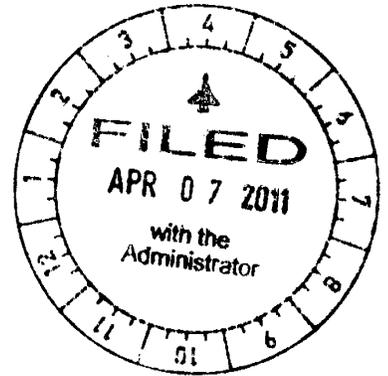


STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
FIRST NATIONAL CENTER
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OKLAHOMA CITY, OKLAHOMA 73102



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

The Oklahoma Department of Securities ("Department") submits the following objection and response to Geary Respondents' (1) Motion for Preclusion Order and Order Striking Witnesses and Allegations, and (2) Alternative Motion to Compel Production of Responsive Documents Wrongfully Withheld by the Department, filed on March 28, 2011 (collectively, "Motion to Preclude or Compel").

I. THE DEPARTMENT HAS NOT ENGAGED IN EVASIVE DISCOVERY TACTICS OR WRONGFULLY REFUSED TO PRODUCE ANY DOCUMENTS.

The Geary Respondent are not being forced to defend themselves "blind folded" or "in the dark." The Department has received a total of thirteen requests for production of documents, several of which contained multiple subparts, from the Geary Respondents. The Department timely responded to each of the requests and produced approximately 14,640 pages of documents

in addition to two CDs and/or DVDs containing multiple other items.¹ In its responses, the Department identified certain documents that it was withholding on the basis of a privilege, the work product doctrine, and/or a statute.

The Geary Respondents allege that the Department wrongfully withheld the following eight items or categories of items: (A) an email chain between the Bank of Union's President and the Department's counsel, (B) emails between representatives of the Department and Pershing LLC ("Pershing"), the clearing firm of Geary Securities, prepared at the direction of the Department's counsel in anticipation of litigation, (C) audio recordings of telephone interviews of Pershing representatives conducted by or at the direction of the Department's counsel in anticipation of litigation, (D) a document created by Pershing at direction of counsel of the Department, (E) an email chain between counsel for the Department and its expert witness, containing the legal opinion of counsel for the Department, (F) internal memorandum of the Oklahoma State Banking Department, (G) attachments to email communications produced by the Department, and (H) notes of the Department's counsel relating to interviews of John Shelley and Mike Braun. The Department's withholding of these eight items or categories of items was proper, as set forth below.

A. Email chain between Bank of Union's President and the Department's counsel

In the email chain at issue, the Department's counsel submitted a series of questions, itemized numerically, to the Bank of Union's President in anticipation of litigation. Another officer of the bank provided answers to the questions. The email chain is clearly protected by the

¹ Geary Respondents' counsel agreed to an extension of approximately one week for the Department's production of certain items on Respondent Geary Securities, Inc.'s First Request for Production of Documents to allow the Department to draft proposed stipulated facts for submission to the Geary Respondents. The Department's efforts to obtain agreement to the stipulations were futile.

work product doctrine. *See Lisle v. Owens*, 521 P.2d 1375, 1378 (Okla. 1974). In *Lisle*, the Oklahoma Supreme Court held that because “work product” includes an attorney’s correspondence to third parties, an attorney’s questionnaire and witnesses’ answers fall within the definition of “work product”.² *Id.* at 1378. Despite the clear protection afforded by the work product doctrine, the Department voluntarily produced the email chain to the Geary Respondents on March 22, 2011 (bates stamped 09-141/ODS PROD GSI 14630-34), prior to the filing of Geary Respondents’ Motion to Preclude or Compel on March 28, 2011. The Department’s voluntary production of an item that is clearly protected by the work product doctrine is further evidence of the Department’s lack of evasiveness in the discovery process.

B. Emails between representatives of the Department and Pershing prepared at the direction of the Department’s counsel in anticipation of litigation

In response to the Geary Respondents’ requests for production of documents, the Department withheld emails between representatives, both lawyers and non-lawyers, of the Department and Pershing on the basis of the work product doctrine. At issue are the emails between non-lawyer representatives of the Department and Pershing.

This proceeding originated as an investigation, rather than an examination, by the Department. As such, counsel for the Department directed and supervised all aspects of the investigation in anticipation of litigation. Each of the emails at issue was prepared by Department personnel at the direction, and under the supervision, of the Department’s counsel in anticipation of litigation.

Under Okla. Stat. tit. 12, § 3226(B)(3), “discovery may be obtained of documents and tangible things. . . prepared in anticipation of litigation or for trial **by or for another party or by**

² The Department provided this case citation to Geary Respondents’ counsel prior to the filing of their Motion to Preclude or Compel; however, the motion’s supporting brief fails to address it.

or for the representative of that other party, including his attorney, consultant, surety, indemnitor, **only upon a showing** that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.” (Emphasis added.) Okla. Stat. tit. 12, § 3226(B)(3); see *Scott v. Peterson*, 126 P.3d 1232, 1235 (Okla. 2005). Section 3226(B)(3) further provides, “In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney **or other representative of a party** concerning the litigation.” (Emphasis added.) Okla. Stat. tit. 12, § 3226(B)(3); see *Scott*, 126 P.3d at 1232. Because employees of the Department are clearly representatives of the Department and the emails were prepared in anticipation of litigation, the emails at issue fall within the statutory definition of work product/trial materials.

The emails at issue are only discoverable upon a showing by the Geary Respondents that they have a substantial need for the emails in the preparation of their case and they are unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. See *Ellison v. Gray*, 702 P.2d 360, 366 (Okla. 1985). The Geary Respondents’ claim that they are unable to obtain the substantial equivalent of the emails by other means without undue hardship is premature and untrue. Before the Geary Respondents are justified in attempting to invade attorney work product, they must show they are not able to get the information directly from Pershing. The Department is not aware of a request by the Geary Respondents for the issuance of a subpoena to Pershing or any representative thereof. Because Pershing is registered as a broker-dealer under the Oklahoma Uniform Securities Act of 2004 (“Act”), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2009), Pershing should comply with a subpoena issued under the

authority of the Administrator of the Department. The Geary Respondents have had ample time to attempt to obtain the substantial equivalent of the emails by subpoena. In addition, the Geary Respondents have received from the Department all responsive documents, exclusive of the emails at issue, obtained by the Department from Pershing. The Department has also been made aware that the Geary Respondents' counsel is in regular communications with Pershing's counsel. The Geary Respondents have failed to demonstrate that they are unable to obtain the substantial equivalent of the emails without undue hardship.

C. Audio recordings of telephone interviews of Pershing representatives conducted by or at the direction of the Department's counsel in anticipation of litigation

During the Department's investigation into the activities of Respondents, in anticipation of litigation, the Department's personnel faced the task of unraveling certain transactions relevant to the allegations contained in the Enforcement Division's Recommendation. Doing so required the assistance of Pershing. During the course of the investigation, the Department's counsel had multiple telephone calls with representatives of Pershing. Three of those telephone calls were recorded by Department's counsel. It was necessary to capture the telephone call to be able to decipher and understand the complex information Pershing was providing.

The audio recordings are at a minimum the ordinary work product of the Department's counsel. *Anderson v. Hale*, 202 F.R.D. 548, 554 (N.D. Ill. April 2001). In some instances, courts outside of Oklahoma have found that the attorney waived the protection of the work product doctrine for audio tapes of the attorney's interviews of the opposing party's witnesses because the attorney engaged in unethical conduct by not informing the witness that the interview was being recorded. *See id.* The *Anderson* court relied on a 1974 American Bar Association formal opinion that was withdrawn in June 2001. *Id.* at 555; *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974); ABA Comm. on Ethics and Prof'l

Responsibility, Formal Op. 01-422 (2001). The Oklahoma Bar Association, however, declined to adopt such a rigid stance and stated the following in 1994 in Ethics Opinion No. 307:

[I]t is not unethical for an attorney to record conversations with persons from whom the attorney has not obtained consent. Attorneys document conversations routinely. Recordation is merely a technological convenience, providing a more accurate means of documenting rather than relying on one's memory, notes, shorthand, transcript, etc. for recall.

It is also legal under Oklahoma law for an attorney who is a party to a conversation to record the conversation without consent. Okla. Stat. tit. 13, § 176.4 (Westlaw 2011). The 2001 ABA opinion concluded that "the mere act of secretly but lawfully recording a conversation inherently is not deceitful." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001).

Because the audio recordings are at least the ordinary work product of Department's counsel, Geary Respondents have to show a substantial need for the materials in the preparation of their case and that they are unable to obtain the substantial equivalent of the materials, without undue hardship. As explained in the preceding section, the Geary Respondents' claim that they do not have the ability to obtain the substantial equivalent from Pershing is premature and untrue. The Geary Respondents have not even attempted to subpoena Pershing. The Geary Respondents also state that they are unable to obtain the substantial equivalent because Pershing does not have copies of the audio recordings. However, a substantial equivalent to the audio recordings is for the Geary Respondents to interview Pershing representatives themselves. In reality, and contrary to the Geary Respondent's claim that they need the audio recordings, the Geary Respondents do not need to interview the Pershing representatives because they do not need to unravel the transactions at issue. The Geary Respondents effected the transactions at issue and, at all times, have had the information that the Department was acquiring from Pershing. Of further significance is the fact that no Pershing representative appears on the

Department's Amended Final Witness List. The Geary Respondents have failed to demonstrate that they have a substantial need for the audio recordings and that they are unable to obtain the substantial equivalent from Pershing.

D. Document created by Pershing at direct of counsel of the Department

The document at issue was created by Pershing and/or The Bank of New York Mellon Corporation at the direction of the Department's counsel in anticipation of litigation. The Department voluntarily produced the document to Geary Respondents on March 24, 2011 (bates stamped 09-141/ODS PROD GSI 14639-40), prior to the filing of Geary Respondents' Motion to Preclude or Compel on March 28, 2011.

E. Email chain between counsel for the Department and its expert witness, containing the legal opinion of counsel for the Department

The Department produced all of its communications with David Paulukaitis, an anticipated expert witness, in response to the Geary Respondents' requests for production of documents, except for one email chain that contained the opinion and mental impression of the Department's counsel. It does not appear that the Oklahoma courts have directly addressed the issue of whether opinion work product loses its protection when disclosed to an expert witness. Therefore, in reliance on *Lisle*, 521 P.2d 1375, and Okla. Stat. tit. 12, § 3226(B)(3), the Department withheld the email chain on the basis that it was protected from discovery under the work product doctrine.

The Department recognizes that Section 3226 is substantially similar to Fed. R. Civ. P. 26, as it was in effect prior to December 10, 2010, and that the majority of federal courts interpreted that version of Fed. R. Civ. P. 26 to require discovery of opinion work product. *Regional Airport Authority of Louisville v. LFG, LLC* 450 F.3d 697 (6th Cir. 2006). The Department would like to point out, however, that effective December 10, 2010, Fed. R. Civ. P.

26 was amended to specifically protect certain communications between the party's attorney and expert witness.³ The Advisory Committee Notes for the 2010 Amendments specifically explain that the changes were made because of the "undesirable effects" of the previous rule and "to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications." The email chain at issue falls within the protected communications of Fed. R. Civ. P. 26. The Oklahoma Legislature is currently considering Senate Bill 941 that if passed also expressly protects certain communications between a party's attorney and expert, like the communication at issue, from discovery. The clear trend now is to recognize that communications between a party's attorney and expert that contain the attorney's opinion work product should be protected under the work product doctrine.

F. Internal memorandum of the Oklahoma State Banking Department

The document at issue is a memorandum among employees of the Oklahoma State Banking Department that was provided to the Department pursuant to Section 1-613 of the Act. Section 1-613 states, in part:

C. 1. Notwithstanding any other statute, rule, or policy governing or relating to records of the requesting agency, all data received by a requesting agency from a supervisory agency shall be and remain confidential and not open to public inspection, subpoena, or any other form of disclosure while in the possession of the requesting agency. Any request for inspection, subpoena, or other form of disclosure shall be directed at the supervisory agency from which the data originated and disclosure thereof shall be subject to the laws, rules, and policies governing or relating to records of the supervisory agency.

³ Only the communications between a party's attorney and expert that "(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed[,]" are discoverable under Fed. R. Civ. P. 26, effective as of December 10, 2010.

2. The provisions of data by a supervisory agency to a requesting agency under this section shall not constitute a waiver of, or otherwise affect, any privilege or claim of confidentiality that a supervisory agency may claim with respect to such data under any federal laws or laws of this state.

Oklahoma administrative agencies are to “give effect to the rules of privilege recognized by law in respect to . . . records and files of any official or agency of any state . . . which, by any statute of a state . . . are made confidential and privileged.” Okla. Stat. 75, § 310 (Westlaw 2011).

Because the memorandum was inadvertently provided by the Department to an expert witness, the Department sought permission from the Oklahoma State Banking Department (Banking Department) to produce the document to the Geary Respondents. The Banking Department declined to grant such permission and asserted its right under Section 1-613(C) of the Act to have the Geary Respondents’ request for the memorandum directed to it (Banking Department) to allow the Banking Department the opportunity to assert any privilege or protection it may have. Section 1-613 of the Act prohibits the Department from producing the memorandum to the Geary Respondents.

G. Attachments to email communications produced by the Department

In response to Request No. 9 of the Geary Respondents’ Third Request for Production of Documents, the Department withheld the attachments to two emails, dated March 14, 2011, from the Department’s counsel to Mr. John Schirger, on the basis of the work product doctrine. The attachments at issue consist of a draft of an affidavit and a revised draft of an affidavit, prepared by the Department’s counsel in preparation for hearing, for review by members of the Bank of Union’s Board of Directors. The Department’s counsel emailed the revised draft approximately forty-five minutes after the original draft was emailed. The Department has not received an executed copy or original of either version of the proposed affidavits. The Department did not become aware that an affidavit had been executed by Bank of Union’s Board of Directors until

after it submitted its response to Geary Respondents' Third Request for Production of Documents on March 22, 2011. The Department does not know whether the executed affidavit contained modifications by a third party.

The work product doctrine protects "information relevant to the evolution of an affidavit, including but not limited to communications with the counsel relating to the affidavit, **prior drafts of the affidavit**, and any notes made by counsel while engaging in the process of drafting the affidavit." (Emphasis added.) *Tuttle v. Tyco Electronics Installation Services, Inc.*, 2007 WL 4561530 *2 (S.D. Ohio 2007) (citing *Infosystems Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 307, n. 4 (E.D. Mich. 2000), and *U.S. v. University Hospital*, 2007 WL 1665748 (S.D. Ohio 2007)). Only the final version of the affidavit is discoverable. *Tuttle*, 2007 WL 4561530*2. When the Department receives the final version of the affidavit, the Department will provide it to the Geary Respondents.⁴

H. Notes of the Department's counsel relating to interviews of John Shelley and Mike Braun

The notes at issue consist of handwritten notes made by the Department's counsel⁵ during an interview they conducted of two witnesses in anticipation of litigation. Despite the Geary Respondents' claim to the contrary, these notes fall squarely within the statutory definition of work product. An attorney's handwritten notes of witness interviews are not only work product—they are "opinion work product." *Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617,

⁴ Prior to the filing of the Geary Respondents' Motion to Preclude or Compel, the Department's counsel communicated its willingness to provide the final version of the affidavit to the Geary Respondents when the Department receives the final version of the affidavit.

⁵ The Geary Respondents conveniently refer to Melanie Hall and Terra Bonnell as merely "Department employees" for purposes of Section III.B.7 of the Geary Respondents' Motion to Preclude or Compel. However, Melanie Hall and Terra Bonnell are the Department's counsel for purposes of this proceeding.

626 (N.D. Okla. 2009) (“Examples of opinion work product are . . . attorney notes of witness interviews.”)⁶; *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) (holding that attorneys’ notes and memoranda of witness interviews reveal “attorneys’ mental processes in evaluating the communications,” to the extent they do not reveal communications.)

“Opinion work product enjoys a virtual immunity from discovery, and it may be discovered only under extraordinary circumstances.” *Ellison*, 702 P.2d at 363. Opinion work product cannot be discovered “simply on a showing of substantial need or inability to obtain the equivalent without undue hardship.” *Upjohn*, 449 U.S. at 385. The discovery of an attorney’s notes of witnesses’ oral statements is “particularly disfavored.” *Upjohn*, 449 U.S. at 399. Further, some courts have found that “no showing of necessity can overcome protection of work product which is based on oral statements from witnesses.” *Upjohn*, 449 U.S. at 401.

The Geary Respondents claim to have a “substantial need to discover all facts concerning the Department’s allegations” and the inability “to obtain the ‘substantial equivalent’ from the witnesses themselves.” The statement that the Geary Respondents have the inability to obtain the substantial equivalent from the witnesses themselves is premature in light of the Department’s filing of an Application to Enforce an Administrative Subpoena in the District Court of Oklahoma County on April 6, 2011. Even if their claim were true, that would not be enough to justify discovery of the notes made by the Department’s counsel in connection with a witness interview.

II. IF AN ITEM HAS BEEN WRONGFULLY WITHHELD, AN ORDER COMPELLING PRODUCTION IS THE APPROPRIATE REMEDY.

⁶ It is appropriate to look at discovery procedures in the federal rules when construing similar language in the Oklahoma Discovery Code. See *Crest Infiniti II, LP v. Swinton*, 174 P.3d 996, 999 (Okla. 2007); *Scott*, 126 P.3d at 1238.

The Department acted in good faith when it withheld the items at issue on the basis of the work product doctrine and Section 1-613 of the Act. In the event the Hearing Officer finds an item to have been wrongfully withheld, the appropriate remedy would be an order compelling the production of the item. The imposition of a sanction under Rule 660:2-9-3(f) of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (as amended July 1, 2007) would be inappropriate because the Department has not acted in bad faith in any aspect of discovery. As set forth above, the Department has timely produced thousands of pages of items to the Geary Respondents and is on strong legal footing to withhold the six items currently at issue. The Department has been cooperative in scheduling depositions and has agreed to voluntarily produce for deposition all witnesses under its control. Further, the Department has no control over the witnesses associated with the Bank of Union. The Department has not in any way encouraged their non-compliance with the subpoenas issued to them. Any implied or express representation to the contrary is without basis in fact. The Department even agreed to postpone the remaining dates in the *Agreed Amended Scheduling Order* to allow time for the Respondents to conduct discovery of the witnesses associated with Bank of Union. It would be grossly unjust to sanction the Department rather than compel the production of an item found to be wrongfully withheld.

III. CONCLUSION

The Department has not been evasive during the course of discovery in this proceeding. The Department has produced thousands of pages of items to the Geary Respondents who have taken issue with eight items, or categories of items, withheld by the Department. Two of the eight items at issue were voluntarily produced by the Department to the Geary Respondents prior to the filing of their Motion to Preclude or Compel. As set forth above, the Department was

justified in withholding the remaining items on the basis of the attorney work product doctrine and Section 1-613 of the Act. The Department's refusal to waive the protection afforded it by the work product doctrine does not constitute bad faith. For the foregoing reasons, the Department respectfully requests that the Geary Respondents' Motion to Preclude or Compel be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of April, 2011, a true and correct copy of the above and foregoing was emailed and mailed by first-class mail with postage prepaid thereon, to the following:

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