

STATE OF OKLAHOMA  
DEPARTMENT OF SECURITIES  
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

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

The Oklahoma Department of Securities ("Department") initiated this enforcement action against Respondent Norman Frager 20 months ago – on September 22, 2010. During these 20 months, Respondent Frager has conducted no depositions and has propounded no discovery requests. Now – just a few weeks before hearing – counsel for Respondent Frager is panicked. As a result, Respondent Frager has brought on two additional counsel and is seeking the delay of the hearing in this proceeding. The first attempt for delay was to file a new witness list, on May 24, 2012, including a representative of Pershing, LLC ("Pershing") and counsel for the Department as witnesses and to seek subpoenas requiring counsel for the Department to produce their work-product and to appear for deposition.<sup>1</sup>

Respondent Frager has tried to justify the filing of his new witness list by claiming that "the defense of this action was being handled by Geary Securities, Inc. ["Geary

<sup>1</sup> The Department's objections to the subpoenas are set forth in the *Department's Objection to Issuance of Deposition Subpoenas Duces Tecum to Terra Bonnell and Melanie Hall*, filed on May 29, 2012.

Securities”] on behalf of all respondents.” Respondent Frager further claims that he “should not be bound by the witness list prepared by Geary [but filed on behalf of all Respondents] over a year ago now that the posture of the litigation has changed and further discovery has been conducted.” Respondent Frager has overlooked the fact that he has had separate counsel representing him in his individual capacity in this proceeding since at least the time he filed his answer to the *Enforcement Division Recommendation* on October 15, 2012, and that his counsel have been, or at least appear to have been, steering the entire defense on the net capital related claims. Further, the Department’s allegations against Respondent Frager have remained the same since this proceeding was initiated 20 months ago.

It appears that the additional discovery to which Respondent Frager refers as a basis for the filing of a new witness list are the infamous Pershing audio recordings produced by the Department pursuant to a discovery request by Geary Securities. Respondent Frager has known about the existence of those audio recordings since at least March 28, 2011, when Geary Securities filed a motion to compel their production. Respondent Frager was notified on October 27, 2011, of the Hearing Officer’s order deeming the recordings not to be attorney work product. Yet, Respondent Frager did not file a witness list identifying a Pershing representative as a witness or inform the Department of its intent to call a Pershing representative as a witness until May 24, 2012. It is too late. In light of the prior deadlines for the filing of final witness lists, common sense dictates that the reference to “the final list of witnesses and exhibits to be utilized at the hearing” made in the *Final Amended Scheduling Order*, dated May 17, 2012, contemplates that the witness lists be narrowed and not expanded at pre-hearing

conference.<sup>2</sup> See *Agreed Amended Scheduling Order*, ¶ 2 (Feb. 14, 2011) (“On or before **Tuesday, April 5, 2011, at 5:00 p.m.**, Respondents shall file final witness lists. The final witness lists shall identify, by name, address, and telephone number, all witnesses, including but not limited to expert witness, intended to be called at hearing and contain a short description of the expected testimony of each witness. Failure to comply with this paragraph will result in the exclusion of witnesses at hearing.”) Respondent Frager should not now be allowed to present the testimony of a representative of Pershing in its case-in-chief.

Respondent Frager should also not be allowed to present the testimony of counsel for the Department “regarding telephone conversations between the Department and representatives from Pershing regarding whether or not Pershing ever entered into a loan with Geary Securities for the purchase of the securities at issue in the Department’s Recommendation.” The Supreme Court of the United States has specifically stated that the forced testimony of an attorney as to what he remembers regarding oral statements made by witnesses “could not qualify as evidence[.]” *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947). The Court further stated:

[T]o use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

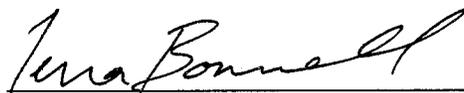
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<sup>2</sup> On page 4 of the *Response of Norman Frager to the Department’s Motion to Strike the Witness List of Norman Frager and Motion in Limine to Exclude Testimony of Department’s Counsel and a Pershing Representative*, Respondent Frager represented “that the Department itself has requested that an unnamed witness from Pershing be allowed to testify at the hearing on behalf of the Department.” Contrary to the representation, the Department requested permission from Respondent Frager to present the testimony of a Pershing representative by telephone or video conference pursuant to Rule 660:2-9-6(d)(4) if deemed necessary to rebut evidence presented by Respondent Frager at hearing. *Department’s Amended Final List of Witnesses*, filed on March 28, 2011, listed “All witnesses needed to rebut the testimony of a witness or a document or exhibit identified on Respondents’ final witness lists or exhibit lists or offered at hearing by Respondents.”

*Id.* at 513. Respondent Frager, who was the Chief Financial Officer and Financial and Operations Principal of Geary Securities during the relevant time period, can surely think of other evidence to present on the issue of whether Geary Securities obtained a “loan” from its clearing broker, Pershing. Respondent Frager should not be allowed to call counsel for the Department as witnesses on the issue.

Respondent Frager has been given 20 months to prepare and present his case in the manner he deems necessary. The original deadline for discovery was February 11, 2011, and the original hearing date was February 23, 2011, approximately 15 months ago. See *Agreed Scheduling Order*, ¶¶ 4 and 8 (Dec. 14, 2010). Enough is enough. For the foregoing reasons and the reasons set forth in the *Department’s Motion to Strike the Witness List of Norman Frager and Motion in Limine to Exclude Testimony of Department’s Counsel and a Pershing Representative*, the Department requests that the Hearing Officer strike the *Witness List of Norman Frager*, filed on May 24, 2012, and prohibit Respondent Frager from presenting Melanie Hall, Terra Bonnell, and a representative of Pershing as witnesses at hearing.

Respectfully,



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Melanie Hall, OBA #1209  
Terra Shamas Bonnell, OBA #20838  
Oklahoma Department of Securities  
120 North Robinson, Suite 860  
Oklahoma City, OK 73102  
Phone: (405) 280-7700  
Email: mhall@securities.ok.gov;  
tbonnell@securities.ok.gov  
*Attorneys for Department*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing reply was emailed and mailed, with postage prepaid, this 31st day of May, 2012, to:

Mr. Bruce R. Kohl  
201 Camino del Norte  
Santa Fe, NM 87501  
[Bruce.kohl09@gmail.com](mailto:Bruce.kohl09@gmail.com)

Donald A. Pape, Esq.  
Donald A. Pape, PC  
401 W. Main, Suite 440  
Norman, OK 73069  
[don@dapape.com](mailto:don@dapape.com)

Susan E. Bryant  
Bryant Law  
P.O. Box 596  
Camden, ME 04843  
[sbryant@bryantlawgroup.com](mailto:sbryant@bryantlawgroup.com)

Melvin R. McVay, Jr.  
Jason M. Kreth  
PHILLIPS MURRAH P.C.  
Corporate Tower, 13<sup>th</sup> Floor  
101 North Robinson  
Oklahoma City, OK 73102  
[jmkreth@phillipsmurrah.com](mailto:jmkreth@phillipsmurrah.com)  
[MRMcVay@phillipsmurrah.com](mailto:MRMcVay@phillipsmurrah.com)

  
Terra Bonnell