

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,

Respondent.

ODS File No. 09-141

**RESPONSE OF NORMAN FRAGER TO THE DEPARTMENT'S MOTION TO STRIKE
THE WITNESS LIST OF NORMAN FRAGER
AND MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DEPARTMENT'S
COUNSEL AND A PERSHING REPRESENTATIVE**

COMES NOW the Respondent, Norman Frager ("Frager"), and respectfully submits his response to the Oklahoma Department of Securities' (the "Department") Motion to Strike the Witness List of Norman Frager and Motion in Limine to Exclude Testimony of Department's Counsel and a Pershing Representative (the "Motion"). In support hereof, Frager would show the Court as follows:

ARGUMENT

A. FRAGER'S WITNESS LIST IS NOT UNTIMELY.

The Department argues that the Witness List filed by Frager herein on May 24, 2012 (the "Witness List") is untimely. To support this argument, the Department states that on February 14, 2011, an Agreed Amended Scheduling Order was filed in this matter setting forth a deadline for Frager and the other Respondents in this matter to file their witness list by April 5, 2011. Accordingly, the Department argues that, since the Witness List was filed after April 5, 2011, it is untimely and should be stricken.

On May 21, 2012, the Hearing Officer entered his Final Amended Scheduling Order. See Final Amended Scheduling Order, attached hereto as Exhibit "A." While no specific mention is

made of a deadline to submit witness lists, the Final Amended Scheduling Order clearly indicates an intent that the witness lists of the parties may be modified prior to the hearing. More particularly, the Final Amended Scheduling Order provides that at the pre-hearing conference scheduled for Wednesday, June 13, 2012, the parties will discuss “the final list of witnesses and exhibits” to be utilized at the hearing. Accordingly, the Final Amended Scheduling Order contemplates that the witness lists of the parties may be amended at the time of the pre-hearing conference. It stands to reason, then, that if the witness lists may be amended at the time of the pre-hearing conference, they should also be able to be amended prior to that time. As a result, based on the language of the Final Amended Scheduling Order, the Witness List is proper and should not be stricken.

To further buttress this argument, it is simply nonsensical that Frager would be bound by a witness list deadline which occurred more than a year ago. During that time, all of the parties have continued discovery and new facts and defenses have been raised. Accordingly, to bind Frager to a witness list that fails to take into account over a years of additional discovery and litigation is inequitable.

B. EVEN IF FRAGER’S WITNESS LIST IS UNTIMELY, THE HEARING OFFICER SHOULD ALLOW THE WITNESS LIST TO BE FILED OUT OF TIME.

Even if the filing of the Witness List is untimely, the Hearing Officer should not strike the same because the interests of justice weigh in favor of allowing amendment. As the Hearing Officer is no doubt aware, until recently, the defense of this action was being handled by Geary Securities, Inc. (“Geary”) on behalf of all respondents. Accordingly, Frager was relying on the litigation strategy undertaken by Geary for its defense including, but not limited to, the filing of the April 5, 2011, Joint Witness List referenced in the Department’s Motion. However, when

Geary settled the claims against it in this matter, not only did the tenor of this litigation change, but Frager was required to begin his own defense. To that end, Frager has conducted his own discovery and is preparing his own case for trial. As part of this process, Frager has determined that he requires the testimony of additional witnesses.

The interests of justice require that Frager be given an opportunity to prepare and present his case in the manner he deems necessary. Frager should not be bound by the witness list prepared by Geary over a year ago now that the posture of the litigation has changed and further discovery has been conducted. While the Department asserts that the timing of the Witness List prejudices its ability to present its case, Frager has requested a continuance of the hearing in this matter by sixty (60) days to allow for discovery related to the newly added witnesses to be completed. This continuance will provide the Department with ample time to conduct any additional discovery it deems necessary related thereto.¹ Accordingly, the Department cannot argue that it is prejudiced by the inclusion of these witnesses.

For all of the reasons set forth above, Frager should be granted leave to file his Witness List at this time.

C. TESTIMONY OF THE DEPARTMENT'S COUNSEL AND A PERSHING REPRESENTATIVE SHOULD BE ALLOWED.

In addition to requesting that the Witness List be stricken, the Department also asks that Frager not be allowed to elicit testimony from the Department's counsel, Melanie Hall and Terra Bonnell, or from a representative of Pershing. The Department's argument with regard to the Pershing representative is that Frager has listed a Pershing representative "to be named following deposition" and that there is not enough time to depose the same prior to the close of discovery.

¹ In any event, three of the four newly added witnesses consist of the Department's own attorneys and the Department's Director of Licensing and Examinations. Accordingly, the Department is already aware of the information held by these individuals and should not require any discovery related to the same.

However, as noted above, the requested continuance of the hearing would provide ample time to complete this deposition. Furthermore, to the extent the Department complains that this witness is, at this time, unidentified, Frager would note that the Department itself has requested that an unnamed witness from Pershing be allowed to testify at the hearing on behalf of the Department.

The Department also seeks to deny Frager the ability to use the testimony of Ms. Hall and Ms. Bonnell. Rather than seeking any privileged information, Frager's purpose in calling the Department's counsel is to explore the narrow issue of counsel's pre-litigation communications with Pershing. As the Hearing Officer is aware, Ms. Hall and Ms. Bonnell conducted a pre-litigation investigation into the matters at issue in this action. As part of this investigation, Ms. Hall and Ms. Bonnell conducted interviews with representatives of Pershing. Some of these interviews were recorded and these recordings (provided only within the last few months) have provided potentially exculpatory information for Frager. It is believed, however, that not all of the interviews conducted by Ms. Hall and Ms. Bonnell were recorded. As a result, it is necessary to use Ms. Hall and Ms. Bonnell as witnesses regarding these contacts.

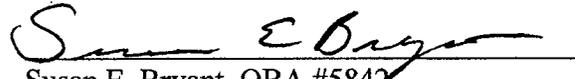
The Hearing Officer, in ordering the release of the recordings, has already determined that the content of these interviews is not privileged or otherwise protected. Accordingly, Frager is entitled to elicit testimony from all parties involved in those interviews to determine the issues that were discussed therein. The fact that these interviews were conducted by counsel for the Department, and not by non-attorney employees, is irrelevant. If it were, the Department could simply utilize its counsel to undertake any number of pre-litigation activities which would otherwise be freely discoverable and then claim that the information sought is protected because their attorneys conducted the work. Such an outcome would simply be inequitable.

For the reasons set forth above, Frager should be allowed to call the Department's Counsel and a Pershing representative as witnesses in this case.

CONCLUSION

As shown above, the Witness List was not untimely filed. However, even if it were, the Hearing Officer should allow for its filing out of time in the interests of justice. Finally, Frager should be allowed to elicit testimony from the Department's counsel, as well as a Pershing representative, regarding the pre-litigation interviews between the Department and Pershing as this information is not privileged or otherwise protected.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2012, a copy of the foregoing document was served on the following via electronic mail:

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