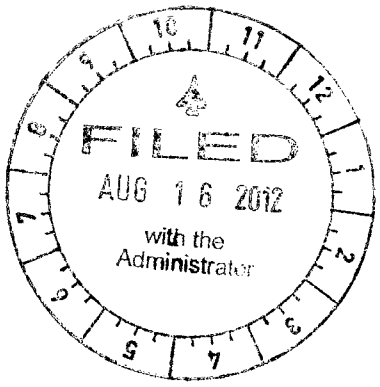

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102

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

MOTION OF RESPONDENT, NORMAN FRAGER, FOR RULING ON MOTION TO DISMISS AND SUPPLEMENT TO MOTION TO DISMISS

COMES NOW the Respondent, Norman Frager ("Frager"), and respectfully requests that the Hearing Officer rule upon the Motion to Dismiss (the "Motion") filed by Frager in this Matter on February 24, 2012. In support of this request, Frager hereby submits the additional evidence and arguments set forth below.

BACKGROUND

1. On September 22, 2010, the Oklahoma Department of Securities ("Department") filed an Enforcement Recommendation ("Recommendation") alleging violations by Frager of Rule 660:11-5-17 of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (the "Oklahoma Rules") and certain federal rules ("SEC Rules") issued by the U.S. Securities and Exchange Commission ("SEC").[1]

2. Oklahoma Rule 660:11-5-17 incorporates by reference SEC Rule 15c3-1 (the "Net Capital Rule") promulgated by the SEC under the Securities Exchange Act of 1934 (the "Exchange Act").

[1] In some of its motions and related filings, the Department has sought to impose on Frager obligations to comply with rules issued by the National Association of Securities Dealers, Inc. ("NASD") and its successor the Financial Industry Regulatory Authority ("FINRA"); however, we note that those rules are not incorporated into the Oklahoma Rules.

3. The Net Capital Rule provides the amount of net capital broker-dealers registered with the SEC must maintain to conduct their business.

4. On November 1, 2011, the Department filed a Motion for Summary Decision (the "November Motion") seeking summary decision against Frager based on the allegations in the Recommendation.

5. At all times relevant to the allegations in the Recommendation, Frager was registered through the National Association of Securities Dealers, Inc. ("NASD") and subsequently the Financial Industry Regulatory Authority (the successor to the NASD, hereinafter, "FINRA") as a Limited Principal - Financial and Operations ("FinOP") of Geary Securities, Inc. ("Geary Securities"); Geary Securities was an Oklahoma Corporation registered as a broker-dealer with the SEC and a member of the NASD and subsequently FINRA; Geary Securities carried out its business as an introducing broker under the terms of a Restriction Agreement, as amended, (hereinafter the "Membership Agreement") between Geary Securities and the NASD.

6. The specific allegations against Frager in the Recommendation, and those on which the Department based its November Motion, related solely to the question of whether Frager properly calculated and reported the net capital of Geary Securities on two separate occasions – May 28 through May 31, 2009 and February 2010.

7. The May 2009 net capital calculation involves the question of whether Geary Securities purchased and held Private Label, Collateralized Mortgage Obligations ("CMOs") from Frontier Bank on May 28, 2009 and subsequently sold those CMOs to accounts controlled by Joseph McKean (the "McKean Accounts") or whether Geary Securities acted as an

intermediary in connection with a sale of the CMOs from Frontier Bank to the McKean Accounts.

8. The transaction in the CMOs was processed by Geary Securities through its clearing broker, Pershing, LLC ("Pershing").[2]

9. The Department alleges that Geary Securities was deemed to have purchased the CMOs since (i) Pershing paid for the sale side of the transaction on May 28, 2012 as clearing broker on behalf of Geary Securities, the introducing broker; and (ii) Geary Securities did not initially designate a purchaser and therefore the CMOs were allocated to a Geary Securities account at Pershing pending designation of a purchaser and settlement and clearance into the account for the purchaser, and therefore, Pershing was presumed to have made a loan to Geary Securities that should have been recorded on its books as of May 31, 2009 with a resulting deduction in its net capital, calculated as the difference between the value of the CMOs after appropriate "haircuts" and the presumed liability to Pershing.

10. Finally, the Department alleges that Frager violated the Net Capital Rule when he did not include the liability in the FOCUS Report filed with FINRA as of May 31, 2009.

11. On December 1, 2011, Frager filed his Response to the November Motion. In that response, Frager demonstrated that genuine issues of material fact existed which precluded summary decision.

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[2] As will be shown below, Geary Securities did not purchase the CMOs directly. Instead, the transaction was between Frontier Bank as the seller and Joseph McKean and Eagle Sky Foundation, Inc. as buyers. Geary Securities simply acted as an intermediary introducing broker in this transaction.

12. On February 27, 2012, Frager filed his combined Supplemental Response to the November Motion and Motion to Dismiss ("Frager Motion"), in which Frager argued that certain recordings of telephone conversations between representatives of Pershing and the Department, which had been produced by the Department, showed unequivocally that the Department had no basis for its May 2009, claims as representatives of Pershing stated, among other things, that they did not lend any money to Geary Securities. *See* Motion to Dismiss, attached hereto as Exhibit "A."

13. On May 16, 2012, the Hearing Officer denied the November Motion, finding that genuine issues of material fact existed which precluded the granting of summary decision.

14. To date, however, the Hearing Officer has never ruled on the Frager Motion.

15. Accordingly, Frager requests that the Hearing Officer issue a ruling on his Motion.

16. Frager also requests that, in ruling on the Motion, the Hearing Officer consider the additional arguments based on the depositions taken recently and other evidence described below, which has been obtained by Frager since the date of his earlier Motion, and the conclusions to be drawn from that evidence as set forth below.

SUPPLEMENTAL ARGUMENT AND AUTHORITY

A. FRAGER COMMITTED NO VIOLATION OF THE NET CAPITAL RULE IN MAY 2009

As a supplement to its Motion, Frager submits the affidavit of Samuel Luque, Jr. Mr. Luque is a securities industry consultant with over 40 years of securities industry and regulatory experience, including over 20 years with the NASD during which (i) he trained NASD staff in the

computation and calculation of net capital under the Net Capital Rule, (ii) he was one of the final arbiters at the NASD of net capital issues raised by any staff at any office of the NASD and (iii) he consulted with the SEC on any complex interpretations of the Net Capital Rule to determine the position of the SEC the application and interpretation of the Net Capital Rule. Unlike the Department's experts, Carol Gruis and David Paulukaitis, Mr. Luque has extensive and continuous experience in both net capital computations and interpretations of the Net Capital Rule, including interpretations issued by the SEC. In contrast, both Ms. Gruis and Mr. Paulukaitis would have deferred to Mr. Luque while at the NASD on issues involving calculation of net capital, the determination of when liabilities must be included in that calculation and the amount of a "haircut" that would need to be taken in situations such as that involved in this Matter. Neither Ms. Gruis nor Mr. Paulukaitis were involved in complex issues involved in interpreting the Net Capital Rule and neither has been involved in such issues since they left the NASD.[3] Conversely, by the deposition testimony of both Mr. Luque and Mr. Paulukaitis, it is clear that Mr. Luque was responsible for determining complex issues involving the application and interpretation of the Net Capital Rule and that Mr. Luque has continued to be so involved since leaving FINRA, by continuing to act as a FinOP for third parties. In his Affidavit and in his deposition testimony, Mr. Luque clearly establishes that Frager and Geary Securities properly accounted for the CMO transaction in May 2009 and that, in his opinion, there was no net capital violation.

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[3]The Department's experts, Carol Gruis and David Paulukaitis, have both indicated that their experience in these areas is limited and dated. For instance, Ms. Gruis indicated that her only dedicated training in net capital occurred in 1986 and her instructor at that time was Mr. Luque. She left the NASD in 1992 and has had no experience in net capital computations or interpretations of the Net Capital Rule since that date. *See* Deposition of Carol Gruis, attached hereto as Exhibit "B" at pp. 15 and 19. Similarly, Mr. Paulukaitis indicated that he also has had no formal training in GAAP accounting and that he has not handled a net capital issue since leaving the NASD in 2005. *See* Deposition of David Paulukaitis, attached hereto as Exhibit "C" at pp. 12, 40, 41, 43, 46. These facts cast serious doubts on the qualifications of Ms. Gruis and Ms. Paulukaitis as experts in these matters.

1. Geary Securities Properly Accounted for the CMO Transaction in May 2009.

In a securities transaction, the "trade date" of a transaction is the date on which the trade is presented for execution. *See* Affidavit of Samuel Luque, Jr., attached hereto as Exhibit "D" at ¶ 11. By contrast, the "settlement date" of a securities transaction is the date upon which (1) the purchaser has made payment to the seller and has received the securities from the seller and (2) the seller has delivered the securities and has received payment from the purchaser and the transaction has cleared. *Id.* at ¶ 12. All broker-dealers are required to use the accrual method of accounting.[4] The accrual method of accounting requires broker dealers to use trade date accounting under Generally Accepted Accounting Principles ("GAAP").[5] Trade date accounting requires that a transaction be treated for accounting purposes as if it were completed on the trade date, irrespective of the settlement date.

Customer statements are not kept on an accrual basis and therefore transactions are not recorded on the trade date, but are recorded on customer statements as of the date settlement should have occurred and as of the date on which payment is actually made. Accordingly, when a FinOP reviews month end transactions for determining the net capital at the end of a month, the FinOP would match a transaction in process at month end by referring to the customer statement, which would show the settlement and payment dates for the transaction. Because broker-dealers are required to use trade date accounting, pending transactions at month end are treated for net capital purposes as having settled on the trade date, even where the payment is made after trade date, while the transaction date on a customer statement reflects the date by which a customer is expected to have paid for the securities purchased and the date payment was actually made.

In securities transactions, introducing brokers (such as Geary Securities) utilize clearing brokers (such as Pershing) to execute their trades. *Id.* at ¶ 16. Each trade has two components, the sale by a seller

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[4] *See* FINRA Interpretation "Net Capital Requirements for Brokers or Dealers, Rule 15c3-1," p. 203.
[5] *See* FINRA Interpretation "Net Capital Requirements for Brokers or Dealers, Rule 15c3-1," p. 201, ("Broker-dealers that use the trade date basis of record keeping are in compliance with the AICPA Guide for Audits of Brokers and Dealers in Securities...").

and the purchase by the buyer. *Id.* at ¶ 10. Under current laws, there can be at least three days between the two parts of the transaction. *Id.* at ¶ 15. When a trade is presented by an introducing broker to a clearing broker, the clearing broker must reflect both parts of the transactions on its books. *Id.* at ¶ 17. If a purchaser is not identified by the end of the trade date and in most transactions involving debt obligations, the securities will be allocated to an account in the name of the introducing broker pending identification of the actual purchaser and a subsequent rebilling into the purchaser's account prior on or before settlement and clearance[6]. The allocation to the account of an introducing broker does not mean that the broker has purchased the securities or that the trade has settled unless and until the transaction has finally settled and the securities cleared. *Id.* at ¶ 18. Instead, all that the appearance of the securities in the account means is that the first half of the transaction has been completed and the transaction is pending until a purchaser submits payment for the transaction. *Id.* at ¶ 20. Importantly, as noted already, settlement of the trade does not occur until payment and clearance. If such payment is never received, the transaction ***never settles***. *Id.* at ¶¶ 12, 23. If the clearing broker has made payment for a transaction and the purchaser does not pay for the transaction, the clearing broker owns the securities that were purchased by virtue of the fact it has paid for those securities.[7] The clearing broker has the right to sell those securities and charge any losses to the introducing broker-dealer. *Id.* at ¶ 22. Neither the clearing broker nor the introducing broker are required to account for the liabilities relating to a broken transaction until the clearing firm realizes the loss by selling the securities and notifies the introducing broker of the amount of the liability owed to the clearing broker.[8]

In the present case, it is clear that Geary Securities properly accounted for the CMO transaction. Contrary to the Department's assertions, Geary Securities did not directly purchase the CMOs. The Department has not presented any evidence that Geary Securities ever paid for the CMOs. The

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[6] *See* the telephone transcripts of conversations between staff of the Department and Joan Schwartz on June 25, 2010 at p. 15 and on October 12, 2009 at p. 6-8, attached hereto as Exhibits "E" and "F".
[7] *See* Sections 7.3.3, 7.5 and 18.2.1 of the Clearing Agreement between Pershing and Geary Securities, attached hereto as Exhibit "G".
[8] *See* NASD Notice to Members 05-38.

Department apparently relies on trade tickets generated by Pershing that indicate the transaction was presented by Geary Securities as a "principal" transaction. Such designation is required under SEC Rule 10(b)(10) and applies to most if not all transactions in bonds, which are not transacted on an exchange and are often processed on a riskless principal or agency look alike basis. The principal designation on the confirmation is intended to disclose to the customer how the broker carries out the transaction and how the broker is compensated.[9] The designation does not indicate ownership, but indicates that the broker will be acquiring bonds to fill the order of a customer.

All of the documents in the present case are entirely consistent with a single transaction from Frontier Bank to accounts held by Joseph McKean and the Eagle Sky Foundation, Inc. (collectively "McKean") with Geary Securities simply acting as an intermediary. *Id.* at ¶ 24.[10] While the trade tickets for the CMO transaction were presented by Geary Securities to Pershing on May 28, 2009, and Pershing obtained the CMOs and placed them in a Geary Securities account, this did not mean that Geary Securities owned those securities or that the transaction had settled. *Id.* at ¶ 12. Indeed, this fact is not only supported by Mr. Luque's affidavit, but also Pershing's clearing agreement which specifically states that "title to securities sold to you, where Pershing has acted as principal, shall remain with Pershing until the entire purchase price is received or until the settlement date, whichever is later." *See* Pershing Terms and Conditions, attached hereto as Exhibit "I." Accordingly, it wasn't until McKean paid for the CMOs on June 1, 2009, that Pershing relinquished title to the same and settlement was completed. *Id.* at ¶¶ 12, 13, and 20.

2. Geary Securities Did Not Receive any Loan from Pershing.

Despite the clear application of the net capital rule set forth above, the Department attempts to argue that this was actually a two-stage transaction whereby Geary Securities purchased the securities on May 28,

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[9] *See* SEC Release 34-13508 (January 1, 1978) and subsequent releases.

[10] *See also* the transcripts of the recorded conversations between representatives of Pershing and staff of the Oklahoma Department of Securities, attached hereto as Exhibits "E" and "F"; Deposition of Samuel Luque, Jr.at pp. 9-10, attached hereto as Exhibit "H".

2009, and then, in turn, sold them to McKean on June 1, 2009. The facts fail to support such a position. As Mr. Luque notes in his affidavit, the relevant records reflect a transaction directly between Frontier Bank and McKean. These records ***do not*** reflect a purchase of the CMOs by Geary Securities. *Id.* at ¶¶ 24-25. Certainly, if Pershing made a loan of this size ($79 million) there would be at least minutes from a credit committee or some documentation evidencing the same, including items such as a promissory note, security agreement, loan agreement, or even a loan application. Yet, in the present case, not a single such document exists. Furthermore, representatives of Pershing have unequivocally stated that no loan occurred and no credit was extended to Geary Securities. *See* Transcript of Joan Schwartz Audio, 6/25/10, attached hereto as Exhibit "E" at p. 4 ("we did not extend them any credit"). Accordingly, the Department's position fails as not only is there a complete absence of loan documentation, but Pershing itself has unequivocally stated that no such loan was ever made.

Simply put, Geary Securities did not have the funds in its account to pay for the securities, neither Pershing nor any other party lent Geary Securities the funds to purchase the CMOs and, therefore, Geary Securities could not have purchased them. *Id.* at ¶ 25. In an attempt to address the lack of documentation of any loan to Geary Securities, the Department has argued that there is a "deemed" loan from Pershing to Geary Securities. There is no such thing in the industry as a "deemed loan." Banking and securities regulations, including the Net Capital Rule have distinct requirements that must be followed in determining when there are liabilities that must be recorded for net capital purposes. If clearing brokers and introducing brokers were required to record "deemed" loans every time there is a failure to complete a transaction or a failure of the introducing broker to name a purchaser, the industry would be subject to a never-ending stream of net capital issues. Instead, broker-dealers are required to document loans and follow accrual accounting under GAAP so that their financial statements correctly document who owns what and when and the books and records of the introducing broker and clearing broker are consistent.[11] To hold otherwise

[11] See Notice to members 05-38, supra.

would shut down all securities firms and their clearing brokers. The Department's position is simply unsupportable by the evidence or common sense.

For these reasons, the Department's claims related to the May 2009 net capital violations lack any support and should be dismissed.

B. OKLAHOMA RULE 660:11-5-17 IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY.

As noted above, the Department brings its claims against Frager (both for May 2009 and February 2010) pursuant to Oklahoma Rule 660:11-5-17. This rule states as follows:

> (a) **General requirement.** 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 240.15e3-1.
>
> (b) **Calculation of "net capital."** 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.

Accordingly, pursuant to Rule 660:11-5-17, the Department does not take responsibility to investigate and determine appropriate levels of net capital for broker dealers registered in Oklahoma. Instead, ODS has, in effect, abdicated such authority to the SEC by setting its net capital requirements for broker-dealers to whatever level the SEC has currently mandated.

It is well-settled in Oklahoma that the legislature, and by extension any agency to which it grants authority, "must not abdicate its responsibility to resolve fundamental policy making by [1] delegating that function to others or [2] by failing to provide adequate directions for the implementation of its declared policy." *Oklahoma City v. Dept. of Labor*, 918 P.2d 26, 29 (Okla. 1996). Under this "non-delegation" principle, the Oklahoma Supreme Court has struck down Oklahoma laws where, as here, an applicable standard was set by the rules of a Federal agency.

In *Oklahoma City v. Dept. of Labor*, the Oklahoma Supreme Court was faced with a challenge to a wage and hour law designed to set certain minimum payment standards for those

working on public projects. In particular, this wage and hour law required the Oklahoma Labor Commissioner to adopt a minimum wage for such projects based on the prevailing wage set by the United States Department of Labor for Federally funded projects. *See Id.* at 28-30. The Oklahoma Supreme Court struck down the law, holding that by using the prevailing wage determined by the United States Department of Labor, the Oklahoma legislature was impermissibly delegating its authority. *Id.* at 30. In so holding, the Court noted that the law failed because there were "no definite standards or articulated safeguards for the United States Department of Labor to follow" in setting the prevailing wage for the purposes of the Oklahoma law. *Id.* Instead, the law left "an important determination to the unrestricted and standardless discretion of unelected bureaucrats. Worse, it delegate[d] to an administrative arm of the federal government." *Id.*

The instant rule is no less problematic than the wage and hour provision struck down by the Supreme Court. In both instances, the ultimate authority to set a relevant regulatory standard (in this case, the required net capital of broker-dealers) has been abdicated to a Federal agency which is not elected and not directly accountable to the people of Oklahoma. The SEC can, and often does, alter the net capital requirements contained in its rules. However, it does so without being bound by any limiting or defining principle from the Oklahoma legislature. Accordingly, Rule 660:11-5-17 "leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats" and, as a result, runs afoul of the non-delegation principal.

For these reasons, Rule 660:11-5-17 is an unconstitutional abdication of the Department's authority and must be struck down. Accordingly, as the claims against Frager for net capital violations in May 2009 and February 2010 are based on this rule, they must fail and the instant action should be dismissed.

C. EVEN IF OKLAHOMA RULE 660:11-5-17 IS NOT UNCONSTITUTIONAL, THE DEPARTMENT LACKS JURISDICTION TO INTERPRET RULE 15C3-1 AND THE CLAIMS AGAINST FRAGER SHOULD BE DISMISSED PENDING A DETERMINATION OF FINRA'S IDENTICAL CLAIMS.

Even if the Hearing Officer does not believe Oklahoma Rule 660:11-5-17 to be unconstitutional, it is clear that the Department lacks jurisdiction to hear these claims at this time. By virtue of Rule 660:11-5-17's incorporation of SEC Rule 15c3-1, ruling on the Department's net capital claims against Frager necessarily involve interpretation and application of SEC Rules and rules adopted by FINRA to implement and oversee compliance by regulated persons with the provisions thereof.

In the instant case, there is a matter pending before FINRA with identical issues to the Department's claims against Frager. Accordingly, a ruling on the Department's claims 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 findings contrary to those of FINRA under Section 15(i).1 of the Securities Exchange Act of 1934, which provides:

> 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.

By its allegations, the Department is imposing its own limitations on a broker-dealer firm's ability to conduct, and the accounting rules to be applied, to cancel and re-bill transactions, conducting riskless principal transactions, interpretations of the Net Capital Rule and related reporting requirements. According to the depositions of both Mr. Paulukaitis and Mr. Luque, even FINRA requests advice from the SEC on the interpretation of the Net Capital Rule in bringing

enforcement cases. If the Hearing Officer rules in this case in any manner other than that approved by the SEC, the Hearing Officer would be approving an interpretation and application of a federal rule that is contrary to the interpretation by the SEC and would impose a separate and unlawful requirement on broker-dealers in Oklahoma. In summary, if the Department's action results 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. It is precisely because of this risk that there are no cases where a state brings a net capital claim based on its own interpretations of 15c3-1 rather than based on a calculation and determination of the same by FINRA who defers to the SEC on such interpretations. The Department's own expert, David Paulukaitis, admitted as much in his deposition. *See* Exhibit "C" at p. 44.

Because this action may result in an interpretation contrary to FINRA and would, therefore, be void under Section 15(i) this instant action must be dismissed. .

D. FRAGER SHOULD BE AWARDED ATTORNEY'S FEES FOR DEFENDING HIMSELF IN THIS MATTER.

Oklahoma law allows for an award of attorney's fees where a party has successfully obtained dismissal of a frivolous action. More particularly, 12 Okla. Stat. § 2011.1 provides as follows:

> In any action not arising out of contract, if requested the court shall, upon ruling on a motion to dismiss ... determine whether a claim or defense asserted in the action by a nonprevailing party was frivolous. As used in this section, "frivolous" means the claim or defense was knowingly asserted in bad faith or without any rational argument based in law or facts to support the position of the litigant or to change existing law. Upon so finding, the court shall enter an order requiring such nonprevailing party to reimburse the prevailing party for reasonable costs, including attorney fees, incurred with respect to such claim or defense. ...

Accordingly, where it can be shown that a party has brought a frivolous action, the party which successfully obtains dismissal of the same is entitled to an award of fees and costs.

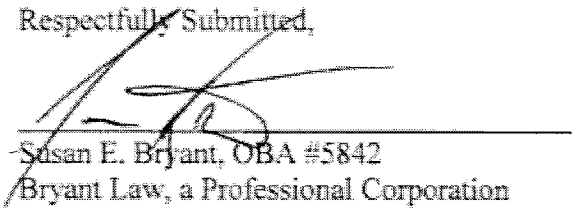
As shown above, the Department's position is simply unsupportable. The Department has continued to assert that there was a loan between Pershing and Geary Securities for the purchase price of the CMOs despite the fact that absolutely no evidence exists to support this position. As Mr. Luque's affidavit notes, there are no documents evidencing a loan from Pershing to Geary Securities for the CMOs and the Department has utterly failed to produce anything in this regard. *See* Exhibit "D" at ¶ 25.

Furthermore, prior to filing this action, the Department had conversations with Pershing related to the transaction at issue. As noted in Frager's original Motion, these recordings establish that the Department had knowledge, prior to filing this action, that its argument lacked any support. More particularly, in these conversations (1) Pershing unequivocally stated that it did not lend Geary Securities any money to purchase the CMOs; (2) Pershing stated that its review of the accounts did not show that the CMOs were purchased by Geary Securities directly, but were, instead, consistent with a transfer by Geary Securities to McKean's accounts with Geary Securities acting solely as intermediary; (3) Pershing stated that the account into which the CMOs were placed prior to settlement was an account used to hold securities pending settlement and transfer to a customer's specific account; and (4) Pershing stated that there was no money ever credited to Geary Securities' account for the CMOs. *See* Exhibit "A;" Exhibit "E;" Exhibit "F." Despite the fact that the Department was aware it lacked support for its May, 2009, claims, it has nonetheless chosen to move forward with this action. Accordingly, the Department lacks any "rational argument" or facts to support its position and accordingly, for the purposes of 12 Okla. Stat. § 2011.1, the Department's argument with regard to the May, 2009, net capital violations is frivolous and the Hearing Officer should award Frager his reasonable costs, including attorney's fees, in defending this claim.

CONCLUSION

As shown above, Geary Securities properly accounted for the CMO transaction and, as a result, no net capital violation occurred in May of 2009. Despite this fact, the Department has argued that Pershing loaned money to Geary Securities to purchase the CMOs which, according to the Department, should have resulted in a reduction of net capital by $79 million. Because there is a complete absence of documentation that any loan occurred, and because representatives of Pershing have unequivocally stated that no loan was made, it is clear that the Department lacks any basis, factual or otherwise, to support its position. Additionally, even if the Department did not lack factual support for its claims, it is clear that the claims against Frager should be dismissed as Oklahoma Rule 660:11-5-17, upon which the Department bases its claims, is demonstrably unconstitutional and the Department lacks the jurisdiction to interpret 15e3-1. Accordingly, Frager's Motion should be granted; the claims against him should be dismissed; and Frager should be awarded his reasonable costs and attorney's fees in defending this action.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 16 2012, a copy of the foregoing document was served on the following via electronic mail:

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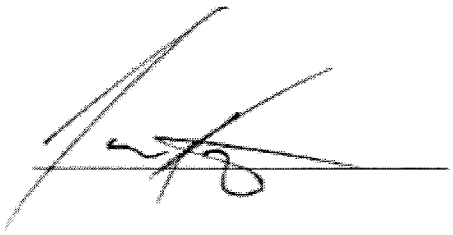
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