

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

**GEARY RESPONDENTS' OBJECTION AND RESPONSE TO
DEPARTMENT'S MOTION FOR PARTIAL SUMMARY
DECISION**

Joe M. Hampton, OBA No. 11851
Amy J. Pierce, OBA No. 17980
A. Ainslie Stanford II, OBA No. 18843
CORBYN HAMPTON PLLC
One Leadership Square
211 North Robinson, Suite 1910
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-7055
Facsimile: (405) 702-4348
Email: jhampton@corbynhampton.com
apierce@corbynhampton.com
astanford@corbynhampton.com

TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	RESPONSE TO DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS	3
III.	OBJECTION TO DEPARTMENT'S MOTION BASED ON INCOMPLETE STATE OF DISCOVERY	20
IV.	ARGUMENT AND AUTHORITIES.....	22
	A. THE DEPARTMENT'S MOTION SEEKS TO VIOLATE THE GEARY RESPONDENTS' DUE PROCESS RIGHTS IN THIS ADMINISTRATIVE PROCEEDING.....	22
	B. NUMEROUS MATERIAL QUESTIONS OF DISPUTED FACT EXIST THAT DEFEAT THE DEPARTMENT'S REQUEST FOR PARTIAL SUMMARY DECISION.....	22
	C. MATERIAL QUESTIONS OF DISPUTED FACT EXIST THAT PRECLUDE THE DEPARTMENT'S PARTIAL SUMMARY JUDGMENT REQUEST BASED ON A PURPORTED VIOLATION OF 71 OKLA.STAT. § 1-501	23
	1. ODS Must Establish Negligence In Order to Prevail on A Violation of 61-501 And Negligence Presents a Question of Fact That is Inappropriate for Summary Judgment.....	23
	2. Materiality is A Question of Fact that Precludes Summary Judgment.	25
	3. There Are Material Questions of Fact Regarding Purported "Misrepresentations" and "Omissions" Which Preclude Summary Judgment.	26
	4. The Misrepresentations and Omissions Alleged by the Department Are Immaterial as a Matter of Law	29

D. SUMMARY JUDGMENT ON THE ALLEGED NET CAPITAL VIOLATIONS SHOULD BE DENIED	30
E. GEARY SECURITIES DID NOT ENGAGE IN UNETHICAL PRACTICES IN VIOLATION OF RULE 660:11-5-42; ALTERNATIVELY, QUESTIONS OF FACT EXIST WHICH PRECLUDE SUMMARY JUDGMENT.....	32
1. Summary Judgment Under Rule 660:11-5-42 for Violations of FINRA Regulations Is Not Appropriate As it Deprives The Respondents of Fair Notice of Contents of ODS Rules and Because ODS Is Exceeding Its Authority.....	32
2. Even if the ODS Could Pursue Geary for FINRA Violations, ODS' Claims Fail Because ODS Has Not Established Bad Faith.....	34
3. The Geary Respondents Did not Attempt to Conceal Any Purported Net Capital Deficiency by Filing an Inaccurate Focus Report Or Timely Notices.....	35
4. Geary Securities Did Not Violate Any Rule Against Excessive Mark-Ups and, Therefore, Disputed Questions of Material Fact Exist and Defeat Summary Judgment.....	36
5. Disputed Questions of Fact Exist Regarding the Alleged False Press Release.....	38
6. Violation of Rule 660:11-5-42 (b)(6) Relating to Offers to Buy Securities	38
F. MATERIAL QUESTIONS OF DISPUTED FACT EXIST REGARDING WHETHER CEMP LLC IS AN UNREGISTERED BROKER-DEALER IN VIOLATION OF §1-401 OF THE OUSA.	39
G. THE GEARY RESPONDENTS SHOULD NOT BE DISCIPLINED PURSUANT TO § 1-411(A)-(C) AS THE ODS IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIMS; ALTERNATIVELY, ODS HAS NOT ESTABLISHED THE IMPOSITION OF SUCH ALLEGED SANCTIONS IS IN THE BEST INTEREST OF THE PUBLIC	41
H. A CEASE AND DESIST ORDER AGAINST CEMP LLC IS NOT APPROPRIATE PURSUANT TO THE ODS' MOTION FOR SUMMARY JUDGMENT.....	42
CONCLUSION	43

TABLE OF AUTHORITIES

<i>Aaron v. Securities and Exchange Commission</i> , 446 U.S. 680, 100 S.Ct. 1945 (1980)	24, 42
<i>Affiliated Ute Citizens v. United States</i> , 406 U.S. 89, 92 S.Ct. 2430 (1972)	25
<i>Avello v. S.E.C.</i> , 454 F.3d 619, 627 (7 th Cir. 2006)	35
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988).....	25
<i>Corporation Commission v. Oklahoma State Personnel Bd.</i> , 1973 OK 94, 513 P.2d 116	22
<i>Cremi v. Brown</i> 955 F.Supp. 499 (D.Md.1997)	37
<i>Erwin v. Frazier</i> , 1989 OK 95, 786 P.2d 61	23
<i>Fecht v. Price Co.</i> , 70 F.3d 1078 (9th Cir.1995)	25, 26
<i>Flanders v. Crane Co.</i> , 1984 OK 88, 693 P.2d 602	24
<i>Grandon v. Merrill Lynch & Co.</i> , 147 F.3d 184 (2d Cir.1998)	37
<i>Grossman v. Novell, Inc.</i> , 120 F.3d 1112 (10th Cir.1997).....	29
<i>Haines Pipeline Const., Inc. v. Exline Gas Systems, Inc.</i> , 1996 OK CIV APP 75, 921 P.2d 955.....	23
<i>In re Ford Motor Co. Sec. Litig.</i> , 381 F.3d 563 (6th Cir.2004).....	30
<i>Lillard v. Stockton</i> , 267 F.Supp.2d 1081 (N.D.Okla.2003)	40, 41
<i>Musson v. Rice</i> , 1987 OK 66, 739 P.2d 1004	40
<i>Northrip v. Montgomery Ward & Co.</i> 1974 OK 142, 529 P.2d 489.....	23
<i>Oklahoma Dept. of Securities ex rel. Faught v. Blair</i> , 2010 OK 16, 231 P.3d 645.....	23
<i>Press v. Chemical Investment Services Corp.</i> , 166 F.3d 529 (2d Cir. 1999).....	37
<i>Rincoyer v. State, Dept. of Finance, Securities Bureau</i> , 866 P.2d 177 (Idaho 1993).....	33, 34
<i>S.E.C. v. Curshen</i> , 372 Fed.Appx. 872, 2010 WL 1444910 (10 th Cir. 2010).....	24, 29
<i>S.E.C. v. Pasternak</i> , 561 F.Supp.2d 459 (D.N.J.2008).....	25, 38
<i>S.E.C. v. Randy</i> , 38 F.Supp.2d 657 (N.D. Ill. 1999)	30

<i>S.E.C. v. Shanahan</i> , 646 F.3d 536 (8 th Cir. 2011).....	24
<i>Seitsinger v. Dockum Pontiac Inc.</i> , 1995 OK 29, 894 P.2d 1077	22
<i>Temple v. Gorman</i> , 201 F.Supp.2d 1238 (S.D.Fla.2002)	40
<i>TSC Industries, Inc. v. Northway, Inc.</i> , 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)	25, 26
<i>Wittenberg v. Fidelity Bank, N.A., Okla.</i> , 1992 OK 165, 844 P.2d 155	23
17 C.F.R. § 240.15C3-1	30, 32
15 U.S.C. § 78bb (Securities Exchange Act of 1934)	31, 32
Section 17(a)(2) and (3) of Securities Act of 1933.....	24
12A Okla. Stat. § 8-509	32
71 Okla. Stat. § 1-17	32
71 Okla. Stat. §§1-101-103.....	32
71 Okla. Stat. §§ 1-201-204.....	32
71 Okla. Stat. §§ 301-307	32
71 Okla. Stat. §§ 1-401-413.....	32, 39, 41
71 Okla.Stat. § 1-501	23- 26, 32
71 Okla.Stat. § 1-501(2).....	24
71 Okla. Stat. §§ 1-701-703	32
75 Okla.Stat. §§ 309 and 310.....	22
Oklahoma Rule 660:11-5-17.....	30
Oklahoma Rule 660:11-5-41.....	34
Oklahoma Rule 660:11-5-42.....	32-33, 35
Oklahoma Rule 660-11-5-42 (b)(1).....	38
Oklahoma Rule 66:11-5-42(b)(6)	38, 39

NASD IM-2440-1	36, 37
NASD Rules of Fair Practice, Art. III, sec. 2 (CCH) ¶ 2152.....	32.

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

Respondents.

ODS File No. 09-141

**GEARY RESPONDENTS' OBJECTION AND RESPONSE TO
DEPARTMENT'S MOTION FOR PARTIAL SUMMARY DECISION**

Respondents Keith D. Geary, Geary Securities, Inc. (formerly known as Capital West Securities, Inc.), and CEMP, LLC (the "Geary Respondents") respectfully submit the following Response to the Department's Motion for Partial Summary Decision (the "ODS Motion").

I. PRELIMINARY STATEMENT

The Department acknowledges and is well aware that its Motion for Partial Summary Decision is the functional equivalent of a motion for partial summary judgment under Oklahoma law. ODS Motion, pp. 28-29. Partial summary judgment is inappropriate and must be denied if there is even the slightest suggestion, inference or scintilla of a factual dispute on any issue. As the Department acknowledges, "[a]ll inferences and conclusions to be drawn from the undisputed facts must be viewed **in the light most favorable to the party opposing the motion,**" and for summary judgment to be granted, it must be "*perfectly clear*" that there are no issues of material fact in the case. ODS Motion, p. 29 (citations omitted)(emphasis added).

The Department's Motion seeks drastic relief – deprivation of the Geary Respondents' right to a full, fair hearing on the merits. The Geary Respondents are entitled to the benefit of

each and every inference or hint of a fact question in the context of the Department's Motion. The Department refuses to recognize and accept this fundamental legal principle.

The Department's Motion demonstrates a troubling propensity and pattern of pre-judging the Geary Respondents and unilaterally resolving every inference or uncertainty in the manner most negative to the Geary Respondents, even when other, positive conclusions are much more likely and logical. In short, rather than be content with presenting the evidence at the hearing on the merits and allowing the Hearing Officer to render his decision on such evidence, the Department appears to be committed to achieving a pre-determined result that the Geary Respondents have violated the Act and must be harshly punished. The Department's approach is inconsistent with the principles of due process and fundamental fairness.

The Department's Motion seeks a partial summary decision that:

- (1) Geary Securities and Mr. Geary violated the Oklahoma Uniform Securities Act (sometimes referred to as "the Act") and the Rules by making untrue statements of material facts and omitting to state material facts in connection with the offer, sale and purchase of securities; and
- (2) CEMP, LLC violated the Act. ODS Motion, p. 54 ("Conclusion").

The Department asks the Hearing Officer to enter the partial summary decisions listed above, then schedule and conduct a hearing to determine appropriate discipline.

The Department's Motion must be denied for the following reasons, all of which are detailed below:

- The Department's Motion violates the Geary Respondents' due process rights;

- Construing all inferences and conclusions in the light most favorable to the Geary Respondents, it is not “perfectly clear” that partial summary decision is warranted due to the existence of disputed issues of material facts; and
- Discovery is ongoing and, therefore, the Department’s Motion is, at best, premature.

II. RESPONSE TO DEPARTMENT’S STATEMENT OF UNDISPUTED MATERIAL FACTS

The Department’s Motion presents one-hundred and twenty three (123) purported statements of undisputed material facts that consume 28 pages. The sheer number alone strongly suggests that many of the statements are either immaterial or disputed, or both.¹ The Geary Respondents respond as follows to each and every one of the Department’s 123 statements:

1-12: Department Fact Nos. 1-12 are immaterial in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

13: Disputed. In response to the Department’s question (“Did you recommend the purchase of the private label CMOs by these four banks?”), Keith Geary responded, “Yes. *I sent them information for them to decide.*” (emphasis added) Geary went on to explain his work with Oklahoma banks since the early 1990s in the context of a leveraged investment program. *See* Geary Depo., p. 33, attached to ODS’ Appendix, Volume I, Tab 12.²

¹ The Department’s Motion acknowledges that the burden it must meet is “no genuine issue as to the material facts raised by the substantive issues.” Motion, p.1. The “substantive issues” in this enforcement action are the issues related to (1) the offer, sale and purchase of two securities by two investors (the “CEMP Claims”), and (2) the net capital status of Geary Securities for less than 3 business days in May 2009 and in parts of January-February 2010 (the “Net Capital Claims”).

² Rather than burden the Hearing Officer with additional copies of the same depositions and certain depositions referred to by the ODS in its Motion, Respondents will refer throughout this brief to certain depositions and exhibits already included in ODS’ Appendix to its Motion. Those

14: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. In addition, Keith Geary became aware of the prospect for ratings downgrades of private label collateralized mortgage obligations (“PL-CMOs”) in April or May 2009, triggered by the FDIC’s release of FIL 20-2009 (the “FIL”). Geary read the FIL and was concerned because a number of his bank customers, including BOU, had previously purchased PL-CMOs. Geary’s focus after reading the FIL was to develop a way to respond to and negate the bank examiners’ potential criticism of the PL-CMOs held by his bank customers, including BOU. Geary anticipated that the bank examiners would criticize the PL-CMOs on the basis that there would likely be charge offs and write downs, such that the examiners would view the PL-CMOs as not being worth their full par value. Geary Depo., pp. 35-40, ODS App, Vol. I, Tab 12; Affidavit of Keith Geary, ¶¶ 4-6 attached hereto as Exhibit “1, and expressly adopted and incorporated herein by reference.”

15-19: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. In addition:

- a. Geary believed that he could satisfactorily address the examiners’ criticisms of the PL-CMOs by adding a support tranche to add security as a form of credit enhancement. Geary referred to this concept as credit enhancement mortgage pool (“CEMP”) in May 2009. Geary Depo., pp. 40-41. Geary’s CEMP concept included two classes, the A-1 and A-2. The A-1 would be considered a senior note that would receive all principal and interest until paid off in full. The A-2 would be considered a support class and would own a 10 year Treasury strip that would mature at a certain value on a certain date.

When the maturity date is reached, if the A-1 is not already paid off in full, the A-2

depositions cites and exhibit references set forth in this brief shall be deemed to be incorporated herein as if attached by Respondents as an exhibit to their Response.

proceeds would be used, in whole or part, to pay off the remainder of the A-1, with the A-2 holder retaining the balance of the A-2 proceeds. Geary Depo., p. 48; Geary Aff., ¶¶ 4-6, Exhibit "1" hereto.

- b. After the FIL was issued, Geary became aware that there was a lack of buyers for PL-CMOs and that the PL-CMO prices were artificially low, despite Geary's opinion that the PL-CMOs had more value than that reflected by the prices then available. Geary Depo., pp. 38-40; Geary Aff., ¶ 5.
- c. Geary's CEMP concept is not unique. For example, since Geary created his CEMP concept in May 2009, others – including the FDIC – have pursued similar credit enhancement projects. For example, the FDIC undertook a credit enhancement project whereby it resecuritized mortgages it acquired through a failed bank. Geary Depo., p. 98; Geary Aff., ¶ 6.
- d. At the time he created the CEMP concept in May 2009, Geary anticipated the opportunity for resecuritization projects utilizing PL-CMOs would exist as long as the PL-CMO market remained disrupted in terms of prices and value. Geary Depo. pp. 43, 46; Geary Aff., ¶ 6.
- e. Geary's CEMP concept consisted of two basic parts. First, it was necessary to acquire PL-CMOs to then be resecuritized. Second, it was necessary to sell the resulting securities – the A-1 and A-2 classes. Geary set out to acquire PL-CMOs for the CEMP process from several of his bank customers that were interested in selling their PL-CMOs due to the FIL. Geary could have opted to acquire PL-CMOs from non-customers at deeply discounted prices, or he could have offered deeply discounted prices to his bank customers that held PL-CMOs. Geary did neither. Instead, Geary placed the interests of

his bank customers ahead of his own interests and did everything he could to avoid or minimize the negative financial impact of the FIL on those customers. For example, in the context of bidding on the purchase of PL-CMOs from his bank customers (including BOU and Frontier State Bank), it was important to Geary to eliminate or minimize the loss they would suffer on their sale of the PL-CMOs because these were long time customers (20 years or longer) that had trusted Geary's recommendations, then were suddenly being told their securities were worth far less by sources Geary considered inaccurate. According to Geary, "I wanted to protect my customer." Geary Depo., pp. 110, 140-141; Geary Aff., ¶ 6.

- f. Once Geary had developed the basic CEMP concept, he retained counsel (Katten Muchin firm in New York) and submitted a list of securities to be resecuritized to the structuring agent (Braver Stern) recommended by counsel. Geary Depo., p. 41.

20-22: Immaterial in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

23: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. In connection with the May 2009 acquisition of PL-CMOs from Frontier State Bank for the first CEMP offering, Geary acknowledges that, with the benefit of hindsight, he naively assumed that the clearing firm (Pershing) would hold the securities, while charging interest, for the two to three weeks Geary initially thought it would take to close the first offering. Geary's naive assumption was partially a product of his earlier experience where Pershing funded the firm's inventory on a bond deal. Geary Depo., pp. 59-60.

24-46: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. See Argument and Authorities, Part IV below.

47: The first and third sentences of Fact No. 47 are undisputed. The second sentence is disputed. In addition, Geary did not make any material misrepresentations or omit to state any material facts to BOU concerning the rating of the A-1 product. Geary Aff., ¶ 10. Geary relayed to BOU the information he received from Braver Stearn – that DBRS (the rating agency) indicated it was “going to rate them AAA.” Geary Depo., p. 160. Geary was told that the CEMP security was being rated AAA without any differentiation between principal and interest. Braver Stearn never differentiated between principal and interest in its discussions with Geary. Geary Depo., p. 160. Geary did not see a version of the DBRS rating letter (dated September 28, 2009) prior to September 28, 2009. As a result, Geary was unaware prior to closing that the AAA rating was only applicable to principal and, therefore, he could not have omitted an allegedly material fact that he was unaware of. Geary Depo., p. 162; Geary Aff., ¶ 10.

48: The first sentence of Fact No. 48 is undisputed. The second sentence is disputed as follows.

a. Geary did not make any material misrepresentations or omit to state any material facts to BOU or Headington concerning their ability to sell the A-1 or A-2 for a profit. Geary Aff., ¶ 12.

The following exchange took place in Geary’s deposition:

Q. (by Ms. Bonnell): Did you ever represent to Mr. Headington that he *would* be able to sell the A-2s and make a profit?” (emphasis added)

A. “I’m sure that I discussed with John (Shelley) and Mike (Braun) that both the A-1 and A-2s *should* be worth more than the prices that they were being paid for.” (emphasis added)

Geary Depo., p. 173.

The Department then followed up:

Q. "But did you indicate to them that they *would* be able to sell the A-1s and A-2s at a profit?" (emphasis added)

A. "I'm sure that I had said as some point in time you *should* be able to sell them for more than you paid. It just made sense given where the current market was with similar items."

Geary Depo., p. 173 (emphasis added).

b. Geary's statement expressing his opinion on what the future values *should be* was truthful. Geary Aff., ¶12. In addition, Geary did not make any material misrepresentations or omit to state any material facts to BOU concerning the existence or absence of another A-1 buyer to induce BOU's purchase. Geary Aff., ¶ 9. Geary did not represent to BOU that it would only have to hold the A-1 for a few days after it purchased the A-1, nor did he represent to BOU that he had purchasers ready to purchase the A-1 at a higher price. Rather, Geary expressed his opinion to BOU that it should be possible to sell the A-1 once the market became aware of a successful CEMP closing. Geary Aff., ¶ 9, 12. In response to BOU calling and asking whether he had located an A-1 buyer, Geary accurately and truthfully told BOU that he was working on finding a buyer. Geary Depo., pp. 158-159. Geary's deposition testimony included the following exchange:

Q. (by Ms. Bonnell): "Did you represent to them in any form or fashion that you had a buyer for the A-1s prior to that point (September 23, 2009)?"

A. "I told them *I was working on finding a buyer.*"

Geary Depo., pp. 158-159 (emphasis added).

c. Geary's response was true. Geary did and was working on finding other buyers. Geary's efforts to find other buyers included Frontier State Bank, Washita State Bank, a life insurance company that was a customer of another Geary Securities' broker, as well as repeatedly inquiring

of others in the industry (including Mesirov, Credit Suisse, and Braver Stearn). Geary Depo., pp. 148-151; Geary Aff., ¶ 9.

d. The Department attempts to mischaracterize a statement made by Geary in an e-mail (dated September 24, 2009) to Shelley and Braun concerning others being interested in the A-1 as a misrepresentation. Geary's statement was "There is a dealer interested in the A-1s above 98." This statement is not a misrepresentation. Geary showed the A-1 to Credit Suisse, Mesirov and Braver Stearn. As Geary explained, "I don't know that I had anyone particular in mind. I just knew I had what I thought were decent conversations." Geary Depo., p. 169-170. The follow up exchange was:

Q. "So how did you know that the dealers you had been speaking to were interested in A-1s above 98?"

A. "I was talking to them about bonds that they had and were offering and comparing them to what the CEMP was in and the yield difference. And so the conversations were, well, four percent at 98, that's a lot better than 104 for three fifty or a three percent coupon, *so we'll take a look at it*. So I thought they would have interest because it had an attractive yield and a AAA rating."

Geary Depo, p. 170 (emphasis added).

BOU officer Mike Braun admits that Geary told BOU he had dealers "interested" in buying the A-1, but BOU *assumed* when Geary said "interested" he meant he had buyers "committed." Braun Depo., pp. 66-67 (attached at ODS App., Vol I, Tab 13). There is no basis for such an assumption.

49-50: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

51: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. *See also*, Fact No. 48 above.

52: The first, third and fourth sentences of Fact No. 52 are undisputed. The second sentence is disputed. *See also*, additional material disputed facts presented in Fact No. 48 above, which are expressly adopted and incorporated herein by reference.

53: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. *See also*, additional material disputed facts presented in 48 above, which are expressly adopted and incorporated herein by reference.

54: The first sentence of fact No. 54 is undisputed. The second sentence is disputed. *See also*, additional material disputed facts presented in 48 above, which are expressly adopted and incorporated herein by reference.

55: Disputed. *See also*, additional material disputed facts presented in 48 above, which are expressly adopted and incorporated herein by reference.

56: Disputed. *See also*, additional material disputed facts presented in 48 above, which are expressly adopted and incorporated herein by reference.

57-58: Immaterial in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

59: Disputed as follows:

- a. Keith Geary sent an e-mail directly to Timothy Headington on September 16, 2009 concerning the CEMP products. A true and correct copy of that e-mail is Exhibit 20 to Geary's deposition (attached at ODS App., Vol I, Tab 12).
- b. Geary did not have any verbal communications with Headington concerning the CEMP products. Geary Depo., p. 164-165.
- c. Prior to Headington's decision to purchase the A-2, Michael Shelley (a broker at Geary Securities and son of BOU Chairman John Shelley) had discussions with Headington's

business associate, Chris Martin, concerning the CEMP concept and products. Geary Depo., p. 165. Geary does not know what Michael Shelley told Martin concerning the CEMP products, nor does Geary know what information, if any, Martin relayed to Headington concerning the CEMP products. Geary Aff., ¶ 14.

d. Geary believed Headington would derive meaningful benefits from purchasing the A-2. Geary Depo., pp. 166-167.

e. Geary did not make any material misrepresentations or omit to state any material facts to Headington concerning how long Headington would need to hold the A-2 if he decided to purchase it. Geary Aff., ¶ 11. Geary's deposition testimony included the following exchange:

Q. (by Ms. Bonnell): "Did you represent to Mr. Shelley and Mr. Braun that Mr. Headington would only need hold the A-2s for 90 days or so?"

A. "Yes. I had said that *I would try to find a buyer* for the A-2s for Tim."

Geary Depo., p. 168 (emphasis added).

Geary's response must be read in context. In context, his answer "yes" is *not* the sum total of his complete answer. In context, the substance of Geary's response was that he told Shelley and Braun that he would try to find a subsequent buyer for the A-2 in the event Mr. Headington purchased the A-2. Geary's statement to Shelley and Braun was true. Geary did, in fact, try to find subsequent buyers for the A-2 but was unsuccessful, despite his good faith efforts. Geary Aff., ¶¶ 11, 12.

f. Geary did not make any material misrepresentations or omit to state any material facts to BOU or Headington concerning their ability to sell the A-1 or A-2 for a profit. Geary Aff., ¶ 12. The following exchange took place in Geary's deposition:

Q. (by Ms. Bonnell): Did you ever represent to Mr. Headington that he *would* be able to sell the A-2s and make a profit?" (emphasis added)

A. "I'm sure that I discussed with John (Shelley) and Mike (Braun) that both the A-1 and A-2s *should* be worth more than the prices that they were being paid for." (emphasis added) Geary Depo., p. 173. The Department then followed up:

Q. "But did you indicate to them that they *would* be able to sell the A-1s and A-2s at a profit?" (emphasis added)

A. "I'm sure that I had said as some point in time you *should* be able to sell them for more than you paid. It just made sense given where the current market was with similar items."

Geary Depo., p. 173 (emphasis added).

Geary's statement expressing his opinion on what the future values *should be* was truthful.

Geary Aff., ¶ 12.

g. Geary did not make any material misrepresentations or omit to state any material facts to Headington that he (Geary) would purchase the A-2 from Headington if he was unable to sell it within 90 days. Geary Aff., ¶ 13. The following exchanges took place in Geary's deposition:

Q. (by Ms. Bonnell): "Do you recall telling the board of directors that you would be willing to purchase the A-2s if Mr. Headington wasn't able to sell them in 90 days?"

A. No.

Q. Do you recall asking – do you recall a representation of that sort?"

A. No.

Q. Can you – do you recall any communication that could be interpreted as you saying that you would buy the A-2s if Mr. Headington was unable to sell them within 90 days?"

A. Before we broke, I think I had mentioned that I had talked to John and Mike about the fact that a potential buyer could be the EYFs if they were successful and gained significant assets under management. **Apart from that, no.**"

Geary Depo., p. 175 (emphasis added).

h. Geary did not issue any guarantee to Mr. Headington in connection with the A-2. The following exchanges took place on this topic:

Q. (by Ms. Bonnell): "Do you recall in the telephone call with the Bank of Union board of directors, Mr. John Shelley or Mike Braun asking you if you had personally guaranteed a representation that you would buy the A-2s back from Mr. Headington?"

A. I don't recall. And if they asked that, I'm sure I would have replied that broker dealers don't guarantee." Geary Depo., pp. 192-193.

Q. "At any point during your representations or your discussions with bank of Union did you tell them that they would only have to hold the A-1s for a couple of days because you *had* another buyer lined up?"

A. I told them that I *hoped* that it would be able to be sold to someone else."

Geary Depo., pp. 193-194 (emphasis added).

i. The Department's attempt to rely on a curious document entitled "Guaranty Agreement" [which was not prepared, presented or signed until after the CEMP securities were purchased by BOU and Headington (Geary Depo. p. 188)] is misplaced:

Q. (by Ms. Bonnell): "Were you guaranteeing to Mr. Headington that the A-2s could be sold –

A. No.

Q. –within 90 days?

A. No.

Q. Were you representing to Mr. Headington that you would purchase the A-2s if they were not sold within 90 days?

A. No.

Q. Then what – are you representing to Mr. Headington that you would pay him approximately \$12.8 million related to the class of the A-2?

A. No.

Q. What exactly is the purpose of this document?

A. ...It means nothing." (p. 190)

Geary Depo., pp. 184-185; 190 Geary Aff., ¶ 13.

60-61: Immaterial in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

62-63: Disputed. Geary did not issue any guarantee to Mr. Headington in connection with the A-2. *See* discussion of disputed facts set forth in 59(h) above, which is expressly adopted and incorporated herein by reference.

64-69: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. Geary did not make any material misrepresentations or omit to state any material facts to BOU concerning the rating of the A-1 product. Geary Aff., ¶ 10. Geary relayed to BOU the information he received from Braver Stearn – that DBRS (the rating agency) indicated it was “going to rate them AAA.” Geary Depo., p. 160. Geary was told that the CEMP security was being rated AAA without any differentiation between principal and interest. Braver Stearn never differentiated between principal and interest in its discussions with Geary. Geary Depo., p. 160. Geary did not see a version of the DBRS rating letter (dated September 28, 2009) prior to September 28, 2009. As a result, Geary was unaware prior to closing that the AAA rating was only applicable to principal and, therefore, he could not have omitted an allegedly material fact that he was unaware of. Geary Depo., p. 162; Geary Aff., ¶ 10.

70: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

71: The first two sentences of fact No. 71 are materially incomplete and misleading and, therefore, disputed. The third sentence is materially incomplete and, therefore, disputed. The Department has failed to present any evidence that BOU and Headington have made any attempt to sell the A-1 and A-2 at any time. The reason for the Department’s omission is simple. The A-1 and A-2 have performed better than expected. Geary Aff., ¶. 15.

72: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. The Department fails to disclose the fact that the referenced commission paid on the sale of the A-2 to Mr. Headington was paid to Michael Shelley, son of BOU Chairman John Shelley. Geary Aff., ¶ 14.

73: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

74: Department Fact No. 74 is materially incomplete and misleading and, therefore, disputed. Geary did not make any material misrepresentations or omit to state any material facts in the form of the subject press release. The subject press release was prepared in anticipation of the first CEMP closing, which was originally scheduled for July 2009.

The following exchanges took place in Geary's deposition concerning the subject press release:

Q. (by Ms. Bonnell): "So you would agree that this press release ended up being a false press release?"

A. It's not a false release. We did create it (the initial, larger version of CEMP 09-1). We just didn't sell and it didn't close.

Q. So would you agree it's an inaccurate press release?"

A. No. At the time we had expected that we were closing 09-1 with 12 different securities from six different sources. Everything in it is accurate as of that date. And it didn't close and it turned into something else.

Q. Would you agree that this press release creates the appearance that CEMP 09-1 had actually closed.

A. No."

Geary Depo., pp. 180-181.

75-77: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. Geary did not make any material misrepresentations or omit to state any material facts in the subject press release or otherwise concerning the rating of the A-1 product. Geary Aff., ¶ 10. Geary relayed to BOU the

information he received from Braver Stearn – that DBRS (the rating agency) indicated it was “going to rate them AAA.” Geary Depo., p. 160. Geary was told that the CEMP security was being rated AAA without any differentiation between principal and interest. Braver Stearn never differentiated between principal and interest in its discussions with Geary. Geary Depo., p. 160. Geary did not see a version of the DBRS rating letter (dated September 28, 2009) prior to September 28, 2009. As a result, Geary was unaware prior to closing that the AAA rating was only applicable to principal and, therefore, he could not have omitted an allegedly material fact that he was unaware of. Geary Depo., p. 162; Geary Aff., ¶ 10.

78: Disputed. The Department attempts to rely on Geary’s September 25, 2009 e-mail to McKean without considering the context of the communication. Before sending the subject e-mail to McKean, Geary had been advised earlier in the day that Mr. Headington would be purchasing the A-2. As a result, in Geary’s mind the first CEMP project was “done.” Geary further believed, in good faith, that the CEMP products would be well received by dealers in the market as they became aware of a successful closing. Based on discussions Geary had with dealers to that point in time, he fully expected the CEMP bonds to sell at par in the marketplace. Geary Aff., ¶16.

79: Immaterial in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

80-84: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. The Department attempts to accuse the Geary Respondents of wrongdoing in connection with their offer to purchase a bond from Mesirow in connection with the attempted second CEMP closing in December 2009. As Geary explained, Geary Securities agreed to purchase a bond from Mesirow for an agreed price on an

agreed settlement date, which was subsequently extended by agreement. Geary explained and Mesrirow understood that the subject bond was being purchased for the second CEMP offering and was predicated on closing taking place. When the extended settlement date came, Geary Securities broke the trade because the second CEMP offering was not ready to close. Geary Depo., p. 204; Geary Aff., ¶ 18. Geary later went back to Mesrirow and offered to buy the same bond for a customer at a higher price, Mesrirow agreed and the sale and purchase of the bond occurred to everyone's satisfaction. Geary Depo., p. 206; Geary Aff., ¶ 18.

85: The Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's response to Department fact No. 9 at page 7 [Part III(B)(1)] of Frager's Response. Additionally, with respect to all purported statements of fact concerning "Net Capital Issues" (Department Fact Nos. 85-108), the Geary Respondents note that no depositions have yet been taken concerning the net capital issues and, therefore, consideration of the Department's summary decision requests on the Net Capital Issues is premature and should be denied or deferred. *See* Part III below.

86: Immaterial and incomplete in the context of the ODS Motion. *See* Argument and Authorities, Part IV below. 24. In connection with the May 2009 acquisition of PL-CMOs from Frontier State Bank for the first CEMP offering, Geary acknowledges that, with the benefit of hindsight, he naively assumed that the clearing firm (Pershing) would hold the securities, while charging interest, for the two to three weeks Geary initially thought it would take to close the first offering. Geary's naive assumption was partially a product of his earlier experience where Pershing funded the firm's inventory on a bond deal. Geary Depo., pp. 59-60.

87-89: The Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's response to Department Fact No. 22 at page 3 [Part III(A)(1)] of Frager's Response.

90: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

91-98: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. In addition, the Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's response to Department Fact No. 32 at page 3 [Part III(B)(3)].

99: The Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's response to Department Fact 30 at page 3 [Part III(B)(3)].

100-108: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

109: The Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's Response to the Department's Motion against Frager, pp. 15-16.

110: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below.

111: Disputed. In connection with the alleged net capital deficiency in January-February 2010, Mr. Geary made diligent efforts to avoid any deficiency and, in fact, believed he had been successful:

Q. (by Ms. Bonnell): "Was the firm under net capital at any point during those two or three weeks while you were working on the loan?"

A. I don't believe so, no.

Q. At any point during February 2010 did you have a discussion with anyone at your firm regarding the need to cease operations?

A. No. Didn't think it was necessary. I'm told Thursday afternoon that it looks as if I am going to have a net capital that I am below 300 and I cured it the next morning, and when I knew the firm was making money from that point on. So it never occurred to me that we had an issue."

Geary Depo., pp. 201-202.

112: The Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's Response, pp. 15-16.

113-114: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. See Argument and Authorities, Parts I and II below.

115: The Geary Respondents expressly adopt and incorporate herein by reference Respondent Frager's Response, pp. 15-16.

116: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. See Argument and Authorities, Part IV below.

117: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. See Argument and Authorities, Part IV below. In connection with the alleged net capital deficiency in January-February 2010, Mr. Geary made diligent efforts to avoid any deficiency and, in fact, believed he had been successful:

Q. (by Ms. Bonnell): "Was the firm under net capital at any point during those two or three weeks while you were working on the loan?"

A. I don't believe so, no.

Q. At any point during February 2010 did you have a discussion with anyone at your firm regarding the need to cease operations?

A. No. Didn't think it was necessary. I'm told Thursday afternoon that it looks as if I am going to have a net capital that I am below 300 and I cured it the next morning, and when I knew the firm was making money from that point on. So it never occurred to me that we had an issue."

Geary Depo., pp. 201-202.

118-123: Immaterial and incomplete in the context of the ODS Motion and, therefore, disputed. *See* Argument and Authorities, Part IV below. Geary did not charge an excessive markup on the PL-CMO transaction referenced by Department Fact Nos. 118-123. Geary Aff., ¶17. As the Department is aware, there is no hard-and-fast rule that prohibits a markup in excess of 5%. Instead, there is a FINRA “policy” that references 5% and a general FINRA rule that prohibits “excessive” markups. The markups charged by Geary Securities were a subject covered by the firm’s 2011 FINRA examination. Geary Securities provided FINRA with detailed explanation and support for the markups it charged on PL-CMO transactions. FINRA has not taken any action against Geary Securities on this issue. Geary Aff., ¶ 17.

**III. OBJECTION TO DEPARTMENT’S MOTION BASED ON
INCOMPLETE STATE OF DISCOVERY**

This action has been plagued by discovery disputes and delays. The Geary Respondents have encountered significant discovery resistance from the Department and certain non-parties. The Geary Respondents have presented a number of discovery motions to the Hearing Officer and a number remain pending at the time this Response is being prepared. Discovery that remains to be conducted and completed includes the following:

<u>Witness</u>	<u>Location</u>	<u>Issue(s)</u>
David Paulukaitis	Atlanta, GA	CEMP, Net Capital (Department’s expert);
Timothy Headington	Texas	CEMP;
Chris Martin	Texas	CEMP (alleged to be a Headington agent);
Michael Shelley	Oklahoma	CEMP;
BOU Directors (6)	Oklahoma	CEMP;
John Pinto	Washington, DC	Net Capital (Respondents’ expert);
Samuel Luque, Jr.	Sarasota, FL	Net Capital (Respondents’ expert).

Oklahoma summary judgment law and procedure expressly recognizes that a summary judgment request may be denied or deferred if discovery remains to be conducted at the time a summary judgment motion is filed. *See* District Court Rule 13 (stating that if it appears from a

party's affidavit that additional depositions need to be taken or discovery had to respond to summary judgment, trial court has discretion to deny summary judgment without prejudice or order a continuance until such discovery is completed). Per the affidavit of Keith Geary attached hereto at Exhibit "1", substantial additional discovery is necessary in order for Respondents to respond to the ODS' Motion, therefore the Hearing Officer should deny the Motion.

Significant discovery remains to be conducted and completed on the precise issues raised by the Department's Motion. As the Hearing Officer is well aware, the Geary Respondents have been severely hampered in their efforts to conduct discovery and cross-examine all witnesses in this matter. Despite repeated efforts on their part, the Geary Respondents have been unable to depose Mr. Timothy Headington, as well as certain directors of the Bank of Union. The scope of the Department's Motion specifically encompasses issues and allegations concerning the Bank of Union ("BOU") and Mr. Headington. Without the opportunity through discovery to obtain the testimony of these witnesses, the Geary Respondents are unable to fully respond to the Department's allegations and have been denied their right to cross-examine witnesses and/or to present testimony in their defense.

Additionally, the Geary Respondents have moved to strike certain evidence and exhibits as they relate to Mr. Headington on the grounds that Mr. Headington has refused to participate in the discovery process. The Department relies upon Exhibit No. 19 in its Motion (Guaranty Agreement dated September 25, 2009), which is an exhibit that is the subject of the Geary Respondents' preclusion motion which remains pending at the time this Response is being prepared. *See* Geary Motion to Strike, filed herein on November 14, 2011.

By submitting this Response, the Geary Respondents do not waive or relinquish their objection and position that the Hearing Officer should deny or defer ruling on the Department's Motion until discovery is completed.

IV. ARGUMENT AND AUTHORITIES

A. THE DEPARTMENT'S MOTION SEEKS TO VIOLATE THE GEARY RESPONDENTS' DUE PROCESS RIGHTS IN THIS ADMINISTRATIVE PROCEEDING.

The Geary Respondents object to any ruling based on summary decision proceedings because it would violate their rights to due process in this matter. Pursuant to the Oklahoma Administrative Procedures Act and the Geary Respondents' due process rights, the Respondents are entitled to a hearing and the opportunity to present evidence and cross examine witnesses at such hearing. 75 Okla.Stat. § 309 and 310; *see also Corporation Commission v. Oklahoma State Personnel Bd.*, 1973 OK 94, 513 P.2d 116 ("the important point in the proceedings before the Board was that each party be accorded a full and fair hearing on all points at issue").

B. NUMEROUS MATERIAL QUESTIONS OF DISPUTED FACT EXIST THAT DEFEAT THE DEPARTMENT'S REQUEST FOR PARTIAL SUMMARY DECISION.

Even if the Hearing Officer determines that, in principle, the summary decision procedure is an appropriate procedure to utilize in these proceedings, the Department's Motion should be denied because numerous disputed issues of material fact exist.

"Summary judgment is proper **only** when it appears that **there is no substantial controversy as to any material fact** and one of the parties is entitled to judgment as a matter of law." *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, 894 P.2d 1077, 1079 (emphasis added). Summary judgments are not favored and should be granted only where it is perfectly clear there

are no issues of material fact in a case. *Erwin v. Frazier*, 1989 OK 95, 786 P.2d 61, 62-63. Furthermore, all inferences and conclusions to be drawn from the undisputed facts must be viewed in the light most favorable to the party opposing the motion. *Northrip v. Montgomery Ward & Co.* 1974 OK 142, 529 P.2d 489, 497. If, under the evidence, reasonable persons would reach different conclusions, summary judgment is improper. *Wittenberg v. Fidelity Bank, N.A., Okla.*, 1992 OK 165, ¶ 2, 844 P.2d 155. Evidence of controverted facts that preclude summary judgment may be presented by the party opposing the motion, or shown to exist in movant's own evidentiary materials. *Haines Pipeline Const., Inc. v. Exline Gas Systems, Inc.*, 1996 OK CIV APP 75, ¶ 2, 921 P.2d 955. Where a mixed question of fact and law exists, but summary judgment is granted, the summary judgment will be reversed. *Oklahoma Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶¶ 54-55, 231 P.3d 645, 669 -670.

As set forth above in the foregoing Responses to ODS's purported Statement of Undisputed Facts, the Geary Respondents (as well as Mr. Frager in his own Response Brief) have established numerous questions of disputed material fact that preclude the entry of summary judgment in this matter.

Given the complexity of the issues involved, the numerous factual disputes and issues, and the incomplete state of discovery, the merits of this matter are more properly determined at a hearing before the Hearing Officer.

- C. MATERIAL QUESTIONS OF DISPUTED FACT EXIST THAT PRECLUDE THE DEPARTMENT'S PARTIAL SUMMARY JUDGMENT REQUEST BASED ON A PURPORTED VIOLATION OF 71 OKLA.STAT. § 1-501.**
- 1. ODS Must Establish Negligence In Order to Prevail on A Violation of § 1-501 And Negligence Presents a Question of Fact That is Inappropriate for Summary Judgment.**

While there is no case law construing Oklahoma's version of 71 Okla.Stat. § 1-501 and determining whether or not scienter is required, the Department is correct that the case of *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 100 S.Ct. 1945 (1980) holds that scienter is not an element of a violation of Section 17(a)(2) and (3) of Securities Act of 1933, which prohibits any person from obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact. 71 Okla.Stat. § 1-501(2) – which the ODS is proceeding under herein – has nearly identical language to Section 17(a)(2).³

However, to the extent the Department is suggesting that absolutely no allegation or proof of any mental state is required in order to establish a violation of 71 Okla.Stat. § 1-501, this is incorrect. In order to establish a violation of 71 Okla.Stat. 1-501(2) the Department must establish that the Geary Respondents acted negligently. *S.E.C. v. Shanahan*, 646 F.3d 536, 541 (8th Cir. 2011)(§ 17(a)(2) and (3) require proof that he acted negligently); *S.E.C. v. Curshen*, 372 Fed.Appx. 872, 877, 2010 WL 1444910, 4 (10th Cir. 2010).

Under Oklahoma law, negligence is a question of fact that generally cannot be determined upon a motion for summary judgment. *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602.

ODS has not alleged, much less established, that the Geary Respondents acted in a negligent matter with respect to any purported misrepresentations or omissions, within the meaning of § 1-501.

³ 17(a)(2) of the Securities Act of 1933 makes it unlawful for any person in the offer or sale of any security to "obtain money or property by means of any untrue statement of material fact or any omission to state a material fact. . ." 71 Okla. Stat. 1-501(2) makes it unlawful for a person in connection with the offer, sale or purchase of a security to "make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances in which it is made, not misleading . . ."

2. Materiality is A Question of Fact that Precludes Summary Judgment.

For a statement or omission to even be material, there must first be a duty to speak on the part of the alleged to have made the material misrepresentation or omission. *See S.E.C. Pasternak*, 561, F.Supp.2d 459, 500 (D.N.J. 2008). A broker-dealer does not owe a fiduciary duty to the customer where the customer is the ultimate decision maker and controls the account. *Id.* Respondents submit that BOU and other banking institutions are financial institutions that clearly controlled their accounts, and Headington is likewise a sophisticated investor with control of his account. At a minimum the duties owed to the purchasers by the various named Respondents is a question of fact that precludes summary judgment.

Even if a duty was found on the part of the various Respondents, in order for a misrepresentation or omission to be material in the context of a purported security violation, the facts misrepresented or omitted must be "material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 18, 153–154, 92 S.Ct. 1456, 1472. More specifically, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976). "It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." *Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988).

Both the materiality and misleading nature of a statement or omission are usually questions for the trier of fact. *See Fecht v. Price Co.*, 70 F.3d 1078, 1081 (9th Cir.1995) ("[W]hether a public statement is misleading, or whether adverse facts were adequately disclosed

is a mixed question to be decided by the trier of fact.”); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)) (“Whether an omission is ‘material’ is a determination that ‘requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.’ ”). “Therefore, only if the adequacy of the disclosure or the materiality of the statement is so obvious that reasonable minds could not differ are these issues appropriately resolved as a matter of law.” *Fecht*, 70 F.3d at 1081 (quotations and citations omitted).

The Hearing Officer is **not** sitting as the “trier of fact” when addressing and disposing of the Department’s Motion. Rather, the Hearing Officer only sits and acts as the trier of fact at the hearing on the merits, at which time he hears all the evidence, in context, and evaluates its weight and credibility. The Hearing Officer’s role in connection with the Department’s Motion is limited to a determination whether there is any issue of disputed material fact – construing all inferences in favor of the Geary Respondents – and ruling on that issue alone as a matter of law.

3. There Are Disputed Questions of Material Fact Regarding Purported “Misrepresentations” and “Omissions” Which Preclude Summary Judgment.

The Department has attempted to allege four (4) separate “material” statements that it contends were made in violation of § 1-501. However, *each of the four (4) allegations has been disputed* by the Respondents and, therefore, the Department’s summary judgment request must be denied.

• **Disputed Allegations Regarding the Existence of Another Buyer** – As set forth above in Paragraph 51, and in the Geary Affidavit (¶ 9), Geary did not make any material misrepresentations or omissions regarding the existence of another buyer in order to induce

BOU's purchase. Rather, in response to a question from BOU regarding another buyer, Geary informed BOU he was working on locating a buyer. Geary showed the A-1 to numerous other potential buyers and felt he had promising conversations with the proposed buyers. According to Geary, his statement was true because he was actively looking for buyers and, based on what he knew and believed in good faith at the time, he believed the candidates were interested in buying the A-1. Geary Aff., ¶¶ 8, 9. At a minimum, Geary's testimony creates an issue of fact that defeats summary judgment.

- **Disputed Allegations Regarding "Sizeable Unrealized Gain" and "Sell at Any Time"** – Mr. Geary's deposition clearly states that Mr. Geary only represented that the securities "*should* be worth more than they were being paid for." Mr. Geary did not testify he told any party they "*would*" be able to make unrealized gains. See ¶ 47 herein.

- **Disputed Allegations Regarding BOU's Prospective Ability to Resell the A-1 within 2-3 Days and at a Profit** – Geary denies that he told BOU that it would only have to hold the A-1 for a few days after it purchased the A-1. See Geary Affidavit, ¶¶8, 9, 12. Geary expressed his honest, good faith opinion, based on what he knew and believed at the time, that an owner of the A-1 or A-2 should be able to sell either product for more than they paid. Geary Aff., ¶ 12. At a minimum, Geary's testimony creates an issue of fact that defeats summary judgment.

- **Disputed Allegations That Headington Could Sell Within 90 Days** – Geary denies that he told Mr. Headington that he would be able to sell the Notes in 90 days or that Geary would repurchase the A-2 from Headington within 90 days. See ¶ 51 above. Geary did not make any misrepresentations or omissions to Headington concerning how long he would have to hold the A-2. Geary Aff., ¶ 11. After Headington purchased the A-2, Geary did attempt to locate a subsequent purchaser. Geary has stated clearly, with detailed explanation, that he did not

represent to Headington that he (Geary) would repurchase the A-2 from Headington if it was not resold within 90 days. Geary Aff., ¶ 13. At a minimum, Geary's testimony creates an issue of fact that defeats summary judgment.

All four of these alleged "misrepresentations" have been disputed and, therefore, the Department's Motion must be denied.

Likewise, the Department attempts to set forth two (2) purported "omissions" that it contends were material and made in order to induce a sale. Again, both of these omissions have been disputed, such that summary judgment is inappropriate:

- **Disputed Allegations Concerning Omissions of Secondary Market Problems** – As set forth above, there are disputed facts that exist regarding this allegation. Mr. Geary testified he informed BOU that, based on what he knew and believed in good faith at the time, there "should" be an opportunity to re-sell the A-1 and A-2 securities. Geary Aff., ¶ 12. At a minimum, Geary's testimony creates an issue of fact that defeats summary judgment.

- **Disputed Allegations Concerning Omission of Limitation of AAA rating** – The Department contends the Geary Respondents made material misrepresentations or omissions regarding the AAA rating; namely, by not disclosing to BOU that the A-1 was AAA rated as to principal only. However, as set forth above in ¶ 69, Mr. Geary was informed that the CEMP security was AAA rated and there was no distinction made between principal and interest ratings. As a result, even Mr. Geary was unaware before closing that the AAA rating was only applicable to the principal. Moreover, Mr. Geary did not represent to BOU that the A-1 was AAA rated as to principal and interest. Geary Aff., ¶ 10. At a minimum, Geary's testimony creates an issue of fact that defeats summary judgment.

4. **The Misrepresentations and Omissions Alleged by the Department are Immaterial as a Matter of Law.**

Regardless of the existence of disputed material facts, the Department's Motion fails for a separate and independent reason - the purported misrepresentations and omissions were not material, as a matter of law, because no reasonable investor would consider them important, given their vagueness and the fact that they clearly represent opinions of the person (Mr. Geary) making the statements.

In applying the materiality element, courts have identified several categories of statements that, as a matter of law, are not considered materially misleading in the context of securities violations. Relevant to the case at hand are "[s]tatements classified as 'corporate optimism' or 'mere puffing'"—"typically forward-looking statements, or ... generalized statements of optimism that are not capable of objective verification." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir.1997)(emphasis added). Examples of puffery include: the company " 'is poised to carry the growth and success of 1991 well into the future';" " 'significant sales gains should be seen as the year progresses'; " the approaching year will " 'produce excellent results [for the company]'; " and the company will "maintain a 'high' level of growth." *Grossman*, 120 F.3d at 1119–20 (collecting cases).

Courts have considered and applied the view that statements of corporate optimism are immaterial as a matter of law in enforcement cases. *See e.g., S.E.C. v. Curshen*, 372 Fed.Appx. 872, 879, 2010 WL 1444910, 5 (10th Cir. 2010).

Circuit courts " 'have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague, so lacking in

specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available.’ ” *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570–71.

Keith Geary’s alleged statements are exactly the type of vague opinions, mere puffing and corporate optimism that the law says cannot be considered “material.” For example, Mr. Geary’s good faith statement that “an owner of the A-1 and A-2 *should* be able to sell either product for more than they paid” (Geary Aff., ¶ 12) is a forward-looking, loosely optimistic statement that the courts have rejected as actionable as a matter of law. This type of statement is vastly different than where brokers have made material misrepresentations “guaranteeing” a specific rate of return. *See e.g., S.E.C. v. Randy*, 38 F.Supp.2d 657, 669 (N.D. Ill. 1999)(defendant “guaranteed” CD’s would pay 14% annual interest and this was found by court to be a material misrepresentation).

D. SUMMARY JUDGMENT ON THE ALLEGED NET CAPITAL VIOLATIONS SHOULD BE DENIED.

At Section III of its Motion the Department contends that Respondent Geary Securities continued operating its securities business while it maintained less net capital than required by 17 C.F.R. § 240.15C3-1 for two short periods of time. ODS contends these actions were in violation of Oklahoma Rule 66:11-5-17.

The Respondents adopt and incorporate the section of Frager’s Response to the ODS’ Motion for Summary Decision filed in this matter on November 30, 2011 at page 2 which sets forth and establishes that the responsibility for calculating net capital and for overseeing net capital computations and reporting by broker dealers is the responsibility of FINRA. *See* Frager Response Brief at P. 2. As set forth therein, 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.

Granting the Department's summary judgment request in this matter could have the impact of resulting in conflicting decisions, which could in effect be an imposition of stricter standards by the Department than those required by FINRA and federal statutes. The Department's ability to make findings of fact with respect to capital requirements and reporting obligations that differ from any findings which might be made by FINRA would be preempted by federal law. *See* Section 15(h)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, which states that no law, rule, regulation, order or administrative action of any State shall establish capital requirements that differ from or are in addition to the requirements established the 1934 Act.

As set forth above, the Geary Respondents also object to the Department's summary judgment request on the net capital issues because discovery at this time has not been completed. As indicated by Mr. Frager's Response, he has retained an expert witness who will testify regarding the net capital deficiency allegations in this matter. *See* Frager Response, p. 4.

Additionally, disputed questions of fact exist that preclude summary judgment on the net capital issues. *See* Disputed Fact Nos. 85, 111, 117. Moreover, per Mr. Frager's Response, Mr. Frager likewise disputes numerous questions of fact raised by the Department, which also preclude summary judgment in this matter. *See* Frager's Response.

For all of these reasons, the Department's summary judgment request on the purported net capital violations should be denied or, alternatively, deferred until discovery is completed on the net capital issues.

E. GEARY SECURITIES DID NOT ENGAGE UNETHICAL PRACTICES IN VIOLATION OF RULE 660:11-5-42; ALTERNATIVELY, QUESTIONS OF FACT EXIST WHICH PRECLUDE SUMMARY JUDGMENT.

1. **Summary Judgment under Rule 660:11-5-42 for Violations of FINRA Regulations is not Appropriate because it Deprives the Geary Respondents of Fair Notice of Contents of ODS Rules and because ODS is Exceeding its Authority.**

660:11-5-42 is entitled "Standards of Ethical Practices for Broker-Dealers and Their Agents" and sets forth the standards to be followed by broker-dealers operating in Oklahoma. The Rule specifically recognizes that "the standards shall be interpreted in such a manner as will aid in effectuating the policy and provisions of the [Oklahoma] Securities Act."⁴ (emphasis

⁴ See also Comments to 12A Okla. Stat. § 8-509, which clearly indicate that Oklahoma views the NASD rules to be separate and enforceable by the NASD/FINRA, and not the ODS.

The SEC has adopted detailed rules of conduct for brokers and dealers and has statutory authority to levy sanctions for non-compliance. For example, broker-dealers registered under the federal law are subject to detailed regulation concerning the safeguarding of customer securities. See 17 C.F.R. § 240.15c3-3 (1995). **In addition, the NASD and the stock exchanges have detailed rules of conduct for member brokers and dealers.** For example, the NASD requires members to have "reasonable grounds for believing" that a recommended security is "suitable" for a customer. See NASD Rules of Fair Practice, art. III, sec. 2, NASD Manual (CCH) ¶ 2152. For the New York Stock Exchange's Rules, for example, see generally the New York Stock Exchange Guide (CCH).

Section 28 of the 1934 Act, 15 U.S.C. § 78bb, specifically provides that the Act does not affect the jurisdiction of any **state securities commission to enforce non-conflicting state law.** In Oklahoma, brokers and dealers are subject to the registration requirements and the rules of conduct of the Oklahoma Securities Act, 71 Okla. Stat. §§ 1-17, 101-103, 201-204, 301-307, 401-413, 501, 701-703 (1994), and the Rules of the Oklahoma Securities Commission, Okla. Admin. Code tit. 660, ch. 10, subch. 5.

added). Despite this express language in the opening Paragraph of the Rule which limits the Rule's application to violations of the Oklahoma Securities Act, the Department instead bases the majority of its claims against the Geary Respondents under this Rule for violations of FINRA/NASD rules. The Department ignores the clear language of the Rule indicating the purpose of the Rule is to enforce *Oklahoma's* Security Act, and instead asserts that Rules promulgated by FINRA/NASD are relevant in Oklahoma's regulatory scheme. In other words, the Department is alleging because Geary Securities violated FINRA rules (which is disputed and denied), the Department has the authority to punish Geary Securities under Oklahoma's Rule 660:11-5-42. If the Legislature and ODS had wanted the FINRA rules to be a part of the Oklahoma Securities Act of 2004 and/or the ODS Rules, they could have easily adopted the same, but they did not.⁵

Allowing the Department to pursue the Geary Respondents for alleged violation of FINRA Rules is simply incorrect and would be a complete violation of the separate regulatory schemes of state and federal authorities, as well as a delegation of the ODS' rule making authority. A near identical issue was addressed in *Rincover v. State, Dept. of Finance, Securities Bureau*, 866 P.2d 177, 180 (Idaho 1993).

In that case, Rincover was a registered broker who let his registration lapse in response to an investigation being conducted by the Idaho state regulator into transactions with two of his clients. A year later he applied to the Idaho state regulator to again become a registered

Id. (emphasis added).

⁵ It is ironic that the Department went to great lengths in opposing the Respondents' motions to bifurcate and stay the net capital claims to adamantly assert its separateness and independence from FINRA, rejecting any suggestion that it should defer in any way to FINRA. However, when it suits the Department's agenda – such as its determination to destroy these Respondents – it does not hesitate to embrace FINRA and its rules.

salesperson, but his application was denied pursuant to a Rule denying registration to any applicant “engaged in dishonest or unethical practices in the securities business.” The hearing officer in the *Rincover* case affirmed the denial of registration, finding that the broker had violated the NASD’s rule of “observing high standards of commercial honor and just and equitable principals of trade. On appeal, the District Court reversed the hearing officer, stating:

Neither the broker-dealer compliance manual nor the NASD rules have the standing of rules and regulations of the department. To allow the department to apply the standards contained in the compliance manual and the NASD rules to Rincover's actions without having previously adopted the standards in its rules and regulations would allow the department, in effect, to delegate its rule-making authority after the fact. This would be contrary to the framework contained in *Tuma* and *H & V* for applying statutory standards constitutionally. It would open the door to the application by agencies of standards not contained in the statutes or the rules and regulations of the agency. This would undermine the requirement of definite warnings that is the fundamental premise of the concept of unconstitutional vagueness.

Id. at 180 (emphasis added).

The Department clearly has the authority to create and adopt rules governing the conduct of brokers. The Department could, but has not, adopted in their entirety all the rules of FINRA.⁶

2. Even if the ODS Could Pursue Geary for FINRA Violations, ODS’ Claims Fail Because ODS Has Not Established Bad Faith.

As set forth above, the Department cannot pursue the Geary Respondents for violations of FINRA rules. Even if the Department could pursue the Geary Respondents, the Department’s

⁶ The Geary Respondents anticipate the Department will argue that (b)(1) of Rule 660:11-5-41 gives the Department authority to pursue brokers for violations of NASD/FINRA rules, as this provision provides that broker-dealers and their agents should not violate federal statutes or rules of any national securities association. However, this is so vague and general as to be unconstitutional and does not provide the Geary Respondents with sufficient notice of the type of conduct that will subject them to discipline.

claims fail because it has not alleged or established bad faith on the part of the Geary Respondents. The Department contends that SEC or NASD rule violations do not require scienter. *See* ODS' brief at p. 41. However, there is no such case law under Oklahoma's rules. Moreover, federal authority construing NASD Rule 2110 on unethical conduct states that a finding of bad faith is not required "when the predicate for violating Rule 2110 is the violation of another NASD or Exchange Act rule." *Avello v. S.E.C.*, 454 F.3d 619, 627 (7th Cir. 2006). It stands to reason that if the Department is allowed to pursue a violation of its Rule 660:11-5-42, it must establish as a predicate to this Rule that the Geary Respondents violated *another* ODS Rule. However, the Department's allegations regarding violation of 660:11-5-42 relate only to violations of SEC and NASD Rules, which would not be enough under the federal authority the Department attempts to rely upon. In other words, a violation of 660:11-5-42 alone is not enough to do away with the requirement that the Department allege and prove some sort of scienter or bad faith on the part of the Geary Respondents.

3. The Geary Respondents Did Not Attempt to Conceal any Purported Net Capital Deficiency by Filing an Inaccurate Focus Report or Timely Notices:⁷

As set forth in Part IV(D) above, regarding the Department's allegations of net capital violations, there are numerous questions of fact that exist that preclude the granting of summary judgment on any net capital violation issues. Additionally, Respondents would refer the Hearing Officer to p. 8 of Mr. Frager's response to the ODS' Motion for Summary Decision which refutes those purported facts set forth by the ODS in its "Undisputed" Fact Section. *See* ODS' Undisputed Facts at Paragraphs 100-103, which are similar to the "Undisputed" Facts set forth in Paragraphs 30-39 of the Frager Motion for Summary Disposition.

⁷ The Geary Respondents have combined their responses to ODS' argument in its Sections *i* and *ii* into one section.

Also, as noted by the Department, FINRA did not notify the Geary Respondents of any alleged net capital deficiency until more than 5 months after the events occurred. *See Department's Motion*, p. 43.

The Department's Motion inaccurately implies that the Geary Respondents participated in a scheme in filing its notices for January and February 2010 net capital violations to "create an appearance" that it had been undercapitalized during the prior period of time specified, but was currently in compliance at the time the notices were filed. The Department's allegations clearly are not facts, but pure conjecture attempting to imply some sort of fraudulent scheme to escape its reporting requirements. The Geary Respondents dispute these allegations, such that material questions of fact exist which preclude summary judgment.⁸

4. Geary Securities Did Not Violate any Rule against Excessive Mark-Ups and, Therefore, Disputed Questions of Material Fact Exist and Defeat Summary Judgment.

ODS contends that a mark-up of 5% on a bond sale is acceptable in only the most exceptional cases and that any mark-up in excess of this amount is generally considered to be excessive, citing to NASD IM-2440-1. However, the Department conveniently fails to cite to the opening sentence of NASD IM-2440-1 which provides:

The question of fair mark-ups or spreads is one which has been raised from the earliest days of the Association. No definitive answer can be given and no interpretation can be all-inclusive for the obvious reason that what might be considered fair in one transaction could be unfair in another transaction because of different circumstances

* * *

1) The "5% Policy" is a guide, not a rule.

⁸ Mr. Geary has provided testimony that he made diligent efforts to avoid any net capital deficiency and, in fact, believed he had been successful. *See* Part II, ¶ 111 above. At a minimum, this testimony creates a disputed fact issue that defeats summary judgment.

See NASD IM-2440-1 attached to ODS App. Vol. III at Tab 41(emphasis added).

A markup "is excessive 'when it bears no reasonable relation to the prevailing market price.' " *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 190 (2d Cir.1998). Determining whether a mark-up is excessive will vary factually on a case by case basis. *Accord Press v. Chemical Investment Services, Corp.* 166 F.3d 529 (2nd Cir. 1999)("What is excessive on one transaction, might be on another, thus all factors must be considered. To say that a specific range of mark-ups is acceptable for a given line of financial product is to paint with a dangerously broad brush. A ten percent markup on a T-bill might be virtually always excessive. A ten percent mark-up on an instrument that is difficult to obtain and priced accordingly might not be.")

As a result, a fact finder determining whether a markup is excessive must conduct a fact-sensitive inquiry. *Grandon, supra*, 147 F.3d at 190. A fact-finder, thus, must consider various factors, such as: industry practice; nature of services provided; cost of transaction; expertise of broker-dealer; type and availability of security in the market; market conditions; and overall risk undertaken by the broker-dealer. *Id.*; see also *Press, supra*, 166 F.3d at 535; *Cremi v. Brown* 955 F.Supp. 499, 520 (D.Md.,1997)(holding "this Court, without any evidence of the facts of that transaction, the complexity or difficulty of it, the amount of work performed by the brokers in connection with it, etc., is not able to determine that it is excessive" and listing seven factors analyzed to determine reasonableness of markup). Again, the Hearing Officer in this case is not sitting as the "fact finder" when he addresses and disposes of the Department's Motion. The Hearing Officer only occupies the role of fact finder at the hearing on the merits.

Here, the ODS has made no effort to establish any facts regarding the prevailing market price for the subject trades or any other comparisons to show that the mark-ups were excessive, in

light of the industry practice, availability and nature of the securities, market conditions and over all risk being taken by the broker-dealer. Therefore, their claims fail. *S.E.C. v. Pasternak*, 561 F.Supp.2d 459, 500 (D.N.J.,2008)(finding SEC failed to present sufficient evidence showing mark-up was excessive and granting partial summary judgment to the broker).

The facts are clearly disputed on the issue of whether an excessive markup was charged and, therefore, summary judgment should be denied. Geary denies, with detailed explanation, that he charged an excessive markup on the PL-CMO transaction referenced by Department Fact Nos. 118-123. Geary Aff., ¶ 17. At a minimum, Geary's testimony creates a dispute issue of fact and defeats summary judgment.

5. Disputed Questions of Fact Exist regarding the Allegedly False Press Release:

The Department contends that Mr. Geary engaged in an unethical practice by directing the issuance of a press release to generate interest in the CEMP process and that the release was false, in violation of Rule 660-11-5-42 (b)(1)(failure to observe high standards of commercial honor). Disputed questions of fact exist which preclude summary judgment on the issues related to the press release. Geary denies that the press release was issued at the time Respondents expected the closing of 09-1 and denies the release creates an appearance that the CEMP 09-1 was actually closed. See part II, ¶ 74 above. At a minimum, Geary's testimony creates a dispute issue of fact and defeats summary judgment.

6. Purported Violation of Rule 660:11-5-42 (b)(6) Relating to Offers to Buy Securities:

The Department contends that Mr. Geary violated Rule 660:11-5-42(b)(6), which provides that "No broker-dealer or agent of a broker-dealer" shall make an offer to buy from or

sell to any person any security at a stated price unless such broker-dealer or agent is prepared to purchase or sell . . . at such price and under such conditions as are stated at the time of such offer to buy.”

ODS has not defined or provided any authority defining what the Rule means by “prepared to purchase” or “at such price and under such conditions as stated at the time of such offer”. Therefore, the Rule is impermissibly and unconstitutionally vague so as to leave the Geary Respondents without notice as to what this rule means.

A fair, common sense reading of the Rule would indicate the Rule was meant to apply in those situations where a transaction was *never* closed. That is simply not the case with the transactions the Department relies on. All of the transactions were eventually closed. *See* ODS’ Undisputed Fact No. 13.

With respect to the Department’s allegations regarding Mesirow, the Department has woefully misstated the facts with respect to that transaction. *See* Part II, ¶¶80-84 above. The bond purchase from Mesirow was eventually consummated. In fact, Geary purchased the same bond from Mesirow at a *higher* price than original agreed, and Mesirow was satisfied. *Id.*

For all these reasons, the Department’s request for summary judgment regarding Rule 660:11-5-42(b)(6) should be denied.

F. MATERIAL QUESTIONS OF DISPUTED FACT EXIST REGARDING WHETHER CEMP LLC IS AN UNREGISTERED BROKER-DEALER IN VIOLATION OF §1-401 OF THE OUSA.

The Department contends that CEMP LLC is a “broker-dealer” within the meaning of 1-401 because CEMP LLC was “engaged in the business of effecting transactions.” However, Oklahoma case law holds that ““engaged in the business”” means the performance of acts which occupy the time, attention, and labor of persons for the purpose of livelihood, profit, or pleasure.

This definition also emphasizes a certain regularity of activity . . .” *Musson v. Rice*, 1987 OK 66, 739 P.2d 1004.

In the instant matter, CEMP LLC never sold any securities to any investor. *See* Department Motion at p. 51. CEMP, LLC was essentially created as the settlor or depositor of one or more trusts that were to be formed. CEMP LLC purchased the PL-CMO’s from the banks, but then sold the PL-CMO’s only to Geary Securities.

Finally, the subject CEMP securities are exempt from registration, pursuant to Regulation D and National Securities Market Act of 1997.⁹ As a result, CEMP LLC cannot be considered a broker-dealer effecting transactions in “securities.” *See* Private Placement Memorandum, pp. ii, vii-viii, xii-xiii, attached to ODS App. Vol. 1, Tab 5 (establishing the transactions are exempt from registration). When an offering purports to be exempt under federal Regulation D, any allegation of improper registration is covered exclusively by federal law and any State law registration requirements are preempted. *See Temple v. Gorman*, 201 F.Supp.2d 1238, 1243-44 (S.D.Fla.2002) (holding that when a private placement of securities purported to be exempt under Rule 506, “[r]egardless of whether the private placement actually complied with the substantive requirements of Regulation D or Rule 506, the securities sold to Plaintiffs are federal ‘covered securities’ because they were sold pursuant to those rules” and as a result registration of such securities is not required and is preempted. *Accord Lillard v. Stockton*, 267 F.Supp.2d 1081,

⁹ Until 1996, both federal and state regulations governed securities offerings. The National Securities Market Improvement Act of 1996 (“NSMIA”) eliminated the dual system of regulations for certain securities offerings, and prohibited states from requiring the registration of such securities. 15 U.S.C. § 77r (1997 & Supp.2001). Section 18 of the NSMIA, entitled “[e]xemption from State regulation of securities offerings,” provides that no law, rule or administrative action of any State shall directly or indirectly apply to a security that is a “covered security”. *See Temple* and *Lillard* cited herein.

1116 (N.D.Okla.2003). The Department's summary judgment request related to CEMP LLC should properly be denied.

G. THE GEARY RESPONDENTS SHOULD NOT BE DISCIPLINED PURSUANT TO § 1-411 AS THE ODS IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIMS; ALTERNATIVELY, ODS HAS NOT ESTABLISHED THE IMPOSITION OF SUCH ALLEGED SANCTIONS IS IN THE BEST INTEREST OF THE PUBLIC.

At Section VI of its Motion, the Department appears to seek to impose sanctions against Respondents Geary and Geary Securities. As set forth above, numerous disputed questions of fact exist that preclude summary judgment. Accordingly, the Department is not entitled to any determination that the Geary Respondents have willfully violated the OUSA, pursuant to 71 Okla.Stat. § 1-411.

Additionally, ODS is required to establish that the entry of an order pursuant to 1-411 is in the "public interest". *See* § 1-411 (A), (B) and (C) holding that only if the Administrator finds that the order issued is "in the public interest" should an order of discipline be issued. *See also* comments to Uniform Securities Act of 2002, § 412 stating "Under 412 the administrator must provide the denial, revocation, suspension, cancellation, withdrawal, restriction, condition or limitation both is (1) in the public interest and (2) involves one of the enumerated grounds in Section 412(d)." *See* Comment No. 2 to § 412 of the Uniform Securities Act, attached in ODS App. Vol. III, at Tab. 49 (p. 227). The Comments further state that "the public interest will not require imposition of a sanction for every minor or technical violation of subsection (d)." *Id.*

At Section VII, the Department likewise seeks to impose "control" person liability against Respondent Geary, asserting that Geary directly or indirectly controlled Respondent Geary Securities and "knew or should have known of the existence of the conduct." This alleged knowledge, along with the numerous other questions identified herein, present material questions

of disputed that that prevent summary judgment. Likewise, the Department must again establish “public interest” where it is asserting that a party should be punished under Sections (A) through (C) of 1-411, which it has failed to do. *Id.*

Accordingly, summary judgment on Sections VI and VII seeking to impose sanctions should be denied.

H. A CEASE AND DESIST ORDER AGAINST CEMP LLC IS NOT APPROPRIATE.

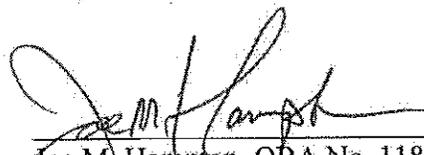
At Section VIII, the Department seeks to have a cease and desist order entered against CEMP LLC on the basis of a summary judgment request. As set forth above, such a determination on a motion for summary judgment is not appropriate as it denies Respondents a right to a hearing. Additionally, numerous issues of disputed material fact exist which preclude the entry of a cease and desist order against CEMP LLC.

Finally, by seeking to enjoin CEMP LLC regarding any future acts, the Department makes scienter an issue that becomes an element, and the Department must “establish a sufficient evidentiary predicate to show that such future violation may occur. . . [a]n important factor in this regard is the degree of intentional wrongdoing evidence in a defendant’s past conduct. . . a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account” *Aaron v. Securities Exchange Commission*, 446 U.S. 680, 701, 100 S.Ct. 1945, 1958 (1980). Here, the Department has made absolutely no showing regarding any scienter with regard to CEMP LLC. As a result, its request must be denied.

V. CONCLUSION

WHEREFORE, based on the foregoing discussion of disputed material facts, arguments and authorities, the Geary Respondents respectfully request that the Hearing Officer issue an Order denying the Department's Motion for partial Summary Decision. Alternatively, the Geary Respondents request that the Hearing Officer issue an Order deferring consideration of the Department's Motion until all discovery is completed in this proceeding.

Respectfully submitted,



Joe M. Hampton, OBA No. 11851

Amy J. Pierce, OBA No. 17980

A. Ainslie Stanford II, OBA No. 18843

CORBYN HAMPTON PLLC

One Leadership Square

211 North Robinson, Suite 1910

Oklahoma City, Oklahoma 73102

Telephone: (405) 239-7055

Facsimile: (405) 702-4348

Email: jhampton@corbynhampton.com

apierce@corbynhampton.com

astanford@corbynhampton.com

**ATTORNEYS FOR RESPONDENTS GEARY
SECURITIES, INC., KEITH D. GEARY, AND
CEMP, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2012, a copy of the foregoing document was served on the following by e-mail:

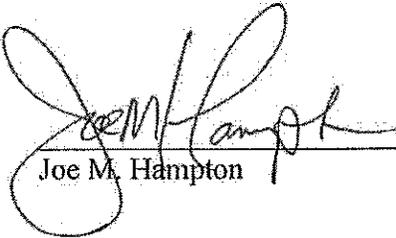
Mr. Bruce R. Kohl
Hearing Officer
201 Camino del Norte
Santa Fe, NM 87501
E-mail: bruce.kohl09@gmail.com

Brenda London, Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, OK 73102; and

Melanie Hall, Director of Enforcement
Terra Shamas Bonnell, Enforcement Attorney
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, OK 73102;

Donald A. Pape, Esq.
Donald A. Pape, P.C.
401 West Main Street, Suite 440
Norman, OK 73069;

Susan Bryant
sbryant@bryantlawgroup.com



Joe M. Hampton

AFFIDAVIT OF KEITH D. GEARY

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Keith D. Geary, being duly sworn, states as follows:

1. I make this Affidavit based on my own personal knowledge.

2. I make this Affidavit in support of the Response filed on behalf of the Geary Respondents to the Motion for Partial Summary Decision filed by the Oklahoma Department of Securities (the "Department") in ODS Action No. 09-141 (the "ODS Action").

3. I have previously given a deposition in the ODS Action on March 22, 2011. I do not make this Affidavit for the purpose of changing my prior testimony. Rather, in certain respects this Affidavit is provided to expand in a consistent manner with my prior testimony, as well as address issues that were not covered in my deposition as conducted by the Department.

4. Most of my business career has been spent providing investment services and products to Oklahoma banks. I have over 20 years' experience in analyzing, buying and selling collateralized mortgage obligations ("CMOs"). One of the types of investment products that my bank customers [including Bank of Union ("BOU")] purchased through Capital West (later renamed "Geary Securities") prior to April 30, 2009, was private label collateralized mortgage obligations ("PL-CMOs"). On or about April 30, 2009, the Federal Deposit Insurance Corporation ("FDIC") issued its Financial Institution Letter No. 20-2009 (the "FIL"). The FIL essentially advised financial institutions that the FDIC was directing its examiners to downgrade any PL-CMOs held by a bank, effective May 1, 2009, notwithstanding the fact that the vast majority of the PL-CMOs held by my bank customers were outperforming expectations.



5. Because a significant portion of my customers are banks, I have always closely monitored developments in the banking industry and immediately became aware of the FIL. I Geary realized the impact of the FDIC's decision would be that banks holding PL-CMOs – including some of my clients like BOU and others – would likely decide to divest themselves of the PL-CMOs to avoid the regulatory backlash, notwithstanding their performance. I also recognized the banks looking to sell their PL-CMOs would be faced with a very disrupted, seller-unfriendly market that would mainly consist of “scavenger buyers” looking for deep discounts and bargains. In the course of analyzing these developments, I developed a concept that I believed could satisfy my clients' need to sell the PL-CMOs at reasonable, fair prices and provide the same clients with the opportunity to acquire a replacement investment grade security for their portfolios. My idea later became known as the “CEMP Concept.” “CEMP” stands for “credit enhanced mortgage pool.”

6. The CEMP concept was not unheard of. In fact, today the same basic concept is being employed in the market by, among others, the FDIC (by resecuritizing mortgages acquired from a failed bank). My CEMP Concept basically consisted of (1) purchasing a group of PL-CMOs from one or more of my bank customers that were wanting to sell, (2) performing, through a team of skilled professionals, a resecuritization process whereby the collateral was materially enhanced by the purchase and addition of a U.S. treasury strip, (3) issuance of a resulting new security, with a new CUSIP number and rating, and (4) offering the resulting new security to, among others, the bank or banks that sold their PL-CMOs. I believed that the CEMP process could be accomplished in a way that eliminated or significantly reduced any losses suffered by the banks in selling their PL-CMOs, while also giving our firm the opportunity to realize a profit after completion of the resecuritization process and sale of the resulting new

W

securities. Because of my relationship with the banks that might sell their PL-CMOs and my involvement in assisting the banks when they purchased those securities, I was well aware of what the banks had paid and what they needed to receive in sale proceeds to avoid or minimize losses on the sale of PL-CMOs. Because I valued and wanted to maintain and continue my business relationship with those bank customers, I was highly motivated to accomplish the transaction in a way that met the banks' need to (a) divest the PL-CMOs, and (b) avoid or minimize any losses resulting from divestiture. As of May 2009, I anticipated the opportunity for CEMP projects would exist as long as the PL-CMO market remained disrupted in terms of price and value.

7. BOU was one of the banks that had purchased PL-CMOs prior to April 30, 2010, and was interested in selling them after issuance of the FIL. It appeared that our CEMP Concept met BOU's need to divest and possibly its need for a replacement investment product. In September 2009, the CEMP transaction was closed, including purchase of the resulting CEMP securities by BOU (the A-1 class) and its majority shareholder, Timothy Headington (the A-1 class).

8. At no time did I make any material misrepresentations or omit to state any material facts to BOU in connection with the CEMP A-1 product.

9. At no time did I make any material misrepresentations or omit to state any material facts to BOU concerning the existence or absence of another A-1 buyer to induce BOU to purchase the A-1. When I told BOU I was looking for buyers, that statement was true because I was actively looking for buyers. When I told BOU I felt I had someone interested in buying the A-1, that statement was true because, based on what I knew and believed in good faith at that point in time, I believed the prospect or prospects were interested in the A-1.

uu

10. At no time did I make any material misrepresentations or omit to state any material facts to BOU in connection with the rating of the A-1 product. I did not see a rating letter until after closing. Prior to that time, I do not believe that any of the professionals we were working with (Braver Stearn, DBRS, Katten Muchin) had differentiated with me between a AAA rating as to principal and interest, or principal only; rather, I heard on multiple occasions the professionals indicate that the A-1 would be "AAA rated." At no time did I tell, indicate or attempt to create the impression on anyone's behalf that the A-1 would be AAA rated as to principal and interest. Moreover, no one ever asked me that question prior to closing of the CEMP 09-1 transaction.

11. At no time did I make any material misrepresentations or omit to state any material facts to Mr. Headington concerning how long he would have to hold the A-2.

12. At no time did I make any material misrepresentations or omit to state any material facts to BOU or Mr. Headington concerning their ability to sell the A-1 or the A-2 at a profit. I readily acknowledge that I did express my honest, good faith opinion, based on what I knew and believed at the time, that an owner of the A-1 or A-2 should be able to sell either product for more than they paid. After Mr. Headington purchased the A-2 I did attempt to find a subsequent purchaser, but was not successful. My efforts included trying to put together a CEMP 09-2 transaction that would have involved buying the A-1 from BOU and the A-2 from Mr. Headington. Unfortunately that transaction never closed.

13. At no time did I make any material misrepresentations or omit to state any material facts to Mr. Headington that I would purchase the A-2 from him if he were unable to sell it within 90 days of his purchase. In the course of my deposition in the ODS Action (at page 176), I explained that I had told John Shelley, before Mr. Headington bought the A-2, that I

would gladly buy the A-2 instead of Mr. Headington if I had the money to make that purchase. I also told Mr. Shelley at the same time that if Mr. Headington would loan me the money needed to purchase the A-2, I would buy it myself. I raised this possibility because I was aware that Mr. Headington had previously loaned money or arranged for funding for Mr. Shelley and Mr. Braun to invest in one or more PL-CMOs. None of these conversations I had with Mr. Shelley were any attempt to persuade Mr. Headington to purchase the A-2; rather, they were attempts by me to purchase the A-2 initially instead of Mr. Headington. After closing, Mr. Shelley asked me to sign a document entitled "Guaranty Agreement." As I explained in my deposition (at page 186), Mr. Shelley told me that he needed something for his file to confirm that I had been willing to borrow money from Mr. Headington to buy the A-2, even though that did not happen. I signed the document to satisfy Mr. Shelley's request, even though my view then and now is that the document has no meaning and certainly did not represent or memorialize any agreement between Mr. Headington and myself.

14. I am aware that, prior to Mr. Headington's decision to purchase the A-2, Michael Shelley (a broker with our firm and the son of BOU Chairman John Shelley) had discussions with Chris Martin (one of Mr. Headington's business associates) concerning the CEMP Concept and product. I do not know the details of what was discussed between Mr. Shelley and Mr. Martin, nor do I know what, if anything, was relayed by Mr. Martin to Mr. Headington. Michael Shelley was paid a \$50,000.00 commission attributable to Mr. Headington's purchase of the A-2.

15. To the best of my current knowledge and information, BOU and Mr. Headington still own the A-1 and A-2 CEMP securities. To the extent possible, I monitor the performance of both securities through publicly-available sources. It appears the A-1 has performed in a positive manner and as expected since the date purchased by BOU. For example, the A-1 continues to

yield at greater than 4% (while Bank Fed Funds are 0 to 0.25%). It appears the A-2 has experienced a significant appreciation in value. For example, Mr. Headington paid 65 for the A-2 in September 2009. At that time, the cost of the 10 year Treasury strip (maturity 8/15/19) was 69.342. As of January 31, 2012, the value of the same 10 year Treasury strip is 89.93, an increase of 24.93 points. This equates to an increase over the course of just more than 2 years from \$13 million to \$17.986 million.

16. The Department's Motion references an e-mail dated September 25, 2009 from me to J.D. McKean, Jr. and suggests that my statements to Dr. McKean were misleading. That is not the case. Before sending the subject e-mail to Dr. McKean at 8:31 p.m., I had been advised (at 2:04 p.m.) the same day by Michael Shelley that Mr. Headington would be purchasing the A-2. As a result, in my mind the first CEMP project was "done." My good faith belief at the time was that the CEMP products would be well received by dealers in the market as they became aware of a successful closing and, based on discussions I had with dealers to that point, I fully expected the CEMP bonds to sell at par in the marketplace.

17. The Department's Motion accuses Geary Securities of charging an excessive markup on a PL-CMO transaction that was unrelated to CEMP. I respectfully disagree for the following reasons.

- a. My understanding is that there is no hard-and-fast "5% markup rule," but, rather, a rule that prohibits excessive markups and a policy concerning 5%. It is my further understanding that each transaction is evaluated on its own facts and circumstances to determine whether a particular markup is or is not excessive. Based on the background, facts and circumstances, I do not believe the subject markup to be excessive.

- b. I have over 25 years' experience related to CMOs, on behalf of financial institution customers and accredited investors that are typically related or affiliated in some manner with the institutional customer. My CMO business has always involved a significant amount of research and analysis, which means that I have spent the majority of my time performing those tasks. From mid-2009 forward, the CMO market has been in a significantly disrupted state, resulting in widespread uncertainty concerning pricing and other issues. As a result, the amount of time and effort devoted to the CMO business on behalf of our customers has increased, while the number of CMO trades has decreased.
- c. Since May 2009 we have also seen that the uncertainties in this market create wide-ranging fluctuations and variations in views concerning the values and resulting pricing for CMOs. Rather than blindly trust and follow the views of others (particularly those whose views have been demonstrated as faulty), I spend a fair amount of time examining and analyzing the underlying data to reach my own view concerning the anticipated performance and resulting value of any particular CMO. While I do not claim to be perfect, I can say that my CMO customers have been very pleased with the results of their CMO activity over the past couple of years.
- d. On the issue of the level of markups on our CMO trades, I recognize the FINRA 5% policy is a policy -- not a rule. The policy includes making inquiry and independently determining whether any given markup is or is not excessive, fair or reasonable. I respectfully submit that, viewing the facts, circumstances and factors as a whole, the markup charged for the transaction the Department identifies in its Motion was fair, reasonable and not excessive.

e. The type of security involved (CMOs) necessarily requires the devotion of a greater amount of time and effort and a higher level of analysis and scrutiny to determine whether a particular CMO represents a worthwhile opportunity that fits a particular customer's needs at a particular point in time. As mentioned above, CMOs of the type, characteristics and quality desired by our customers have not been readily available in the market for some time now. As a result, we have to spend more time and effort identifying and then analyzing CMO prospects, as well as staying in contact with potential sources of the desired CMO products. As discussed, CMO pricing has been and continues to be quite volatile, such that more time and analysis is required to best serve our customers' needs and objectives. We do not have a set or predetermined markup percentage. Rather, I look at each transaction and determine based on my experience and involvement what I believe to be a fair, reasonable and appropriate markup for that transaction. This line of business represents the vast majority of my work. Consequently, I spend the majority of my time in this area and additionally compensate and rely on Chad Goodman to support this business through regular monthly analysis, review and reporting, as well as CMO-specific review and analysis as we attempt to thoroughly examine a CMO prospect from all sides, realizing that our window of opportunity may be quite limited depending on market conditions and other factors that often come into play. Of course, we do the same level of work regardless of whether a trade is ultimately accomplished for any given CMO that we examine, discuss with other brokers and show to our customer. For all of these reasons, it is my opinion, based on my experience, training, skill and

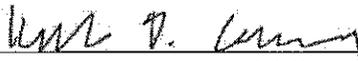
understanding of the FINRA policy, that the markup at issue was fair and reasonable, not excessive.

- f. FINRA addressed the issue of PL-CMO markups charged by Geary Securities as part of its 2011 examination of the firm. In response to the FINRA exit interview, Geary Securities provided detailed explanation and support for the markups it charged on PL-CMO transactions. FINRA has not taken any action against Geary Securities or otherwise pursued the issue.

18. The Department's Motion references discussions I had with Mesirov in December 2009 concerning a PL-CMO I was interested in purchasing for a second CEMP offering. The Department attempts to accuse me of wrongdoing in connection with my offer to purchase a bond from Mesirov in connection with the attempted second CEMP closing in December 2009. As I explained in my deposition (at page 206), Geary Securities agreed to purchase a bond from Mesirov for an agreed price on an agreed settlement date, which was subsequently extended by agreement. Mesirov was told and understood the intended use of the bond in connection with the anticipated second CEMP closing. When it became necessary to delay the second CEMP closing, Mesirov was advised and the settlement date of the bond purchase was revised to coincide with the revised closing date. When it became apparent that the second CEMP closing would not occur due to outside forces beyond our control, Geary Securities notified Mesirov that it was necessary to break the trade because the second CEMP offering was not ready to close. I later went back to Mesirov and offered to buy the same bond for a customer at a higher price, Mesirov agreed and the sale and purchase of the bond occurred to everyone's satisfaction. At no time I did I mislead Mesirov, misrepresent material facts, omit to state material facts or deal with Mesirov in an unethical manner.

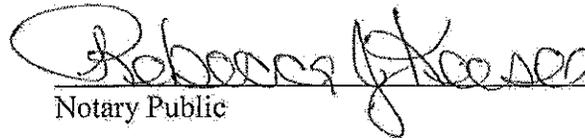
19. It is my understanding that discovery is ongoing and not complete in this matter. In order to fully address the issues raised by the Department's Motion, it is necessary to conduct the depositions of the Department's expert witness (Mr. Paulukaitis) and certain fact witnesses, depending on the Hearing Officer's rulings on pending preclusion motions. The fact witnesses to be deposed include, but are not necessarily limited to, Timothy Headington, Chris Martin, Michael Shelley, and the six Bank of Union directors.

FURTHER AFFLIANT SAYETH NOT.



KEITH D. GEARY

Subscribed and sworn to before me this 3rd day of February, 2012.



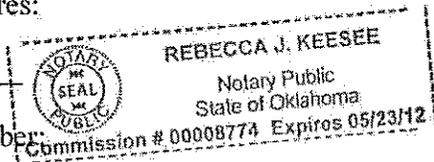
Notary Public

My Commission Expires:

5/23/12

My Commission Number:

00008774



Seal