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. **File No. 09-141**

RESPONSE OF NORMAN FRAGER TO MOTION BY OKLAHOMA DEPARTMENT OF SECURITIES FOR SUMMARY DECISION AGAINST NORMAN FRAGER

I. INTRODUCTION

Respondent Norman Frager hereby submits this Response to the Motion for Summary Decision filed by the Oklahoma Department of Securities (***Department***) against Respondent Frager on November 1, 2011 under Section 660:2-9-3(d) of the Oklahoma Rules[1]. As described in detail below, granting the Department's Motion is not appropriate under Section 660:2-9-3(d) of the Oklahoma Rules.

II. PRELIMINARY STATEMENT

Mr. Frager respectfully submits that the Motion for Summary Decision filed by the Oklahoma Department of Securities on November 1, 2011 should be denied for the following reasons:

(1) There are genuine issues of material fact in dispute in this matter as described in more detail below, and therefore, the Department is not entitled to prevail as a matter of law on the issues.

[1] The Administrative Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities, Okla. Admin. Code, 660:1-1-1 through 660:25-7-1 (hereinafter, the ***Oklahoma Rules***).

(2) Granting the Department's Motion would deprive Respondent Frager of his right to a hearing under Section 660:2-9-1 of the Oklahoma Rules, at which he could cross examine witnesses, present his own evidence as authorized by Section 660:2-9-6 of the Oklahoma Rules and have the hearing officer make findings of fact as authorized by Section 660:2-9-8 of the Oklahoma Rules.

(3) Granting the Department's Motion would allow the Department to prove its case through the submission of affidavits and deposition testimony, thus depriving Respondent Frager of his right to cross examine witnesses and to verify the credibility of those witnesses.

(4) The central question of fact in this matter relates to the calculation and reporting of net capital, which has been delegated to the Securities and Exchange Commission (***SEC***) by the Oklahoma Uniform Securities Act and the Oklahoma Rules.[2] The SEC, in turn, has delegated to the Financial Industry Regulatory Authority (***FINRA***) the responsibility for calculating net capital and for overseeing net capital computations and reporting by broker-dealers. FINRA is currently involved in evaluating the net capital issues involved in this matter in a separate action brought by FINRA involving the same transactions.[3] Since FINRA is the regulator responsible for making factual determinations about net capital under SEC and Oklahoma Rules, and since FINRA has not made any factual determinations on the net capital issue to date, the Department cannot assert that there are no material questions of fact to be resolved in this matter. Based on the issue of net capital alone, there is clearly a question of fact that has not yet been determined, which fact cannot be decided by the hearing officer or the

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[2] Section 1-410 of the Oklahoma Uniform Securities Act of 2004, Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2010), authorizes the adoption of a rule establishing minimum net capital requirements for broker-dealers in Oklahoma. The Rule adopted in Section 660:11-5-17 of the Oklahoma Rules states (a) **General requirement.** All broker-dealers registered under the Securities Act shall at all times have and maintain net capital of no less than the highest minimum requirement applicable to each broker-dealer as established by the SEC in 17 CFR 240.15c3-1. (b) **Calculation of "net capital."** As used in this subchapter, net capital shall mean the net worth of a broker-dealer calculated according to the formula established by the SEC.

[3] FINRA Matter Nos. 20090204658 and 20100216574/Norman Frager

Department and, therefore, the Department has not met its burden of proving that there is no genuine issue of material fact to be determined.

(5) The ability of the Department to make findings of fact with respect to capital requirements and reporting obligations that would differ from findings to be made by FINRA are preempted by federal law[4] and therefore, any determination of facts on the net capital or reporting issues raised by the Department must be deferred until FINRA and the SEC have made final determinations on those facts and, therefore, the Department has not met its burden of proving that there is no genuine issue of material fact to be determined.

(6) Finally, there is no public interest to be served in denying Respondent Frager's right to a hearing.

III. DISCUSSION

A. GENERAL OBJECTIONS TO THE BASIS OF MOST "FACTS" ON WHICH THE DEPARTMENT'S MOTION IS BASED

The following is a summary of objections we have to the information that has been submitted by the Department as "fact" in its Motion (the numbers refer to the numbered items categorized as "facts" in the Department's Motion):

1. We **vehemently** contest the undisputed nature of all of the statements categorized as "facts" based on the affidavit of David E. Paulukaitis, an individual presented as an expert by the Department, without being properly qualified as such or deposed by the parties. Specifically, we contest the information included in items 21-25, 27-29, 33, 39, 40 and 42. With due respect to Mr. Paulukaitis, he has not been qualified or accepted as an expert as of this date, nor do we concede that he has the background to give expert testimony on those issues. According to his

[4] Section 15(i) of the Securities Exchange Act of 1934 (15 USC 78a *et seq*) states as follows: "(1) CAPITAL, MARGIN, BOOKS AND RECORDS, BONDING, AND REPORTS.- No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this title."

affidavit, Mr. Paulukaitis has been employed since 2005 as Managing Director of Mainstay Capital Markets Consultants, Inc. (***Mainstay***) and he provides "a variety of consulting services principally to broker-dealers, focusing on regulatory compliance, particularly in the areas of supervision, supervisory controls, and internal compliance systems." None of that experience involves accounting or net capital computation issues under GAAP, FINRA Rules or SEC Rules. A review of the types of services offered by Mainstay on its website does not include any mention of assistance with net capital computation or accounting issues. Before 2005, Mr. Paulukaitis states that he "was employed for 23 years in the Atlanta District Office of the National Association of Securities Dealers, Inc." (hereinafter, ***NASD***, which entity was merged with the member regulation operations of the New York Stock Exchange and consolidated into FINRA in July 2007, after Mr. Paulukaitis' departure). There is no description of the responsibilities or position of Mr. Paulukaitis at the NASD that would indicate any relevant experience or qualifications in the application of accounting rules and GAAP to the issues in question or in computing net capital, particularly under current FINRA and SEC rules.

We have retained the services of experts previously identified on our list of witnesses, one of whom has substantial experience in the computation of net capital with the NASD and FINRA and currently serves as a Financial and Operations Principal (***FinOP***) for a registered broker-dealer. Because we had not anticipated this Motion, we do not have an affidavit from our expert to present on the issues in question; however, our expert has advised us that he disagrees with at least some of the conclusions derived from the affidavit of Mr. Paulukaitis.

We find the statements by Mr. Paulukaitis to be too simplistic, without consideration of the facts and circumstances of the specific issues involved in this matter and failing to reflect accurately the accounting rules applicable to the transactions at issue. We submit that there is no basis for concluding that his statements represent undisputed facts.

Because there is no evidence of Mr. Paulukaitis' ability to provide expert testimony on the issues addressed in his affidavit, and because we expect to provide testimony contradicting his conclusions, all "facts" derived from the affidavit of Mr. Paulukaitis must be disregarded in evaluating the Department's Motion.

2. We also **vehemently** object to categorizing the statements of Mr. Geary in his deposition as "facts" on which a Motion for Summary Decision should be granted, particularly when other statements in the same deposition provide contradictory testimony on the same issues, statements which have apparently been overlooked by the Department in preparing its Motion.[5] We find this selective listing of "facts" to be at best negligent on the part of the Department. The items in dispute include, but are not limited to: (i) statements that the securities at issue were "purchased" on May 28 (item 14) when the deposition testimony of Mr. Geary two pages[6] later indicated that Pershing did not provide any financing for the securities and therefore, there was no liability to Pershing to be reported on the FOCUS Report for Geary Securities, Inc. (hereinafter, ***Geary Securities*** or the ***Firm***)[7]; (ii) that the securities were in the Firm's account (item 16) when in fact, Pershing may have placed them there on paper, but Pershing knew that the Firm did not have the capital to settle the purchase and that Pershing could not lend money to the Firm without violating its own policies and procedures; (iii) that Mr. Geary entered the trade tickets correctly (stated as fact in item 18), when at page 89 of Mr. Geary's deposition, he admits that he did not enter the trade tickets correctly and that Mr. Frager was justified in relying on Mr. Geary to have entered them correctly; (iv) the statement of Mr. Geary that the securities were

[5] See, for example, the testimony on page 61 of the deposition of Keith D. Geary taken on March 22, 2011 by enforcement staff of the Oklahoma Department of Securities (hereinafter, *Geary ODS Deposition*), which contradicts the "facts" listed in item 15 of the Department's Motion. similarly, testimony of Mr. Geary on page 89 of his ODS Deposition contradicts the "facts" cited in item 19 of the Department's Motion.

[6] Deposition of Keith D. Geary taken on March 22, 2011 by enforcement staff of the Oklahoma Department of Securities (hereinafter, *Geary ODS Deposition*), page 61.

[7] We submit that Pershing would not have loaned money on this type of security without approval from its Credit Committee, which was unlikely to be given; therefore, the purchase by Geary Securities was never completed, unless it was completed in violation of Pershing's internal policies and procedures.

sold from the Firm's account to the Geary customers (item 19), when the actual accounting and booking of the transactions is in dispute and is based on issues outside of the knowledge or expertise of Mr. Geary, including the nature of the understanding of the parties as to the transaction; (v) statements attributed to Mr. Frager by Mr. Geary relating to an alleged "cover-up" of the transaction (item 29) when those statements were clarified by Mr. Geary at page 89 of his deposition. Based on the foregoing, we submit that all "facts" derived from Mr. Geary's deposition as listed in the Department's Motion are without foundation must be ignored in evaluating the Motion.

Furthermore, depositions are very different from in-person testimony at a hearing, when other parties would have the opportunity to cross examine the witness, elicit additional information and explanatory statements from the witness and present contrary testimony, all of which we intend to do in a hearing. It is inappropriate to use deposition testimony to establish undisputed facts, when the parties are available to appear at a hearing and undergo cross examination. Accordingly, all "facts" derived from deposition testimony should be disregarded.

3. We also contest using any statements of Mr. Frager as "facts" on which a Motion for Summary Decision can be based, since counsel did not believe it was necessary to elaborate or present additional testimony during a deposition. We are prepared to provide additional testimony from Mr. Frager and from our other witnesses listed on our witness list previously submitted to elaborate on the deposition testimony and to document that Mr. Frager's actions were appropriate and based on current accounting, FINRA and SEC rule requirements. Accordingly, all "facts" derived from Mr. Frager's testimony must be ignored in evaluating the Department's Motion.

B. SPECIFIC "FACTS" DISPUTED BY RESPONDENT

In addition to the above, the following lists a limited number of other genuine issues of material facts that we submit are in dispute and need to be vetted before a hearing officer. This list is not all inclusive, but provides examples of why a Summary Decision is inappropriate at this time.

1. We dispute the statement in item 9 that the amount of net capital at all times was $250,000, which is directly relevant to the violations alleged by the Department during February 2010. The determination of the amount of net capital is different for different purposes, including reporting purposes under SEC Rules, the determination of which is in the sole jurisdiction of FINRA and the SEC. The amount of net capital required under the Firm's membership agreement with FINRA is not necessarily the amount of net capital required to comply with SEC Rule 17a-11 promulgated under the Securities Exchange Act of 1934, relating to the reporting of net capital deficiencies. The latter rule requires a Firm to provide notice to the SEC when the firm's "net capital declines below the minimum amount required pursuant to §240.15c3-1." FINRA Rule 4110 states that "a member shall suspend all business operations during any period in which it is not in compliance with applicable net capital requirements set forth in Securities Exchange Act of 1934 Rule 15c3-1." Neither rule incorporates the net capital requirement stated in a firm's membership agreement. We expect to provide testimony that the interpretation of the rules above is the correct one and that Mr. Frager did not believe that he violated FINRA reporting requirements by using the $100,000 threshold instead of the $250,000 threshold. Furthermore, as noted above, this issue is currently under review by FINRA[8] and a determination of this issue by the Department at this time is premature.

[8] The question of net capital required for reporting purposes under SEC Rule 17a-11 is one of the matters on which states have been preempted under Section 15(i) of the Securities Exchange Act of 1934.

2. Item 11 purports to present as a "fact" the substance of FINRA rules through testimony of compliance personnel at Geary Securities. Such statements are not primary authority and must be disregarded. Furthermore, as stated elsewhere, the Department is preempted from making decisions about reporting issues under Section 17 of the Securities Exchange Act of 1934 by reason of Section 15(i) of the Securities Exchange Act of 1934.

3. We dispute the information categorized as "facts" included in Items 30 through 39 alleging a "cover-up" by Mr. Frager, most of which "facts" are based on deposition testimony of various parties. The "facts" as described by the Department in its Motion omit any of the testimony that would support the position of Mr. Frager. We expect to provide testimony indicating that trades, whether or not for same day settlement, can and must be cancelled if the transaction cannot be completed as submitted. Testimony of Mr. Geary in his deposition confirms that Pershing was unable to lend the money to the Firm to settle the transactions and that Mr. Frager informed Mr. Geary that the trades could not be completed. Mr. Geary admits that Mr. Frager was entitled to rely on him to cancel and rebill the trades correctly. There is no evidence of a "cover-up."

4. The information included as "fact" with respect to the February 2010 net capital issues is disputed, based on the application of the FINRA rules and the SEC net capital rules discussed above.

IV. RESPONDENT DID NOT VIOLATE NET CAPITAL AND FINANCIAL REPORTING RULES AND STANDARDS OF ETHICAL PRACTICE

A. MAY 2009 CMO TRANSACTIONS

The following describes our position with respect to Mr. Frager's involvement in the May 2009 net capital computations, based on facts and testimony that is contained in the depositions on

which the Department relies for its Motion as well as on testimony we would expect to present at hearing:

During 2009, Keith Geary had determined that certain private label collateralized mortgage obligations (*CMOs*) were being undervalued in the market and offered an opportunity for profit. In the Spring of 2009,[9] Mr. Geary discussed the opportunities with Mr. Frager, who recommended a possible strategy for acquiring CMOs in a separate entity and then adding enhancements. Mr. Frager used a hand written diagram to illustrate how the strategy could work and gave the diagram to Mr. Geary with typewritten notes (see Exhibit 1). The diagram and notes describe a separate entity that would be owned by The Geary Companies, that would purchase and hold CMOs and that would attempt to raise the funding required to purchase the CMOs through a private or limited offering to accredited or qualified investors. Mr. Frager listed in his notes that a securities attorney should be a participant in the project that would represent the issuer and prepare required documents. The notes also indicated that the project would need to be in "COMPLIANCE WITH SEC & FINRA RULES & REGULATIONS ..."

None of the items prepared by Mr. Frager included any suggestion that Geary Securities purchase any of the securities directly. Mr. Frager advised Mr. Geary about the limitations on the involvement of Geary Securities with CEMP and Mr. Geary appeared to have understood those limitations.[10]

Following the initial discussions, to provide legal support in implementing the project, Mr. Geary retained the services of Katten Muchin Rosenman LLP, a law firm that was reputed to have experience in the subject matter. Through the assistance of the law firm, Geary Securities established CEMP later in 2009 as a separate entity and successfully carried out one project (CEMP 09-1). Mr. Frager had no involvement with the law firm, with CEMP or with any other

[9] Frager ODS Deposition, Page 35, *et seq. and Frager* OTR Testimony, page 35, *et seq.*
[10] Testimony of Keith D. Geary given on November 19, 2010 before the staff of the Financial Industry Regulatory Authority, Department of Enforcement in New Orleans, Louisiana (hereinafter, *Geary OTR Testimony*), page 39.

aspect of carrying out the project, except that he reviewed certain correspondence within the Firm to ensure that the Firm would have no obligations or liabilities with respect to the project.[11]

During May 2009, Mr. Geary became aware of CMOs that were to be offered for sale by a bank that was owned by one of Mr. Geary's clients. Mr. Geary placed bids on the CMOs apparently contemplating that they could be held until CEMP was ready to acquire them. Mr. Frager was not aware of the placement of the bids or the fact that Mr. Geary was attempting to purchase CMOs within the Firm. Mr. Geary had not discussed with Mr. Frager any aspect of the attempted purchase. He had not asked Mr. Frager whether the Firm could hold the CMOs directly or how a purchase would affect the Firm's net capital. As the Chief Executive Officer and General Securities Principal, it was Mr. Geary's obligation to understand and work within the limitations of the Firm's net capital requirements and, if he was unsure, to consult with the Chief Financial Officer before committing the Firm to any obligation that could affect net capital.

Mr. Geary's bid on the CMOs was accepted and on May 28, 2009, Mr. Geary directed Chad Goodman to submit the trade tickets for the purchase to Pershing. Unknown to Mr. Frager until the date of Mr. Frager's testimony before FINRA in August 2010, Mr. Goodman submitted tickets for same day settlement, which is unusual in the market and would not have been contemplated by Mr. Frager. Normal transactions are done on a three-day settlement. Mr. Geary was aware that the Firm did not have sufficient capital to purchase the CMOs, but apparently assumed that the purchase could be financed by Pershing until the Firm had sufficient capital in CEMP to purchase them.

On Friday May 29, 2009, Pershing placed a call to Geary Securities stating that the Firm did not have sufficient capital to complete the transaction as submitted and asked what Geary Securities intended to do about the proposed transaction. Mr. Geary did not contact Mr. Frager on

[11] Testimony of Norman L.[sic] Frager given on August 4, 2010 before the staff of the Financial Industry Regulatory Authority, Department of Enforcement in New Orleans, Louisiana (hereinafter, *Frager OTR Testimony*), pages 30-31.

Friday to ask about any net capital issues, although he knew on that date that he did not have sufficient capital. In testimony before the Oklahoma Department of Securities, Mr. Geary admitted that he had delayed in contacting Mr. Frager because "I was still trying to conceptualize how I was going to go forward."[12]

On Saturday, May 30, 2009, Mr. Geary sent an email to Mr. Frager forwarding an email from J.D. McKean, Jr., a client of Mr. Geary, discussing the current market for CMOs.[13] At the end of the email, Mr. Geary added "I may need to visit with you on Monday morning as to how Cap West (with Pershing's "help") can carry a group of PL's for the 10-15 days it will take to re-remic and Sell. ..." Mr. Frager responded to the email, in part with the question: "What amount of PL's are you looking to position?"[14] Clearly, at that time, Mr. Frager had no knowledge of the amount of the proposed transaction or the fact that trade tickets had already been submitted. Mr. Geary apparently did not believe that there was any urgency in the situation, since he did not suggest discussing the matter with Mr. Frager until Monday.

On Monday morning, June 1, 2009, Mr. Geary told Mr. Frager what he was attempting to do. The following testimony from the Geary ODS Deposition describes the June 1 conversation:[15]

> **Q.** [Oklahoma Enforcement Attorney Bonnell, discussing the conversation between Mr. Geary and Mr. Frager on June 1, 2009] When you spoke to him [Norm Frager], did you tell him that you had purchased the private label CMOs with the intention of holding them?
>
> **A.** Yes. I described what I was trying to accomplish with the CEMP transaction. He was generally aware of CEMP because I had asked him questions about it early in May.

[12] Geary ODS Deposition, page 70.
[13] See Exhibit 2.
[14] See Exhibit 3.
[15] See pages 71 – 73 of Geary ODS Deposition.

Q. Do you feel that you made it clear to him that you purchased those with the intention of holding them for two to three weeks?

A. He told me I couldn't hold them, so I just -it was basically, you can't hold them.

Q. But did he tell you that because he knew you had purchased them with the intention of holding them? Did he know that you wanted to hold them?

A. I described -- he didn't know anything until I told him that morning. This is what's happening, this is where we are, what are my options. Well, you can't hold them. Okay, that's what I needed to know.

Q. But when -- it sounds like when you told him about what had happened, you told him that you purchased those private label CMOs with the intention of holding them; is that correct?

A. Sure. He was asking me, what were you thinking?

The tickets had been written on Thursday, May 28, 2009. As noted above, unless otherwise directed, transactions settle on the third business day following placement of an order. Mr. Frager was not told that the tickets had been submitted for same day settlement.[16] Whether or not they were submitted for same day settlement, the trades could still be cancelled.[17] On Friday, Mr. Geary was told by Karen Coker that Pershing had a problem with the trades[18] and that the Firm could not hold the CMOs in the Firm's account.[19] By Monday, Mr. Frager had been told by Mr. Geary and by Denise Hintze,[20] that Pershing had a problem with the trades as of Friday

[16] See Frager OTR Testimony, page 59.
[17] See Geary ODS Deposition, page 95.
[18] Geary OTR Testimony, page 134.
[19] Geary OTR Testimony, page 135.
[20] Coker ODS Deposition, page 25.

afternoon and was asking what to do with them. Since Mr. Frager was aware that Pershing was asking what to do with the trades, Mr. Frager would have been justified in believing that the trades had not settled, that they were not in the Firm's inventory account, but rather held by Pershing until the Firm identified an account with sufficient capital to complete the trades.[21]

Both Mr. Frager and Mr. Geary ended their conversation on June 1 with the understanding that it was the responsibility of Mr. Geary to find a solution by doing one of the following:[22]

(i) cancel the trades completely as of May 28, 2009;

(ii) add enough acceptable capital to the Firm (not through borrowings from Pershing) to meet the capital requirements so that the trades could be completed as submitted; or

(iii) cancel the initial trades and rebill the trades as customer transactions, if the Firm had a purchaser for the CMOs so that the Firm would not acquire them directly, but would be acting in a capacity similar to an agency transaction in equity securities (riskless-principal transaction).

After his conversation with Mr. Frager, Mr. Geary discussed the trades with a client, J.D. McKean, Jr., who had advised Mr. Geary that he had an interest in acquiring undervalued CMOs.[23] Dr. McKean agreed to purchase the securities and Mr. Geary directed Mr. Goodman to rewrite the trade tickets.[24] Mr. Goodman and the Operations staff were responsible for carrying out the rebilling of the trades.

Mr. Frager was advised that the trades had been rebilled as customer transactions as of May 28, 2009.[25] Unknown to Mr. Frager at the time of preparing the FOCUS Report was the fact that the staff in the Operations Department allegedly did not carry out the cancelling and rebilling

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[21] The fact that the trades were allocated to Geary Securities on its account statement does not mean the transaction had settled.
[22] Geary ODS Deposition, page 94.
[23] See email from J.D. McKean to Keith Geary dated May 30, 2009, attached as Exhibit 2.
[24] Geary ODS Deposition, page 89.
[25] See Frager OTR Testimony, page 72.

correctly and allegedly did not document the corrected transaction accurately.[26] Mr. Frager did not oversee the Operations Department and it was not his responsibility to review trade tickets to confirm that they accurately represented the transaction as corrected and reported to him.[27] Mr. Frager was, in fact, not aware of any problem with the trade tickets until November 2009, when Mr. Decker of FINRA brought the issue to Mr. Frager's attention during Mr. Decker's audit of the Firm.[28]

Subsequently, Dr. McKean deposited $30 million additional capital into his accounts at Geary Securities and the CMOs were settled into those accounts, not the inventory account of the Firm. Mr. Frager reported the transaction as it had been described to him and as it apparently had been completed through Pershing.

All of the testimony confirms the fact that, although the Operations Department and Mr. Geary were aware of the proposed transactions on May 28 and May 29, 2009, Mr. Frager had no knowledge of the trades until Monday, June 1, 2009, when Mr. Geary first shared the specifics of the proposed trades with Mr. Frager, at which time, Mr. Frager told Mr. Geary emphatically that the trades could not be completed. Because he did not know about the trades until June 1, it would have been impossible for Mr. Frager to cause the Firm to cease business on May 28 or May 29, 2009 and therefore, he cannot be held accountable for failing to do so.

Mr. Geary was the Chief Executive Officer responsible for submitting and, if necessary, correcting trades. He has admitted that he knew the transaction had to be cancelled and the securities either returned to the seller or sold to another purchaser with the Firm acting for a customer in an agency-like capacity. He has also admitted that he directed and oversaw the writing of the initial trade tickets and the corrected trade tickets.

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[26] See Geary ODS Deposition, page 89.
[27] See Geary ODS Deposition, page 87.
[28] Frager OTR Testimony, pages 46-47.

According to the testimony, Mr. Frager made it very clear to Mr. Geary during their conversation on June 1 that the trades could not be completed as Mr. Geary had planned. Mr. Geary understood that he had to cancel the trades as proposed.[29] Mr. Frager was the FinOP for the Firm and was not responsible for the Operations Department or for verifying that paperwork was done correctly and proper trade tickets submitted for any given transaction. Mr. Frager was told that a purchaser had been found for the CMOs and that the transaction had been corrected. Mr. Frager directed the Operations staff to be sure that the transaction was done on an "as of" basis, meaning that it was a transaction done *through* Geary Securities, but not a purchase *from the inventory of* Geary Securities. Mr. Frager justifiably relied on Mr. Geary and the Operations Department to take the actions they all knew were necessary to avoid a net capital problem.

Also according to the testimony, Mr. Frager did not find out until November 9, 2009 that the trade tickets had allegedly been submitted incorrectly. Based on all the testimony, Mr. Frager had been advised that Dr. McKean had purchased the CMOs for investment purposes and that the CMOs had never been settled into the Firm's account. Mr. Frager reported the transaction as he understood it to have been accomplished, which was supported by all information provided to him at the time. Accordingly, not only was Mr. Frager not responsible for the alleged net capital violation, he had done everything that was within his control to advise those who did have the requisite authority to take the actions necessary to prevent a net capital violation. Mr. Frager relied on Mr. Geary, to whom Mr. Frager reported, and he relied on staff of the Operations Department. Under those facts, Mr. Frager cannot be held accountable for the alleged net capital violation simply because he was the FinOP of the Firm.

B. FEBRUARY 2010 NET CAPITAL ISSUES

As discussed above, the issues with respect to the net capital computations, reporting and business operations during February 2010 hinge on the applicability of certain SEC and FINRA

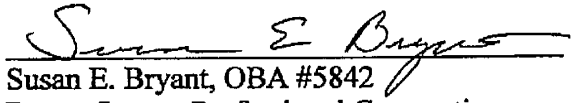
[29] See Geary ODS Deposition, pages 94-95

Rules. The interpretation of those rules is in dispute and currently expected to be resolved in a hearing before FINRA. Not only are the facts in dispute, it is premature to make **any** determinations with respect to those factual issues until there has been a ruling by FINRA.

V. CONCLUSION

Based on the above, it is clear that there are numerous genuine issues of material facts that are in dispute and that granting a Motion for Summary Decision is not appropriate at this time under Section 660:2-9-3(d) of the Oklahoma Rules and based on the authorities cited in the brief submitted by the Department. Furthermore, it is clear from the above that the principal issues in dispute are subject to the primary oversight and evaluation of FINRA and the SEC and that the Department has been preempted from making contradictory findings on those issues. Since we currently anticipate resolving those issues in a hearing before FINRA, we submit that any decision on those issues at this time is premature, if not completely preempted, and should be deferred until a final resolution of the issues by FINRA and the SEC. We are preparing and expect to submit shortly, a motion to defer any hearing on the net capital issues pending a determination by FINRA.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2011, a copy of the foregoing document was served on the following via electronic mail:

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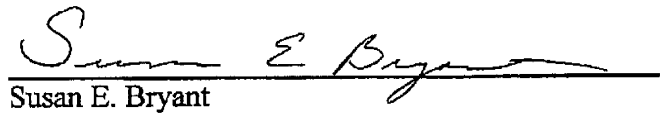
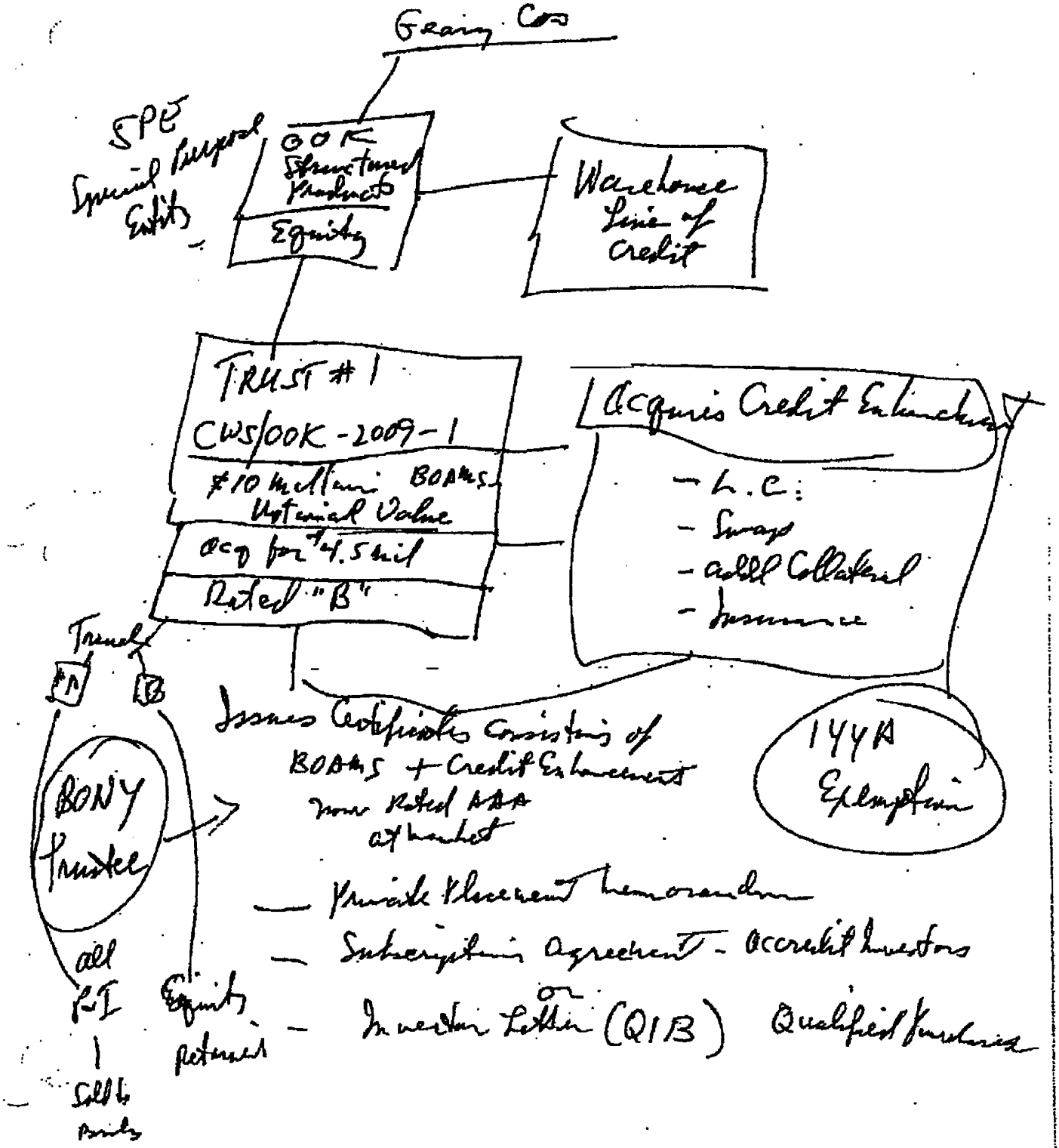


Susan E. Bryant

EXHIBIT 1


Gearing Cos
SPE
Special Purpose Entity
OOK Structured Products
Equity
Warehouse Line of Credit
TRUST #1
CWS/OOK-2009-1
$10 million BOAMS Notional Value
Acq for $4.5 mil
Rated "B"
Acquires Credit Enhancement
- L.C.
- Swaps
- Addl Collateral
- Insurance
Trench
A
B
BONY Trustee
Issues Certificates consisting of BOAMS + Credit Enhancement now Rated AAA at market
IYYA Exemption
— Private Placement Memorandum
— Subscription Agreement - Accredit Investors
or
— Investor Letter (QIB) Qualified Purchases
all P-I
Equity retained
Sold to Banks

GOAL: TURN A PRIVATE LABEL CMO CURRENTLY CARRYING A "B" RATING INTO AN "INVESTMENT GRADE" SECURITY THUS EARNING THE CURRENT SPREAD BETWEEN A "B" AND "AAA" PRODUCT.

PROCESS: FINANCIAL ENGINEERING. CREATE A STRUCTURED PRODUCT WHICH CONSISTS OF THE PRIVATE LABEL CMO AND A CREDIT ENHANCEMENT WHICH WOULD ENABLE THE STRUCTURED PRODUCT TO OBTAIN AN INVESTMENT GRADE RATING FROM A CREDIT RATING AGENCY.

PARTICIPANTS IN THE PROCESS:

1. ISSUER OF THE NEW SECURITY – SPE/SPV IN THE FORM OF A TRUST
    a. CASH FLOWS
    b. PRICING
    c. WRAP OLD CUSIP WITH ENHANCEMENT
    d. SIZE AND FREQUENCY
2. SECURITIES ATTORNEY REPRESENTING ISSUER, PREPARE OFFERING DOCUMENT FOR UNREGISTERED PRODUCT FOR SALE TO QIB'S & ACCREDITED INVESTORS, RESALE PURSUANT TO SEC RULE 144A (OFFERING DOCUMENT & INVESTOR LETTERS, ETC.)
3. SECURITIES BROKER-DEALER TO ACQUIRE INITIAL PRIVATE LABEL SECURITY AND TO SELL THE NEW SECURITY (STRUCTURED PRODUCT)
4. EQUITY PROVIDER TO SECURE AND PROVIDE CREDIT ENHANCEMENT
    a. CASH EQUITY
    b. LETTER OF CREDIT
    c. ADDITIONAL COLLATERAL
    d. SWAP AGREEMENT
    e. INSURANCE
    f. OTHER
5. OBTAIN UNIQUE CUSIP # FOR NEW STRUCTURED PRODUCT
6. OBTAIN INVESTMENT GRADE RATING FROM RATING AGENCY
7. FINANCING, I.E. WAREHOUSE LINE OF CREDIT TO CARRY DURING CREATION PROCESS
8. CORPORATE TRUST SERVICES OF BANK TO COLLECT AND DISTRIBUTE CASH FLOWS DURING LIFE OF INSTRUMENT, I.E. PRINCIPAL AND INTEREST
9. SALE OR RETENTION OF EQUITY TRANCHE OF PRODUCT
10. COMPLIANCE WITH SEC & FINRA RULES & REGULATIONS, I.E, OFFERING OF UNREGISTERED SECURITIES, SALE OF STRUCTURED PRODUCTS, ECT.

EXHIBIT 2

Norm Frager

From: Keith Geary [kgeary@capitalwest.com]
Sent: Saturday, May 30, 2009 4:35 PM
To: Norm Frager
Cc: jhampton@corbynhampton.com
Subject: Norm - FW: Investment Opportunity (a Fwd from our Customer to his friends)

Norm,

JDM999 is J.D. McKean, Jr whose Net Worth is something >$250 Mill. I thought you'd enjoy his thoughts on Private Label CMO's below.

He has a Personal Account at Cap West and a Foundation Account. Cash in both (at Pershing) is something like $30 Mill and $50 Mill ($80 Mill Total).

The item he speaks of below was Bought at the end of the day Friday at 37. Tickets will be written Monday morn with JDM taking $10 Mill and his friends $3.749 Mill at 40. A nice $412,440 start for June's Net Income.

Last week, I was speaking with several Contacts in NY (thanks to the Katten Law Firm's help) and have begun working on a re-remic of PL's to create a SSNR Tranche that's Rated AAA (and will Sell for >90) and a Support Tranche.

I may need to visit with you on Monday morning as to how Cap West (with Pershing's "help") can carry a group of PL's for the 10-15 days it will take to re-remic and Sell. What number can I reach you at on Monday morning?

Thanks, Keith .

From: JDM999@aol.com [mailto:JDM999@aol.com]
Sent: Sat 5/30/2009 11:54 AM
To: mbishop@unitypg.com; bhaycraft@frontier-ok.com; mstanford74@yahoo.com; jmonroe@frontier-ok.com; NillaStennes@aol.com; BFBock@aol.com; nichole@nvestfinancial.com; StennesGrp@aol.com; JBrind1949@aol.com; sguerrero@frontier-ok.com; Keith Geary; Josh.Bock@bgllp.com; bmasbell@yahoo.com; elisha.d.ferguson-1@ou.edu; Zack Robinson; rcroft@frontier-ok.com; kcollins@frontier-ok.com; EagleSkyF@aol.com; May2362@aol.com; jimm@eaglesky.com
Subject: Investment Opportunity

Currently the market is in a major turmoil regarding Private Label Collateralized Mortgage Obligations (PL-CMO). These are NON-AGENCY CMOs. Basically they are home mortgages whose loan amount exceeded the maximum allowed by an Agency (Freddie Mac, Fannie Mae, etc). Those issued in 2007 were at the peak of appraised values. However, most PL-CMO mortgages were written at much lower LTV than Agency mortgages, average 70 versus 96, respectively.

CMOs are written with many different classifications which greatly affect the potential risk. Super Senior (SSNR) are the least likely to lose any money; Senior Support (SSUP) are the second most likely to lose any money; others; then "B" Credit Support CMOs. The B's absorb all the loses, until they are gone, then others, then SSUP, then the SSNR.

Rating agencies were designed to rate Commercial Securities. Any loss at all starts to drop the rating. And a loss of 5-10% will send the rating below that considered to be "Investment Grade". Obviously, since the average home in the USA is currently selling for 19.1% below it's appraisal high in 2007. Thus, almost all of the SSUP securities are or are in the process of being downgraded by the Rating Agencies. This, in turn, has triggered the FDIC to classify these securities which are owned by banks. On April 30, 2009, the FDIC issued new guidelines for examiners which basically required the PL-CMO SSUP Classifications to be collateralized by Bank Capital on a dollar for dollar basis. Obviously this is creating a Capital Crisis for many banks. Therefore they are dumping them on the market. Cheaper to take a hit on current capital and earnings than to find additional dollar for dollar new capital. This dumping is driving the market value far below the securities real value. It's absolutely crazy, and a classic example of what ill conceived government policies do in the Market Place.....The LAW of Unintended Consequences at work!

The buyers for these securities are few, since no Bank is going to buy any of them. And the Federal Reserve isn't buying any of them. With few buyers, and a ton of sellers, and more sellers to come, I believe there is a huge window of opportunity to make a sizeable investment return with the assumption of just a little risk.

When these PL-CMO were issued, the agency limit for a mortgage was in the $300,000 range. Now it is $417,000 nationwide, and up to $729,500 in high cost geographic areas..... such as California.....during 2009!!!!!!! And, by nature of the beast, California is where most of the PL-CMOs were written because homes values for even the lower middle class were above the agency limits. Approximately, 75% of the home mortgage loans in an PL-CMO are for loans below $750,000. Therefore, I believe, that many of these will refinance during 2009.....an, in fact, that is occurring during all this craziness. There is a total disconnect between PERFORMANCE and MARKET VALUE due to the combination of a major flaw in the Ratings assigned and the FDIC regulations.

Attached is a Security (BOAMS 2007-3 1A2) originally issued by Bank of America in 2007. Various Bloomberg Screens are attached for your review. The seller is asking 44. I declined. Late yesterday the seller offered to sell at 40. I have decided to buy at 40.

$13,748,585 current par value (face value) is available. The purchase price will be 40% of this amount. I hav told Capital West we will purchase all of this security. I will purchase $10,000,000 of the Face Value for a Market Price of $4,000,000. That leaves $3,748,585 available for other investors to buy at 40% of the face value. This is offered on a first come basis. It will settle on Wednesday, June 3rd. IF there are not enough buyers for the remaining amount, then I will purchase it. $10,000 Face Value is the lowest amount you can purchase ($4,000 cost).

If you wish to buy any of this security, then you should let Capital West know ASAP. I am not selling this, nor am I recommending it. I am only doing what each of you asked me to do.....let you know what I am personally investing in. I make no commission. The value to me is simple. When I buy all of a security that is available I can negotiate a cheaper price..... I win.....Greater Reward. When I am able to diversify between several different securities.....I win.....Less Risk.

This security has a Coupon of 6%, which at a 40% discount, is an Effective Coupon Yield of $15%. Because of the major discount, and the actual performance where mortgages are paying off much faster than expected, the current effective yield is about 50-55%. That's the reward. Doesn't often get better than this!

However, the Risk is also up. 90+ Day Delinquent is 4.13%. Basically I apply a real loss of about 50% this category = 2.065%. Currently the credit support is 4.36%. So, there is no current risk. However, the delinquency has been increasing every month, and I think will continue to do so during 2009. But even assuming the 90+ day doubles, there is still no loss. But, if it triples, there can start to be some loss. So, YES, there is a high probability that you can lose some of your principal. Say, maybe 20%. That would mean that homes sold for about 50% of their original appraisal high during 2007. That isn't happening on massive scale, and I don't think it will.

But, even if you lose 20% of the corpus, with a 40-50% yield, you still have a net of 20-30%. So, to me the REWARD far out weighs the RISK. I like this one's RRR (RISK REWARD RATIO)

A Good Credit Score is 700 or Above. See yours in just 2 easy steps!

EXHIBIT 3

From: Norm Frager
To: Keith Geary
Subject: RE: Norm - FW: Investment Opportunity (a Fwd from our Customer to his friends)
Date: Saturday, May 30, 2009 7:07:13 PM

Keith:

Call me at (636) 532-0160. What amount of PL's are you looking to position?

Norm

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Sent: Saturday, May 30, 2009 4:35 PM
To: Norm Frager
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