

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
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OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

Geary Securities, Inc. *aka* Capital West Securities, Inc;
Keith D. Geary; Norman Frager; and CEMP, LLC,

Respondents.

ODS File No. 09-141

**GEARY RESPONDENTS' REPLY TO DEPARTMENT'S OBJECTION AND
RESPONSE TO GEARY RESPONDENTS' (1) MOTION FOR PRECLUSION ORDER
AND ORDER STRIKING WITNESSES AND ALLEGATIONS, AND (2) ALTERNATIVE
MOTION TO COMPEL PRODUCTION OF RESPONSIVE DOCUMENTS
WRONGFULLY WITHHELD BY THE DEPARTMENT**

Respondents Geary Securities, Inc. (formerly known as Capital West Securities, Inc.),
Keith D. Geary, and CEMP, LLC (the "Geary Respondents") respectfully submit the following
Reply to the Department's Objection and Response filed April 7, 2011, and show the following:

A. The Department Overstates Its Discovery "Cooperation" to Date.

The Department attempts to divert the Hearing Officer's attention from the merits of the pending Motion by stating that it has produced approximately 14,640 pages of documents in this action. While this statement is true, it is materially incomplete. Of the 14,640 pages produced, more than 8,700 pages (60% of the production) are simply the Department's production of all documents produced by the Respondents prior to initiation of the Department's public investigation that preceded this enforcement action.¹ In any event, and irrespective of how many pages of documents the Department has produced, the pending Motion addresses the

¹ The Geary Respondents requested copies of documents produced by Geary Securities during the non-public investigation because the firm did not retain a bates-numbered set of documents produced to the Department. Upon the Department's initiation of the public investigation, counsel for the Geary Respondents advised the Department that they would be requesting a copy of the documents previously produced.

Department's refusal to produce additional documents it admits are responsive to pending discovery requests.

B. E-mail Chain between BOU President/Department Witness John Shelley and Counsel for the Department.

The Geary Respondents' Motion sets forth the argument and authority that supports the conclusion that the subject email chain is not protected and must be produced. In response, the Department misinterprets and misapplies Lisle v. Owens, 1974 OK 57, 521 P.2d 1375, in a misguided effort to defend their wrongful withholding of the e-mail chain. *Lisle* involved a plaintiff consumer and a defendant car dealership. The plaintiff requested and obtained a customer list and customer information from the dealership as a part of the litigation. The plaintiff, after obtaining customer information, sent a questionnaire to the dealership's customers to find out if any other customers had similar experiences to the plaintiffs. The dealership sought the answered questionnaires in discovery. Plaintiff claimed the answered questionnaires were protected by the work product doctrine.

On appeal, the Oklahoma Supreme Court applied a two-prong test to determine whether the documents were protected. First, the Court examined whether the dealership had set forth a factual basis showing "good cause" for the discovery of the documents. The Court ruled the dealership had not met the statutorily required "good cause" showing, because the record was devoid of facts that would support such a showing. The Lisle court went on to apply Hickman v. Taylor, 329 U.S. 495 (1947), in the application of the second prong, the "special circumstance" test. In short, if the documents are shown to be work product, then only under special circumstances where the documents are essential to the preparation of the seeking party's case can they be discovered. Because the defendant in Lisle failed to even meet the first prong, there was no substantive analysis of the second prong. Worth noting, Hickman involved a dispute

where all parties had access to witness statements through a related public hearing, wherein the testimony was recorded and made available to all interested parties. Further, the parties had access to the witnesses through deposition testimony. Hickman specifically noted that the witness statements being sought were from witnesses whose availability to the seeking party was unimpaired. Hickman at 508. In fact, the Hickman Court noted that counsel for the party seeking the documents admitted he only wanted the statements to help prepare himself to examine witnesses and make sure he had not overlooked anything. This could not be more dissimilar from the dispute before this Hearing Officer. The core dissimilarity between this case and both Hickman and Lisle is obvious - the Respondents continue to have **no access** to the witnesses at issue, wholly unlike Hickman and Lisle. Therefore, the Department's efforts to liken this matter to Hickman and Lisle simply fail and must be rejected.

Not only do Lisle and Hickman fail to support the Department's inaccurate claim of work product, both are replete with reasoning that supports discovery of the documents that are the subject of the pending Motion. As an example, the Hickman Court stated, "Where relevant and non-privileged facts remain hidden in an attorney's file, and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence, or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available **or can be reached only with difficulty.**" Hickman at 511 (emphasis added).

In addition to the Department's general misapplication of these two cases throughout its Response, the Department's particular response to Respondent's request for these responsive emails is contradictory and mystifying: "[T]he email chain is clearly protected by the work

product doctrine....Despite the clear protection afforded by the work product doctrine, the Department voluntarily produced the email chain.” See, Department’s Response, pp. 2-3. The Department claimed, then waived, the work product protection, which begs the question of why the Department withheld the email chain in the first place and caused the Geary Respondents to spend the time and incur the expense in filing its Motion?

The Department characterizes its conduct as being in good faith and not evasive. In reality, the Department is attempting to misuse the work product as both a “sword” and a “shield” - a “shield” when it wants to strategically avoid discovery that may be damaging or detrimental to it; a “sword” when disclosure works to its perceived advantage. This tactic is improper. “[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged [information or documents] to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” Frontier Refining, Inc. v. Gorman-Rupp Co., 136 F.3d 695, 704 (10th Cir.1998).

The Department has created Rules to discourage and address this type of conduct. Those Rules should be enforced under these circumstances, regardless of whether the Department complains of potentially harsh consequences associated with the requested preclusion order.

C. The Pershing Email Chain.

As an initial matter, The Geary Respondents do not understand the following statements by the Department: “[T]he Department withheld emails between representatives, both lawyers and non-lawyers, of the Department and Pershing on the basis of the work product doctrine. At issue are the emails between non-lawyer representatives of the Department and Pershing.” See, Department’s Response, p.3. It is unclear how the scope of this discovery dispute has now supposedly been narrowed to emails involving only non-lawyer representatives of the

Department. To be clear, if the Department is also withholding emails between lawyers for the Department and Pershing that are responsive to discovery requests, such emails should be produced.

One defect in the Department's attempt to stretch and distort the work product doctrine is by portraying itself as quasi-counsel for Pershing. This is simply not the case and is inadequate to claim work product protection. The work product privilege protects against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed.R.Civ.P. 26(b)(3). The party asserting a work product privilege as a bar to discovery must prove the doctrine is applicable. See Barclaysamerican Corp. v. Kane, 746 F.2d 653, 656 (10th Cir.1984). A mere allegation that the work product doctrine applies is insufficient. See Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir.1984), cert. dismissed, 469 U.S. 1199, 105 S.Ct. 983, 83 L.Ed.2d 984 (1985).

Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product. Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86, 89 (W.D.Okla.1980). Thus, work product does not preclude inquiry into the mere fact of an investigation. State of Oklahoma v Tyson, 262 FRD 617, 628 (ND OK 2009).

The most blatant and offensive aspect of the Department's Response is its argument that the Geary Respondents' Motion is "premature and untrue" because they "must show they are unable to get the information directly from Pershing." Department's Response, p. 4. First, the Department ignores the fact that it bears the burden of first establishing whether the documents

at issue are even protected by the work product doctrine. Scott v. Peterson, 2005 OK 84, 126 P.3d 1232, 1235.

The Department also ignores, distorts and blatantly misstates the express language of the Oklahoma Discovery Code by asserting that Respondents' Motion is premature. The Discovery Code does not establish a standard of "unable" or "impossible" to get the sought after information from another source. Instead, the Discovery Code sets the standard – **IF** work product status has been established (which it has not here) – as "unable, *without undue hardship*, to obtain the substantial equivalent of the materials by other means." 12 Okla. Stat. 3226 (B)(3)(emphasis added). Not surprisingly, the Oklahoma Discovery Code tracks almost exactly with the reasoning of the U. S. Supreme Court in Hickman, which first formalized the "work product" doctrine more than sixty years ago.

The Department suggests that the Geary Respondents face no undue hardship in having to issue, serve and enforce a subpoena for documents to Pershing, which is located in New Jersey. According to the Department's view of "good faith," it matters not that the Department – located across the street from the Geary Respondents – has in its possession the email chain that is admittedly responsive. Instead, the Department would have the Hearing Officer believe that the Department's efforts to cause the Geary Respondents to jump through multiple unnecessary procedural hoops and incur unnecessary expense are reasonable and appropriate. The Department's position is particularly disingenuous in light of the fact that the Department's counsel is very well aware of – and has likely contributed to – the strained relationship that exists between Geary Securities and Pershing, its clearing firm. The Department is engaged in gamesmanship, evasive discovery tactics and bad faith conduct. The Department's own Rules exist to prevent and remedy this type of conduct. The Department's Rules should be enforced.

Again, the Department has the admittedly responsive email chain in its possession. Rather than simply produce the email chain consistent with “good faith,” the Department’s view is that the Geary Respondents should be forced to go subpoena its own clearing firm and risk the aggravation that inevitably accompanies service of any subpoena. The Department’s view and position is anything but “good faith.”² It again amounts to attempting to abuse the work product doctrine and use it as a “sword” and a “shield.” The Department’s own Rules should be enforced and a preclusion Order issued as requested.

D. The Pershing Telephone Recordings.

Among other things, the Department’s Response reveals that information provided in the course of the parties’ discovery conferences has been inaccurate and incomplete, as the Department’s Response now reveals for the first time that three of the “multiple” telephone calls with Pershing were recorded. The Department’s first refusal to produce the responsive recordings advised that there were “one or more recordings of telephone interviews of representatives of Pershing...”. Then, when pressed on the matter in a March 18, 2011 discovery conference requested by Respondents, the Department advised that there may be as many as two such recordings.

The Department’s position concerning the need to subpoena Pershing misses the mark in two respects – both of which further reveal and confirm the lack of good faith and evasive nature of the Department’s discovery tactics. First, the Department knows that Pershing does not have

² The Department includes a curious statement in its Response (at p. 5): “the Department has also been made aware that the Geary Respondents’ counsel is in regular communications with Pershing’s counsel.” The Department’s statement is curious in at least two respects. First, it is inaccurate. Second, it reveals and confirms what the Geary Respondents have suspected and confronted the Department’s counsel about; namely, that the Department has failed and breached its duty to supplement its discovery responses, particularly with respect to communications with various third parties, including Pershing. It is unfortunate, but apparently inevitable, that the Hearing Officer will have to hear and rule on additional discovery motions in the near future due to the Department’s persistent and misguided discovery tactics.

the responsive telephone recordings because the Department readily admits it did not disclose the fact to Pershing that it was recording the telephone interviews. Incidentally, whether the Department's actions were unethical (or, at a minimum, unprofessional) is not the point. Second, the Department's suggestion that the Geary Respondents can obtain the functional equivalent of recordings of interviews conducted with Pershing personnel by issuing and subpoenaing Pershing depositions is beyond bad faith.

Clearly, the Department is attempting to misuse the work product doctrine as a "sword" and a "shield," raising the legitimate question of what all the Department hopes to keep concealed. As indication of its desperation to avoid having to produce the call recordings, the Department attempts to somehow rely on the fact that the Department included a Pershing representative on its preliminary witness list, and then dropped the Pershing witness **after** this discovery dispute arose and the Geary Respondents' instant Motion was filed. If anything, the timing and circumstances surrounding the Department's omission of a Pershing representative highlights the reason the withheld recordings should have been produced. Again, the Department's own Rules address this type of misconduct and should be enforced by issuance of the preclusion order requested.

E. The Withheld Pershing Document.

Notwithstanding the apparent fact that the Department's counsel has managed to assign tasks to Pershing personnel and have those tasks accomplished, the fact remains that the Department's counsel is not counsel for Pershing. As stated in the Geary Respondents' Motion, the Department's misguided attempt to misuse the work product doctrine to shield and conceal "facts" – such as the Pershing document – is improper and must be rejected. The Department's own Rules should be enforced and a preclusion Order issued as requested.

F. Email Chain Between the Department and its Expert.

In a desperate attempt to avoid the clear mandate and express provisions of the currently enacted version of the Oklahoma Discovery Code, the Department argues that the Federal Rules of Civil Procedure have been modified and Oklahoma is *considering* (but has not undertaken) modification of the Oklahoma Discovery Code. How far will the Department go to avoid discovery and keep the Respondents in the dark? Far.

The Department's own Rules should be enforced and a preclusion Order issued as requested.

G. Banking Department Document.

The Department continues to stand behind its refusal to produce a document it provided to its own expert, and offers an explanation of an "accidental" providing of this document to its expert in conjunction with a regulation that governs intra-administrative department behavior as a way to hide and disguise document(s) that are wholly discoverable. In Oklahoma, it is axiomatic that an "expert's entire files-including correspondence to and from our firm (in this case, the Department)-are discoverable by the other side." *Oklahoma Bar Journal*, 79 OBJ 509 (March 8, 2008). It cannot reasonably be disputed that the Banking Department Documents can be withheld by the Department any longer. That the Department "accidentally" disclosed them in an alleged violation of intra-administrative department regulation is an issue that should be addressed between the Department and the Banking Department outside the realm of this matter. Whether or not the expert intends to rely on them is not the issue; the issue is that the Department provided the document to its expert. Respondents are, therefore, unquestionably entitled to the document. There is simply no just reason that the Respondents should not be

provided with all documents provided by the Department to its expert, as mandated by statute. The Department's own Rules should be enforced and a preclusion Order issued as requested.

H. Withheld Attachments to Produced Emails.

Respondents appreciate the Department's offer to produce the "final version of the affidavit", but as the Department well knows, there is not even a colorable argument to be made that the final affidavit could be withheld. Notably, the Respondents became aware that a "final version of the affidavit" had been executed not from the Department, but by happenstance from counsel for the affiants. As of the date of filing of this Reply, Respondents still have received no version of this affidavit in any form, final or otherwise.

However, given the Department's surrender on the issue of provision of the "final version", the only remaining dispute is as to the Department's withholding of the draft(s) of the affidavit. Despite the Department's attempts, there is simply no lawful justification for the Department's withholding of the draft(s). Even the two unreported Ohio and Michigan district court cases which the Department attempts to rely on do not fit here. The Department either misunderstands or misrepresents the finding of the court in Tuttle v. Tyco Electronics Installation Services, Inc., 2007 W.L. 4561530 (S.D. Ohio 2007), which involved counsel for a party who provided draft affidavits directly to non-party witnesses. The court did eventually find that the draft affidavits were not discoverable, but the facts of Tuttle were dissimilar to those here. In this matter, the Department repeatedly emailed proposed affidavits to counsel for the non-parties. The Tuttle court did not contemplate such an intermediary in its analysis. Interestingly, Tuttle cites to Infosystems Inc. v. Ceridian Corp., 197 F.R.D. 303 (E.D. Michigan 2000), which did consider the provision of a draft affidavit to a third party, and stated that it could be interpreted

that any arguable protection is lost when such a disclosure is made. (See Infosystems, footnote 4.)

Infosystems, contrary to the Department's representations, refused to extend any protection to the analogous affidavit documents at issue, and instead required the documents to be produced. Additionally, the Infosystem court clearly contemplated that the party seeking the affidavits and draft affidavits would have an opportunity to depose the non-party witness regarding the affidavit documents, which remains to be seen here.

U.S. v. University Hospital, 2007 WL 1665748 (S.D. Ohio 2007), involved a dispute regarding draft affidavits and affidavits of a party witness, and thus is completely distinguishable based on assertions of both work product and attorney client privileges. Most mystifying of all is why the Department has decided that some protection applies to the draft and/or final version of the affidavit(s), yet no protection applies to the emails to which the affidavits were attached. The simple explanation is that there is no protection afforded for the draft affidavits, and they should be immediately produced.

Additionally – contrary to the Department's position - **drafts** of affidavits are not work product simply because they are in "draft" form and numerous courts have compelled the production of draft affidavits. *See e.g.*, E.E.O.C. v. Jamal & Kamal, Inc., 2006 WL 2690226, * 3 (E.D.La.,2006)(ccompelled draft affidavits of witness, concluding that an attorney's memorialization of events into an affidavit, whereby attorney is effectively acting as a stenographer, does not fall within the sphere of documentation protected by the work product privilege); Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303 (E.D.Mich.,2000)(corporation did not show that affidavit of former employee, prior drafts of the affidavit, and communications concerning the affidavit were protected attorney work product and noting that one party should

not be frustrated in its ability to test the perception and credibility of witnesses by other party's claim of work product for draft affidavits); Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Products, Inc. , 140 F.R.D. 373, 379 (E.D.Wis.,1991)(draft affidavits of witnesses ordered were ordered produced as the affidavits were "facts" but allowing attorneys' to redact any notes they had made to the affidavits).

Numerous other courts have discussed and compelled the production of affidavits, holding they are not work product. *See e.g.,* Murphy v. K-Mart Corp., 259 FRD 421 (D.S.D. 2009)(distinguishing Tuttle and compelling production of third party affidavits as not being protected by work product); Ford Motor Company v. Edgewood Properties, Inc., 257 F.R.D. 418 (D.N.J. 2009)(fact that counsel prepared affidavits does not make them immune from disclosure); Walker v. George Koch Sons, Inc., 2008 WL 431372 (S.D. Miss. Sept. 18, 2008)("affidavits merely recite relevant facts within the affiants' personal knowledge rather than revealing an attorney's mental impressions or legal strategy").

H. Interview Notes of BOU Personnel.

The Department had and continues to have ongoing discussions with BOU personnel, both through BOU's counsel and directly with the BOU personnel. This cannot be disputed. As evidenced by the emails and phone calls between the Department and the BOU personnel in the last month, the Department enjoys a particularly friendly relationship with these witnesses and their counsel, despite the Department's concerted efforts to portray the contrary. The simple fact is that the Respondents have taken pursued and exhausted – at great expense – every available procedural step to obtain discovery from the Department-listed BOU personnel, and have simply received no cooperation.

The Department would have the Hearing Officer believe there is no rhyme or reason to the BOU personnel's total cooperation with the Department's discovery efforts, and contrasting stonewalling of the Respondent's discovery efforts. The current issue is not whether the Department is complicit in the stonewalling; rather, justice demands the Respondents be provided with all available, discoverable documents relating to facts discovered by the Department. In Upjohn Co. v. United States, 449 U.S. 383 (1981), a case cited by both the Department and Respondents, the U.S. Supreme Court left open for examination the issue of whether attorney notes of interviews of a third party are discoverable work product. The Court indicated that while there may be material within such notes that was not discoverable (mental impressions, conclusions, opinions or legal theories), there may also be factual material that is proper for discovery upon a showing of necessity and unavailability by other means. Upjohn at 401. The unavoidable fact is that the factual portions of the notes from the telephonic interviews of the BOU personnel are necessary and unavailable by other means. The Department's own Rules should be enforced and a preclusion Order issued as requested.

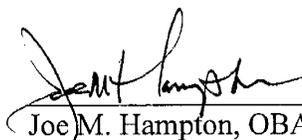
Based on the foregoing discussion, argument and authorities, together with those previously presented, the Geary Respondents respectfully request that the Hearing Officer:

A. Enter an Order (1) striking the names of John Shelley, Mike Braun, and David Paulukaitis from the Department's witness list and precluding those individuals from providing any testimony in this proceeding, including at the time of the Hearing, and (2) striking "Findings of Fact" paragraphs 5, 6, 8-17, 21, 33-35, 40-94, 107-119, and "Conclusions of Law" paragraphs 1, 2, 4 (b) – (g) and (j), 5, 6, of the Enforcement Division Recommendation and precluding the Department from attempting to introduce any evidence and seeking any relief in connection with

the CEMP Charges and any additional subject matter sought to be addressed by the stricken witnesses; or

B. Alternatively, immediately issue an Order compelling the Department to produce all documents responsive to the Geary Respondents' request for production including but not limited to those specifically addressed herein, and award the Geary Respondents their costs, including reasonable attorney's fees, incurred in pursuing this discovery issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April 12 2011, a copy of the foregoing document was served on the following via electronic mail:

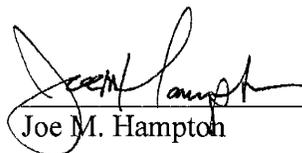
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