

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of: Geary Securities, Inc., fka Capital West Securities, Inc.;
Keith D. Geary; Norman Frager; and CEMP, LLC,

Respondents.

ODS File No. 09-141

**RESPONSE OF NORMAN FRAGER TO THE DEPARTMENT'S OBJECTION TO
ISSUANCE OF DEPOSITION SUBPOENAS DUCES TECUM
TO TERRA BONNELL AND MELANIE HALL**

COMES NOW the Respondent, Norman Frager ("Frager"), and respectfully submits his response to the Oklahoma Department of Securities' (the "Department") Objection to the Issuance of Deposition Subpoenas Duces Tecum to Terra Bonnell and Melanie Hall (the "Objection"). In support hereof, Frager would show the Court as follows:

BACKGROUND

On May 24, 2012, Frager requested the Hearing Officer issue Subpoenas to compel the depositions of the Department's Counsel, Terra Bonnell and Melanie Hall, as well as the Department's Director of Licensing and Examinations, Carol Gruis. The purpose of the depositions was to explore interviews that these individuals conducted with employees and agents of Pershing LLC ("Pershing") prior to the initiation of this action.¹ On May 25, 2012, Frager sent revised subpoenas to the Hearing Officer related to Ms. Bonnell, Ms. Hall, and Ms. Gruis. The revised subpoenas sought identical information to those submitted on May 24, 2012, but included requests for the following documents:

1. All Documents, Writings or Communications between and/or among You and Pershing, LLC ("Pershing"), or any agent, representative, attorney or other person acting or purporting to act on Pershing's behalf.

¹ Ms. Gruis was also listed by the Department to testify at the hearing in this matter and, accordingly, it is expected that her deposition may encompass her proposed testimony at the hearing as well.

2. Copies of any and all recordings, both audio and video, made by You of any conversation which in any way relates to Your contacts with Pershing to the extent such recordings have not already been produced.

3. All notes, summaries, reports or memoranda prepared by You related to Your contacts with Pershing.²

The subpoenas to Ms. Hall and Ms. Bonnell (the “Subpoenas”) are the only ones at issue in the Department’s Objection. The subpoena to Ms. Gruis is not being challenged.

The Department challenges the Subpoenas by arguing that the deposition should not be allowed because (1) the Subpoenas are “unreasonable, oppressive, excessive in scope, and not relevant;” (2) discovery issued to opposing counsel is disfavored and (3) the documents sought in the Subpoenas should not be produced because the information sought is protected by the work-product doctrine. As will be shown below, because the Subpoenas are narrowly focused, because there is no other practical means to obtain the testimony at issue, and because the documents sought were not created in anticipation of litigation, the objection should be denied and the Subpoenas issued.

ARGUMENT AND AUTHORITY

A. THE SUBPOENAS ARE NOT UNREASONABLE, OPPRESSIVE, EXCESSIVE IN SCOPE, UNDULY BURDENSOME OR IRRELEVANT.

The Department begins its assault on the Subpoenas with the statement that the Subpoenas are “unreasonable, oppressive, excessive in scope, unduly burdensome and not relevant.” In essence, then, the Department implies that the Subpoenas are so overreaching in their scope that it would be burdensome for it to respond. A simple reading of the Subpoenas reveals the falsity of this statement. Contrary to the Department’s assertions, the Subpoenas seek information that is narrowly tailored to a particular issue: Ms. Hall’s and Ms. Bonnell’s pre-

² In light of Ms. Gruis’ status as a witness for the Department, her subpoena also requested “[a]ll Documents, Writings or Communications in any way related to the testimony You anticipate providing at the hearing for this matter.”

litigation interviews with Pershing—interviews which provided the basis for the claims at issue herein. Regardless of whether or not the Department’s other objections to the Subpoenas are appropriate, there is simply no argument that the information sought is not relevant or that the scope of these Subpoenas is somehow excessive or burdensome. Given the narrow and focused objective of the Subpoenas, there is simply no colorable claim that the Subpoenas are “unreasonable, oppressive, excessive in scope, unduly burdensome and not relevant.”

B. THE DEPOSITIONS ARE NECESSARY AND WARRANTED UNDER THE LAW.

The Department is correct when it notes that, generally, discovery directed to opposing counsel is disfavored. However, such discovery is not subject to a blanket prohibition and may indeed be available where the proper conditions are met. While the Oklahoma Supreme Court does not appear to have adopted a specific framework for determining when depositions of opposing counsel may be taken, the United States District Courts presiding in Oklahoma have utilized a three prong test for determining if such is proper. This three prong test, originating from an 8th Circuit case entitled *Shelton v. Am. Motors Corp.*, provides that such depositions may be allowed if:

- (1) no other means exist to obtain the information than to depose opposing counsel;
- (2) the information sought is relevant and nonprivileged;
- and (3) the information is crucial to the preparation of the case.

Edmondson v. Tyson Foods, Inc., 2007 WL 649335 at *2 (N.D. Okla. 2007) (quoting *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)).

In the present case, the second and third prongs are not truly at issue and, indeed, the Department fails to even address them. Certainly there is no argument to be made that the scope of the Subpoenas— interviews between the Department and Pershing regarding the matters at issue in this action—is not relevant or would somehow be privileged. Indeed, the Hearing

Officer has already ruled that the recordings of some of those same interviews are not privileged or protected. Additionally, the content of those interviews with the Department are crucial to Frager's preparation of this case as the information obtained in those interviews is what the Department's claims herein are largely premised upon.

Based on the foregoing, the only matter truly at issue is the first prong of the *Shelton* test, namely whether any other means exists for obtaining the information. In that regard, the case of *Stockton v. Housecalls Home Health Services, Inc.*, 2007 WL 2609835 (N.D. Okla. 2007) is particularly instructive. In *Stockton*, the Court, in determining whether or not to allow opposing counsel to be deposed regarding interviews that had been conducted, found the first prong of the *Shelton* test to be met. More particularly, the court held that deposing opposing counsel was warranted because the other parties to the interviews could not recall all of the details thereof. *See Id.* at *1. Accordingly, the only way to obtain all information related to the interviews was to depose opposing counsel.

For the same reason that the deposition of opposing counsel was allowed in *Stockton*, they should also be allowed here. The interviews conducted by the Department occurred nearly three years ago and involved multiple agents and employees of Pershing. Additionally, if the recordings previously provided by the Department are of any indication, the interviews likely touched on a broad array of subjects. In light of the length of time since those interviews occurred, and the breadth of topics likely addressed, it is unlikely that any personnel from Pershing will be able to fully recall the substance of the matters discussed. Instead, it is far more likely that Ms. Hall and Ms. Bonnell, the parties who conducted the interviews, prepared the questions, and were invested in the outcome of those interviews, will be able to recall specifically what was discussed. For this reason, there is likely no other means of obtaining full

and complete discovery related to the Pershing interviews without the depositions of Ms. Hall and Ms. Bonnell and, therefore, the remaining prong of the *Shelton* test is met.³

Ms. Hall and Ms. Bonnell also argue that Oklahoma's Rules of Professional Responsibility may disqualify them from representing the Department in this matter should they be required to testify. More particularly, they cite to Rule 3.7 which prevents a lawyer from participating in a trial in which it is likely that the lawyer will be a necessary witness. In essence, Ms. Hall and Ms. Bonnell imply that if they are deposed, they will not be able to represent the Department and that such inability would create hardship on the Department. However, there are two points with regard to this potential disqualification that the Department overlooks. First, Ms. Bonnell and Ms. Hall are not the only attorneys employed by the Department and should they be disqualified by the application of Rule 3.7, there are other attorneys who could step into this matter. Second, if for some reason, no such other attorneys existed, Rule 3.7 does not require disqualification if it would "work substantial hardship on the client." To that end, even if no other attorneys could handle this matter for the Department, Rule 3.7 would not require Ms. Bonnell and Ms. Hall's disqualification. For this reason, the arguments related to the application of Rule 3.7 are unavailing.

In the alternative, should the Hearing Officer be disinclined to allow the deposition of Ms. Hall and Ms. Bonnell without first determining to a certainty that the requested information cannot be obtained through other means, Frager would ask that the Hearing Officer delay ruling on the Objection until such additional discovery can be completed and it can be determined with certainty that the requested information can be obtained from other sources. To accomplish this, Frager would ask that the Hearing Officer require the Department to provide a list of all

³ It is also worth noting that Ms. Hall is the head of the Department's enforcement division and has been an attorney with the Department for twenty-five years. As such, she is aware of the potential ramifications of using the Department's attorneys to conduct pre-litigation investigations.

representatives of Pershing with whom it spoke and that the Hearing Office provide Frager with sufficient time to depose the same prior to ruling on this Objection.

C. NO DOCUMENTS PROTECTED BY THE WORK PRODUCT DOCTRINE ARE SOUGHT UNDER THE SUBPOENAS.

As noted above, the Subpoenas also seek production of various documents including notes, summaries, and reports prepared by the Department related to their interviews with Pershing. The Department argues that this material is protected by the work-product doctrine and should not be produced. As will be shown below, the Department bears the burden of establishing that the work-product doctrine applies and has failed to do so. *See Kincaid v. Wells Fargo Sec., LLC*, 2012 WL 712111 at *3 (N.D. Okla. 2012).

To support its position, the Department cites to *Hickman v. Taylor*, 329 U.S. 495, 505, 510 (1947) wherein it was decided that the work-product doctrine protected “materials collected by an adverse party's counsel in the course of preparation for possible litigation.” *Hickman*, however, is easily distinguishable from the present case. The Department fails to recognize that simply because the material at issue was collected or generated by an attorney does not make it work-product. Instead, in order for the work-product doctrine to apply, the information generated with regards to these interviews must have been done “in preparation for possible litigation.” *Hickman*, 329 U.S. at 505. The Department has failed to make such a showing.

When many of these contacts with Pershing occurred, this matter was still in its investigatory stage. The Department had yet to file any action and was acting much like an insurance company does when investigating potential claims. That is to say, the Departments role was solely to determine if any securities violations had occurred and it was just as possible that litigation might result as the possibility that it might not. As one court noted, “[t]he inchoate possibility, or even likely chance of litigation, does not give rise to work product.” *Kincaid*,

2012 WL 712111 at *3. Instead, the “key inquiry is whether the documents would have been created regardless of whether litigation was in the offing.” *Id.* It is clear that during the period in which the Department was merely investigating the potential claims that may be available, the documents created were not principally for the purpose of preparing for litigation, they were for the purpose of fact-finding. The Hearing Officer has already recognized this fact in his October 27, 2011, Ruling on the Department’s Objections to the Geary Respondents Discovery Requests, wherein he recognized that documents obtained and prepared as part of the pre-litigation investigation by the Department were likely not work-product as, if they were, “then virtually all evidence gathered in such investigation would be privileged and arguably undiscoverable.” *See* Ruling on the Department’s Objections to the Geary Respondents’ Discovery Requests, attached hereto as Exhibit “A” at p.6, n.1.

Accordingly, the Departments has failed to meet its burden in showing that the documents requested are covered by the work-product doctrine and, therefore, the documents referenced in the Subpoenas should be produced.

CONCLUSION

As shown above, the information sought in the Subpoenas is relevant to the instant case and is not readily obtainable from any source beyond Ms. Hall and Ms. Bonnell. Additionally, the documents requested in the Subpoenas are not protected by the work-product doctrine and should be produced. For these reasons, the Department’s Objection should be overruled and the Subpoenas should be issued.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May ~~31~~, 2012, a copy of the foregoing document was served on the following via electronic mail:

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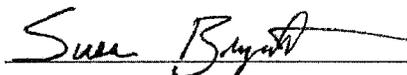
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