

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

DEC - 4 2009

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

OKLAHOMA DEPARTMENT OF )  
SECURITIES, *ex. rel.* Irving L. Faught, )  
Administrator, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GLOBAL WEST FUNDING, LTD., CO., )  
an Oklahoma limited liability company, et al., )  
)  
Defendants. )

Case No. CJ-2009-2773

HEARING SET FOR  
DECEMBER 7, 2009 @ 10:00 A.M.

**OKLAHOMA DEPARTMENT OF SECURITIES'**  
**MOTION TO QUASH NOTICE TO TAKE DEPOSITION**

The Oklahoma Department of Securities ("Department") moves this Court to quash a Notice to Take Deposition ("Notice") issued by Defendant Brian McKye ("Defendant") to Patricia Labarthe, attorney for the Oklahoma Department of Securities. As set forth below, Defendant's effort to depose Ms. Labarthe is an improper attempt to invade privileged areas, including the mandatory investigatory privilege provided for by the Oklahoma Uniform Securities Act, the deliberative process privilege, the attorney-client communications privilege, and the attorney work-product privilege.

On December 3, 2009, the Oklahoma County District Court provided the Department with a copy of the Notice attached hereto as Exhibit A. In connection with her employment with the Department, Ms. Labarthe has been and continues to be involved in the Department's investigation of and prosecution of a case against the Defendant and related persons. Ms. Labarthe's only contact with Defendant has been in connection with her employment as an attorney of the Department in this matter. Any information she could possibly testify to would have been learned in her capacity as

Department attorney in anticipation of a civil action against Defendant and related persons.

In addition, the Department has ongoing investigations and pending actions involving persons with whom Defendant has been associated. If Ms. Labarthe is required to testify, and the testimony elicited relates to the staff's litigation strategies and investigative theories, these ongoing investigations and pending actions could be jeopardized by such information ending up in the hands of these persons.

#### **Attorney-Client Privilege**

Ms. Labarthe is also responsible for advising Department staff and the Administrator as to the factual and legal theories related to potential violations of the Act. Any testimony relating to her confidential communications with the staff and the Administrator of the Department should not be allowed pursuant to the attorney-client privilege.

The opinions and recommendations made by Ms. Labarthe to her client, the Oklahoma Department of Securities, in connection with the investigation of Defendant and related parties were never intended to be disclosed to persons outside the Department except in the limited circumstances allowed by Section 1-607. Rather, the theories, strategies, opinions and recommendations made by Ms. Labarthe as a result of her evaluation of the Department's files were created for the purpose of communicating the facts and legal basis on which the Administrator could decide whether to take action. The communications are therefore privileged under the attorney-client privilege.

### **Work Product Privilege**

The testimony Defendant may attempt to elicit will likely involve work product of the Department's staff such as mental impressions, conclusions, opinions, or legal theories concerning the Department's investigation of Defendant or his related entities. The work-product privilege, although generally thought of in terms of memorandums or notes prepared by an attorney, extends to oral statements made by witnesses to attorneys. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947). Ms. Labarthe's recollections of meetings with witnesses, whether reduced to writing or not, are properly excluded pursuant to the work-product privilege.

### **Department Litigation and Investigatory Files are Privileged**

The Oklahoma Legislature has declared that Department litigation, examination and investigatory files shall be kept confidential. Section 1-607 of the Oklahoma Uniform Securities Act of 2004 ("Act"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), provides in pertinent part:

B. The following records are not public records and are not available for public examination under subsection A of this section:

1. A record obtained by the Administrator or created by a representative of the Administrator in connection with an audit or inspection under subsection K of Section 14 or subsection D of Section 27 of this act [Section 1-305 or 1-410 of this title] or an investigation under Section 40 of this act [Section 1-602 of this title];

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4. A record in a litigation file[.]

C. If disclosure is for the purpose of a civil or administrative investigation, action, or proceeding brought by the Administrator or a criminal referral made by the Administrator or to a person specified in subsection A of Section 46 of this act [Section 1-608 of this title], the Administrator may disclose a record obtained in connection with an audit

or inspection under subsection K of Section 14 of this act [Section 1-305 of this title] or subsection D of Section 27 of this act [Section 1-410 of this title] or a record obtained or created in connection with an investigation under Section 40 of this act [Section 1-602 of this title] so long as the receiving person specified in subsection A of Section 46 of this act [Section 1-608 of this title] provides assurances to undertake such safeguards as are necessary and appropriate to protect the confidentiality of files to which access is granted and information derived therefrom.

The meaning of Section 1-607 of the Act is plain and unambiguous. The Department's investigatory, examination and litigation files *may only* be disclosed in the three instances approved by the Oklahoma Legislature: for use in an action brought by the Administrator, to make a criminal referral, or to assist another law enforcement, governmental or regulatory agency.

Important public policies underlie the codification of Section 1-607. Maintaining the integrity and confidentiality of the Department's investigatory and litigation files prevents subjects of the Department's investigations from learning agency investigatory theories, directions and strategies and preserves the confidentiality of the Department's inter and intra-agency communications. Revealing these matters would have a chilling effect upon the fullness and frankness of the communications among the staff involved in the investigations. Confidentiality also protects innocent parties who may be subject to investigation, but later exonerated.

Ms. Labarthe's knowledge of the information in Department files gained solely through their employment at the Department is as privileged as the documents in those files. It would be ludicrous to protect the Department's files from disclosure but allow testimony of their contents. The Department cannot conceive of any line of questioning that would not invade the Department's privilege.

### **Deliberative Process Privilege**

Ms. Labarthe's responsibilities at the Department include working with the staff of the Department and other agencies to develop Department policy. Any testimony relating to Ms. Labarthe's confidential communications with the staff of the Department and other governmental agencies should not be allowed pursuant to the "deliberative process privilege." The "deliberative process privilege" is a common-law privilege unique to the government that serves:

to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

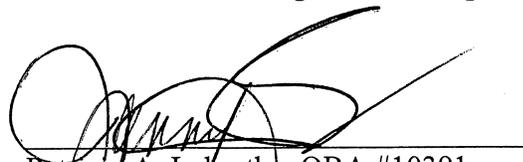
The privilege protects the pre-decisional inter-agency and intra-agency communications of the Department's staff from public disclosure. Ms. Labarthe's recollections of her participation in the Department's deliberative process are privileged.

### **Conclusion**

The Act mandates that the Department's investigatory and litigation files be kept confidential. Testimony regarding the Department's investigatory and litigation files would reveal the Department's law enforcement techniques and sources; would disclose the Department's strategies, procedures and direction of investigations; would deter witnesses from providing information; and would encourage others in similar situations to seek "discovery" of the Department's information. A ruling in favor of disclosure would complicate and delay agency enforcement actions by protracted discovery

proceedings of this kind, thus allowing private litigants the defacto use of the state's police powers.

The Department respectfully requests that this Court grant the Department's motion for an order quashing the Notice.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11<sup>th</sup> day of December, 2009, a true and correct copy of the above Motion to Quash Notice to Take Deposition was mailed with postage prepaid thereon addressed to:

Brian McKye  
PO Box 957  
Jay, OK 74346  
*Pro Se*

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