all relevant times, was not licensed as a small- or payday-loan lender by the Department under RSA 399-A.

12. CashCall, as part of its business, has offered mortgage loans in certain states, including New Hampshire. CashCall is licensed by the Department as a mortgage banker under RSA Chapter 397-A.

13. On or about February 12, 2012, the Department commenced an examination of CashCall pursuant to RSA 397-A.

14. On June 4, 2013, the Department initiated an enforcement action against the CashCall Parties by issuing an Order to Cease and Desist pursuant to RSA 399-A.¹ A true and correct copy of the Order to Cease and Desist is attached hereto as Exhibit 1.

15. Although the Department did not allege any individual conduct on the part of Reddam, the Department has since made clear that it seeks to assert that he is liable under RSA 399-A:18, VI for “control person” liability.

16. In the Order to Cease and Desist, the Department ordered, among other things, that the CashCall Parties:

- Disgorge any finance charges, delinquency charges, or collection charges associated with the Loans made to New Hampshire consumers;
- Pay restitution to all New Hampshire consumers who received the Loans; and
- Be assessed an administrative fine of \$1,967,500 for 787 knowing or negligent violations of RSA 399-A;2, I, which works out to \$2,500 per violation.

17. The CashCall Parties filed motions to dismiss the enforcement action on December 11, 2013. Among other bases, the CashCall Parties argued that the Department lacked subject matter jurisdiction over the loans made to New Hampshire consumers by third party

¹ References to RSA 399-A are to the version in effect on June 4, 2013, the date of the Department’s Order to Cease and Desist, unless otherwise stated.

Western Sky Financial (the “Loans”) based on principles of tribal sovereignty and because the enforcement proceeding was the result of an illegal warrantless examination.

18. Reddam, a California resident, moved to dismiss on the basis that the Department lacked personal jurisdiction over him individually.

19. The Presiding Officer denied the CashCall Parties’ motions to dismiss in their entirety by written orders on April 29, 2016.

20. Reddam moved for rehearing solely on the issue of personal jurisdiction. That motion was denied on September 21, 2016 by the Department Commissioner (who accepted a proposed order by a Reviewing Officer). Reddam thereafter filed a petition for writ of certiorari with the New Hampshire Supreme Court as to the personal jurisdiction issue, which was accepted, briefed and argued.

21. On December 19, 2017, this Court issued its order in *Ridlon v. State of New Hampshire, Bureau of Securities Regulation*, Docket No. 2017-CV-00405. In *Ridlon*, this Court enjoined an administrative proceeding in which the Bureau of Securities Regulation sought penalties, restitution and disgorgement from an individual because it violated his right to a jury trial under Part I, Article 20 of the New Hampshire Constitution.

22. On February 9, 2018, the Supreme Court issued an opinion affirming the orders of the Department on the issue of personal jurisdiction over Reddam and remanded the matter for further proceedings. *Petition of Reddam*, 180 A.3d 863 (N.H. 2018).

23. On March 26, 2018, the CashCall Parties filed a motion to transfer the action to Superior Court on the basis that, under the reasoning set forth in *Ridlon*, they would be deprived of their constitutional right a jury trial under the New Hampshire Constitution if the action were to proceed in the Banking Department.

24. On June 14, 2018, the Presiding Officer denied the motion to transfer, concluding that 1) the CashCall Parties are not entitled to a jury trial under the test adopted in *Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363 (2009), and 2) even if the CashCall Parties were entitled to a jury trial, they waived their right. A copy of the Presiding Officer's Order is attached as Exhibit 2.

THE CASHCALL PARTIES HAVE A RIGHT TO A JURY TRIAL

25. Under the New Hampshire Constitution, the State cannot impose a fine in excess of \$1,500, or seek restitution or disgorgement in excess of that amount, without affording the party the option of a jury trial.

26. The New Hampshire Constitution provides that "in all suits between two or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1,500 and no title to real estate is involved, the parties have a right to a jury trial." N.H. Const. Pt. 1, art. XX.

27. "It is beyond dispute that the right to a jury trial is a fundamental one under [the] State Constitution in both the civil and the criminal contexts." *State v. Morrill*, 123 N.H. 707, 711 (1983). The right to a jury trial extends to "cases for which the jury trial right existed when the constitution was adopted in 1784." *Id.* at 712; *see also, Gilman v. Lake Sunapee Props., LLC*, 159 N.H. 26, 31 (2009) ("Part I, Article 20 was a recognition of an existing right, guaranteeing it as it then stood and was practiced, guarding it against repeal, infringement, or undue trammel by legislative action....").

28. In *State v. Morrill*, the Supreme Court held that while persons charged with a first offense of driving while intoxicated were not entitled to a jury trial, "any fine imposed upon them cannot exceed the sum of \$500." 123 N.H. 707, 709 (1983). (At that time, the monetary

threshold under Part, Article 20 of the New Hampshire Constitution was \$500; it has since been amended to \$1,500). The Supreme Court explained: “Our review of the landmark cases outlining the right to a jury trial in this State convinces us that the framers of our constitution did not intend that individual criminal defendants be denied a jury trial in cases where fines may be levied which are greater than the amount constitutionally entitling civil litigants to a jury determination....” *Id.* at 712.

29. This principle was applied to a civil fine in *Town of Henniker v. Homo*, 136 N.H. 88 (1992). The defendants had been fined \$6,060 by the Superior Court for maintaining an unlicensed junkyard in violation of state and local law. The defendants appealed on the ground that “they were unfairly deprived of their right to a jury trial because the amount of the fine exceeded \$500.” *Id.* at 88.

30. The *Henniker* court started with the holding in *Morrill* that a “fine exceeding [\$500] can [not] be levied against individuals charged with offenses under our penal code, without granting them a jury trial on appeal.” 136 N.H. at 89 (quoting *Morrill*, 123 N.H. at 713) (alterations in original). It then applied that rule to civil penalties for maintaining an unlicensed junkyard, holding that “the same principle” it had announced in *Morrill* “applies to violations of local ordinances.” *Henniker*, 136 N.H. at 89. In other words, if a person is to be fined more than \$1,500 for violating a local ordinance, they are entitled to a jury trial.

31. Recently, in *Ridlon*, this Court applied that principle to a situation where a state agency sought to assess administrative fines against a party in an administrative enforcement action. The Bureau of Securities Regulation (“BSR”) alleged that Ridlon improperly obtained close to \$2.8 million in fees from his client. The BSR brought an administrative enforcement action against Ridlon seeking fines, restitution, and disgorgement totaling approximately \$6

million. Under the statutory framework of the Uniform Securities Act, as enacted in New Hampshire, RSA 421-B *et seq.*, Ridlon was not afforded the opportunity for a jury trial where the BSR instituted an administrative enforcement action within the BSR.

32. Reviewing the history of New Hampshire jurisprudence regarding the right to a jury trial where a civil penalty is sought to be imposed, this Court said: “The New Hampshire Supreme Court has not wavered from the principle that a penalty greater than \$1,500 may not be imposed other than after jury trial.” The Court found that the administrative fines, restitution and disgorgement the BSR sought to impose on Ridlon were *all* “penalties” based on the language of the Uniform Securities Act. Order at 12-13, 17-18. The Court thus held that “the BSR cannot seek a fine of \$2,500 for a violation of RSA 421-B without a jury determination of liability.” Order at 16-17.

33. The same principle applies to this case. It is unconstitutional for the Department to impose fines and penalties exceeding \$1,500 on the CashCall Parties for violating state laws relating to the regulations of small loan lenders without providing them with the opportunity for a jury trial.

RSA 399-A

34. RSA 399-A, entitled “Regulation of Small Loans, Title Loans, and Payday Loans,” addresses the licensure and regulation of small-loan lenders, among other things. It was repealed and reenacted effective January 1, 2016. N.H. Session Laws Ch. 73:1.

35. The Department’s Order to Cease and Desist was entered on June 4, 2013 with respect to the CashCall Parties’ alleged conduct prior to that date. Thus, citations herein are to the pre-2016 version unless otherwise noted. Attached as Exhibit 3 is a Disposition Table

showing where the subject matter of the pre-2016 version of RSA 399-A can be found in the current version of RSA 399-A.

36. The Department commenced “an adjudicative proceeding under RSA Chapter 399-A and RSA 541-A” against the CashCall Parties. Order to Cease and Desist at 1.

37. Neither the pre-2016 nor the current version of RSA 399-A provides a respondent with the opportunity for a jury trial. Instead, the statute provides only for an administrative hearing with respect to cease and desist orders. RSA 399-A:8, I (setting forth procedure with respect to cease and desist orders); *see also*, current RSA 399-A:22 (same).

38. RSA 399-A:8, I provided that “[a]ll hearings shall comply with RSA 541-A.” RSA 541-A, in turn, provides the basic framework for agency adjudicative proceedings in New Hampshire. RSA 541-A:31 – 541-A:35. It does not provide for a jury trial.

39. The Banking Department utilizes the model rules of practice and procedure for agency adjudicative proceedings promulgated by the Attorney General. *See*, RSA 541-A:30-a, I, II, IV, V; Banking Dep’t website at <https://www.nh.gov/banking/laws-rules-guidance/index.htm> (listing JUS model rules). The model rules appear in the New Hampshire Administrative Code at Chap. Jus 800 *et seq.* and do not provide for a jury trial.

40. RSA 399-A provides the *Department* with the ability to seek relief from the Superior Court (through the Attorney General). RSA 399-A:18, VII (attorney general, on commissioner’s behalf, may “with or without prior administrative action by the commissioner” bring action in superior court against person to enforce compliance with RSA 399-A) (*see also* current RSA 399-A:23, XI (same)). The Department’s failure to do so here precluded the CashCall Parties from exercising their right to a jury trial.

41. The only recourse for a person who suffers an adverse decision from the Department in an adjudicative proceeding is an appeal to the Supreme Court. *See*, N.H. S. Ct. R. 10.

42. Since the CashCall Parties do not have the opportunity to seek a jury trial with respect to penalties, including an administrative fine, restitution and disgorgement, that exceed \$1,500, RSA 399-A is unconstitutional as applied.

43. The Department seeks the imposition of an administrative fine of \$1,967,500 for 787 separate violations (*i.e.*, \$2,500 per violation). The Department further seeks disgorgement of any “finance charges, delinquency charges, or collection charges associated with” the Loans made to New Hampshire consumers and restitution related to such charges. Cease and Desist Order at 8.

44. In support of the relief sought, the Department cites to RSA 399-A:7, I(i), RSA 399-A:8, I, RSA 399-A:18, II, and RSA 399-A:18, V. *Id.*

45. RSA 399-A:7, I(i) provides that the Department commissioner “may by order, upon due notice and opportunity for a hearing, **assess penalties**...if it is in the public interest and the ... respondent...” has violated RSA 399-A. (Emphasis added). *See also*, current RSA 399-A:8, III.

46. RSA 399-A:18 is entitled “Penalties.” RSA 399-A:18, II provides that any person engaging in small loan lending without first obtaining a license “shall be barred from recovering any finance charge, delinquency, or collection charge on the contract.”

47. RSA 399-A:18, V provides:

Any person who, either knowingly or negligently, violates this chapter may, upon notice and opportunity for a hearing, and in addition to any other penalty provided by law, be subject to...an administrative fine not to exceed \$2,500....

48. Thus, the administrative fines, disgorgement of “finance charges, delinquency charges and collection charges” and restitution sought by the Department are expressly identified as “penalties” under RSA 399-A. Since the penalties sought by the Department exceed \$1,500, the CashCall Parties are entitled to a jury trial. *See Ridlon*.

Count I – Declaratory Judgment

49. The CashCall Parties repeat and re-allege paragraphs 1 through 50 of the complaint as if fully stated herein.

50. There is an actual controversy and dispute, as defined in RSA 491:22, between the CashCall Parties and the Department regarding the appropriateness of the proposed method of adjudication of the Department’s enforcement action against the CashCall Parties. This includes, but is not limited to, whether seeking to impose penalties in excess of several million dollars on the CashCall Parties through an administrative enforcement action deprives the CashCall Parties of their constitutional right to a jury trial.

51. The Department disputes that its proposed method of adjudication of the enforcement action against the CashCall Parties violates the CashCall Parties’ constitutional right to a jury trial.

52. The CashCall Parties therefore seek a declaration from the Court that the Department may not pursue an administrative enforcement action against them seeking more than \$1,500.

Count II – Injunctive Relief

53. The CashCall Parties repeat and re-allege paragraphs 1 through 62 of the complaint as if fully stated herein.

54. The CashCall Parties have a constitutional right to a jury trial.

55. The Department's proposed method of adjudicating its enforcement action against the CashCall Parties violates the CashCall Parties' constitutional right to a jury trial.

56. If the Department is not enjoined from pursuing its enforcement action against the CashCall Parties, they will suffer irreparable harm from the denial of their constitutional right and the possible imposition of several million dollars in penalties.

57. The Department will not be harmed by an injunction preventing it from pursuing an administrative proceeding action against the CashCall Parties because RSA 399-A grants the Department the right to pursue the same remedies in Superior Court (through the Attorney General).

58. The balance of interests weighs in favor of preserving the CashCall Parties' constitutional right to a jury trial.

59. The Court should therefore enjoin the Department from pursuing an administrative enforcement action against the CashCall Parties for any amount exceeding \$1,500.

PRAYER FOR RELIEF

WHEREFORE, the CashCall Parties respectfully request that this Honorable Court enter an order and judgment in their favor and against the Department, and award the CashCall Parties the following relief:

- A. An order declaring that the Department has violated the CashCall Parties' constitutional right to a jury trial by pursuing an administrative enforcement action against them for penalties in excess of \$1,500.
- B. An order enjoining the Department from pursuing an administrative enforcement action against the CashCall Parties for penalties or damages in excess of \$1,500.

C. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

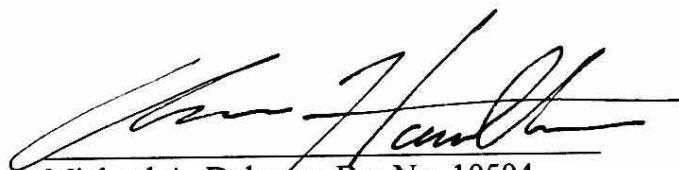
CASHCALL, INC., JOHN PAUL REDDAM,
PRESIDENT AND CEO OF CASHCALL, INC.,
AND WS FUNDING, LLC,

By their Attorneys,

MCLANE MIDDLETON,
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Dated: June 26, 2018

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