

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



**In the Matter of:**

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

**Respondents.**

**File No. 09-141**

**RESPONDENT FRAGER'S MOTION TO BIFURCATE AND STAY  
PROCEEDINGS PREDICATED ON FEDERAL CLAIMS**

Respondent Norman Frager hereby joins in *Respondents' Motion to Bifurcate and Stay Net Capital Claims* filed by Respondents Keith D. Geary, Geary Securities, Inc. (formerly known as Capital West Securities, Inc.) and CEMP, LLC (the ***Geary Respondents***) on December 21, 2011.

Respondent Norman Frager hereby requests that the hearing officer enter an Order

(A) bifurcating the proceedings by separating all claims in the Enforcement Recommendation (***Recommendation***)<sup>1</sup> filed by the Oklahoma Department of Securities (***Department***) against the above named Respondents, which claims are based on violations of Rule 15c3-1 (the ***Net Capital Rule***) promulgated under the Securities Exchange Act of 1934; violations of reporting obligations under Section 17 of the Securities Exchange Act of 1934 and the rules adopted under that Section (***Books and Records Rules***); and the rules of the Financial Industry Regulatory Authority (***FINRA***) implementing, overseeing and otherwise related to those rules (collectively, ***Federal Claims***); and

(B) staying all proceedings on the Federal Claims until the FINRA action involving the same claims has been finally concluded.

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<sup>1</sup> *Enforcement Division Recommendation*, filed by the Oklahoma Department of Securities on September 22, 2010.

Respondent Frager incorporates all of the statements in the Respondents' Motion as if they were stated herein. In addition, Respondent Frager respectfully submits the following in support of this Motion.

### **I. SEPARATION OF ISSUES IS APPROPRIATE**

Separation of issues is authorized under Oklahoma law in Section 2018.D of the Oklahoma Rules of Civil Procedure, which provides:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

In addition, Section 2020.C of the Oklahoma Rules of Civil Procedure provides:

The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice. In determining whether to allow joinder under this section or to order separate trials, the court shall consider if in the interest of justice such action provides a fair and convenient forum for all parties.

Granting the motion is appropriate since the issues in this case relating to the Federal Claims are readily severable from the other issues in this case and there are no issues of law or fact alleged in connection with the Federal Claims that affect the other claims.

There have been no allegations linking Mr. Frager to any of the other issues in this matter and therefore, there is no reason to have Mr. Frager attend and participate in a hearing on unrelated issues.

The separation of the Federal Claims would reduce the number of parties and counsel that would be required to participate in a hearing on the remaining claims, making a hearing on those issues more efficient.

None of the Department's allegations concerning Mr. Frager involves the transactions related to CEMP, LLC; therefore, including Respondent Frager in a hearing involving those issues could be prejudicial to Mr. Frager.

As evidenced by the Department's recent Motion for Summary Decision,<sup>2</sup> the Federal Claims are readily separable from the other claims in the Recommendation and are appropriately addressed separately.

Based on the above, Respondent Frager respectfully requests that the Hearing Officer issue an order separating the Federal Claims from all other issues in this matter.

## **II. PROCEEDINGS INVOLVING INTERPRETATION OF FEDERAL LAWS AND RULES SHOULD BE STAYED**

The Federal Claims involve interpretation and application of provisions of the Securities Exchange Act of 1934,<sup>3</sup> rules adopted by the U.S. Securities and Exchange Commission (*SEC*) under such Act<sup>4</sup> and rules adopted by FINRA to implement and oversee compliance by regulated persons with the provisions of the Securities Exchange Act of 1934 and the rules promulgated under such act.

There is a matter pending before FINRA on the identical issues on which the Department bases its action against Respondent Frager.<sup>5</sup>

A proceeding by the Department would involve the same issues, the same statutes, the same rules, the same witnesses and the same evidence as those that will be required in the proceeding before FINRA.

States are preempted from making contrary findings under Section 15(i).1 of the Securities Exchange Act of 1934, which provides:

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<sup>2</sup> *Motion for Summary Decision against Respondent Norman Frager*, filed by the Oklahoma Department of Securities on November 1, 2011.

<sup>3</sup> 15 USC 78a *et seq.*

<sup>4</sup> 17 CFR 240.15c3-1, 17 CFR 240.17a-3, 17 CFR 240.17a-4, 17 CFR 240.17a-5 and 17 CFR 240.17a-11.

<sup>5</sup> See FINRA Matter Nos. NO. 20090204658 and 20100216574, currently pending,

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this title.

If the Department's action resulted in conclusions contrary to those reached by FINRA, the Department's conclusions would be preempted and negated based on Section 15(i) of the Securities Exchange Act of 1934.

A deferral of the Federal Claims until there has been a resolution of those claims by FINRA would preserve resources and provide the uniformity Congress mandated when it adopted the National Securities Markets Improvement Act of 1996 (*NSMIA*) and would lead to a more efficient resolution of the Federal Claims.

The Department would not be precluded from imposing sanctions based on the FINRA findings and a stay would avoid having to resolve inconsistent findings.

Based on the above, Respondent Frager respectfully submits that the Department should be stayed from proceeding on the Federal Claims until FINRA has concluded its pending action.

### **III. AUTHORITY**

The Hearing Officer has the authority to issue an order bifurcating and staying proceedings under Section 660:2:9-3 of the Oklahoma Administrative Rules.<sup>6</sup> Bifurcation of issues is within the discretion of the trier of fact.

Generally, it is within the discretion of the trial court to bifurcate a trial. The court may order a separate trial of any issue upon proper motion by a party and the exercise of discretion will be disturbed only for clear abuse. *Faulkenberry v. Kansas City Southern Ry. Co.*, 1983 OK 26, 661 P.2d

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<sup>6</sup> The Administrative Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities, Okla. Admin. Code Sections 660:1-1-1 through 660:25-7-1 (hereinafter, the *Oklahoma Rules*).

510, (Cert. denied) 464 U.S. 850, 104 S.Ct. 159, 78 L.Ed.2d 146 (1983).<sup>7</sup>

Where an issue is being tried in another forum that has a superior right to try the issue, it is appropriate to stay a proceeding under Section 140.2 of the Oklahoma Rules of Civil Procedure.<sup>8</sup>

Section 1-410 of the Oklahoma Uniform Securities Act of 2004 (*Oklahoma Act*), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2010), authorizes the adoption of a rule establishing minimum net capital requirements for broker-dealers in Oklahoma. Section 660:11-5-17 of the Oklahoma Rules states as follows:

All broker-dealers registered under the Securities Act shall at all times have and maintain net capital of no less than the highest minimum requirement applicable to each broker-dealer **as established by the SEC in 17 CFR 240.15c3-1**. [emphasis added]

As used in this subchapter, net capital shall mean the net worth of a broker-dealer **calculated according to the formula established by the SEC**. [emphasis added]

The above explicitly incorporates the federal rule into Oklahoma law and explicitly requires that net worth be calculated by the formula established by the SEC.

The SEC has delegated to FINRA the authority to calculate net capital.

FINRA has an action pending against Respondent Frager involving the calculation of net capital based on the same facts as those in the Federal Claims brought by the Department and, accordingly, FINRA is the party responsible for making determinations about net capital under the SEC rule and under Oklahoma law, per Section 660:11-5-17 of the Oklahoma rules.

FINRA has the superior right to try the issues in this matter and resolve the Federal Claims.

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<sup>7</sup> *Fisher v. Northland*, 23 P. 3D 396, 298 (Okla. 2001)

<sup>8</sup> Section 140.02A states: If the court, upon motion by a party or on the court's own motion, finds that, in the interest of justice and for the convenience of the parties, an action would be more properly heard in another forum either in this state or outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay, transfer or dismiss the action.

It is premature to submit Federal Claims to hearing or to summary decision by a hearing officer for the state of Oklahoma, until there is a final issue of the same facts in the FINRA proceeding.

#### IV. CONCLUSION

It is appropriate and in the best interests of all parties to separate the issues involving the Federal Claims and to stay all proceedings on those issues until FINRA has concluded its proceedings.

**Respectfully Submitted,**



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**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2011, a copy of the foregoing document was served on the following via electronic mail:

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