

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

RULING ON THE DEPARTMENT'S OBJECTIONS
TO
THE GEARY RESPONDENTS' DISCOVERY REQUESTS

This matter has come before the Hearing Officer on objections raised by the Department of Securities ("Department") to production of certain documents and other materials sought in discovery requests made by the Respondents Geary Securities, Inc. fka Capital West Securities, Inc., Keith D. Geary and CEMP, LLC. (hereafter "Geary Respondents"). At a previous hearing held before the Hearing Officer concerning the 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, it was decided that the Hearing Officer would review certain documents and audio recordings *in camera* to determine if the Department's objections were well founded, or whether the Geary Respondents' discovery requests should instead be granted, and the documents and audio recording sought through discovery be produced in whole or in part by the Department. The procedure for the *in camera* review is governed by the Agreed Order Relating to *In Camera* Inspection entered on May 20, 2011 ("Agreed Order").

The categories of discoverable information sought by the Geary Respondents from the Department and to which the Department has objected are in four different areas: 1) email communications between representatives of the Department and Dave Paulukaitis, who has been disclosed by the Department as an expert witness for the Department in this proceeding (“Paulukaitis E-Mails”); 2) a memorandum prepared by representatives of the Oklahoma State Banking Department that was delivered by the Department to its expert witness, Mr. Paulukaitis (“Banking Memo”); 3) e-mail communications between representatives of the Department and representatives of Pershing, LLC (“Pershing E-Mails”); and (4) audio recordings of telephone conversations between representatives of the Department and representatives of Pershing, LLC (“Pershing Recordings”). It should be noted that it is undisputed by the Department that each of these categories of discovery are responsive to the Geary Respondents’ various requests for production of documents, but discovery is being objected to and they are being withheld by the Department on the grounds of claimed privilege as “work product”. Each of these categories of discovery shall be dealt with separately below.

Initially it should be noted that the purpose of discovery is to allow the parties to the proceeding the fullest possible knowledge of the issues and facts before a hearing on the matter. While the Oklahoma Discovery Code as set forth in Title 12 O.S. 3224 – 3237 does not strictly apply to this administrative proceeding, it provides valuable guidance as to discovery requests made pursuant to Rule 660:2-9-3 of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities. The Oklahoma Discovery Code provides a legislative statement of purpose that it is to be liberally construed so as to provide a just, speedy and inexpensive resolution of every matter to which it applies. See 12 O.S. 3225. It is with this philosophy in mind that the Hearing Officer approached the objections interposed by the Department to the Geary Respondents’ discovery requests.

Paulukaitis E-Mails

The Department contends that the e-mail communications between representatives of the Department and the Department's expert witness contain "work product", and are therefore protected from discovery pursuant to 12 O.S. 3226(B)(3) of the Oklahoma Discovery Code. Mr. Paulukaitis has been identified as an expert witness by the Department. Certain of the e-mails do contain what could arguable be classified as "opinion work product". (See as an example the July 9, 2010 e-mail from the Department's attorney Terra Shamas Bonnell to Dave Paulukaitis.) While there is generally a distinction between ordinary work product prepared in anticipation or preparation for litigation, and opinion work product which contains the mental impressions and legal theories of counsel in the litigation which generally is afforded greater protection from discovery, there is no need to determine the classification, if any, that the Paulukaitis E-Mails may represent.

Because Mr. Paulukaitis is an identified expert for the Department for purposes of this proceeding, documents and communications provided to him are subject to discovery pursuant to the Oklahoma Discovery Code. In this regard, the Discovery Code provides that "[i]f any documents are provided to such disclosed expert witnesses, the documents shall not be protected from disclosure by privilege or work product protection and they may be obtained through discovery." 12 O.S. 3226(B)(4)(2) [emphasis added]. Counsel for the Department has represented that courts in Oklahoma have not specifically addressed the issue of whether opinion work product has lost its privilege when provided to an expert witness. While the discovery rule in Oklahoma regarding the production of documents delivered to expert witnesses differs from that currently provided in the Federal Rules of Civil Procedure (Fed.R.Civ.P. 26) as far as opinion work product, which in some situations allows the work product privilege to be asserted to resist discovery of documents delivered to an expert witness which contains mental

impressions, conclusions, opinions or legal theories of an attorney or other representative of a party, such is not the law in Oklahoma at this time. The Department argues that the Oklahoma Legislature was considering a change to the Discovery Code that would expand the claim of privilege that could be made for documents provided to expert witnesses similar to that contained in Rule 26 of the Federal Rules of Civil Procedure, but to the knowledge of the Hearing Officer such change has not been made to the Discovery Code.

The language of §3226(B)(4)(2) of the Oklahoma Discovery Code is clear and unambiguous, and thus requires the production of the Paulukaitis E-Mails to the Geary Respondents.

Banking Memo

The Department has represented that the Banking Memo was accidentally provided to their expert witness, Mr. Paulukaitis, and that the Banking Memo additionally has confidential status pursuant to the provisions of Oklahoma banking law and §1-613 of the Oklahoma Uniform Securities Act of 2004. The Department does not dispute that the Banking Memo was provided by the Department to its expert witness, and no evidence has been submitted to establish whether the information contained in such memo may or may not have contributed to opinions formed by such expert witness that he is prepared to testify to in this proceeding. It is also impossible at this time for the Hearing Officer to determine whether the substance of the Banking Memo is relevant to the issues in this proceeding, and to the allegations made by the Department against the Respondents.

Under the Oklahoma Discovery Code, 12 O.S. 3226(B)(4)(a)(2), any documents provided to a disclosed expert witness are discoverable, and claims of privilege and work product shall not be allowed so as to keep such documents from being subject to discovery by the opposing side.

Thus, the Discovery Code dictates that the Banking Memo be produced by the Department pursuant to the Geary Respondent's discovery request.

Additionally, while the Department has asserted that such memo is confidential under provisions of Oklahoma banking and securities laws, it has failed to present any argument as to why in the case of this particular document maintaining its confidentiality from disclosure to the Geary Respondents is in the public interest which would override the Respondents' right under the Discovery Code to have such document produced pursuant to their discovery request. The Hearing Officer does not believe that the production of the Banking Memo to the Geary Respondents will in any way adversely affect the regulatory mission of the Oklahoma State Banking Department or the Oklahoma Department of Securities under their respective regulatory statutes.

The Department further contends that the Geary Respondents should have submitted a request to the State Department of Banking for the Banking Memo to be produced so as to allow the Banking Department the opportunity to assert any privilege or protection it may have. The Hearing Officer believes that such approach to this issue is incorrect in that the burden of asserting any privilege to bar production of the Banking Memo in discovery is on the Department. If there were additional grounds to justify maintaining the Banking Memo as confidential under Oklahoma law such grounds should have been asserted by the Department. The Department has created this situation by its own violation of §1-613 of the Securities Act in providing the Banking Memo to its expert witness, and has provided no justification to support maintaining confidentiality for the document.

For these reasons the Department's objection to the production of the Banking Memo is not well taken, and the document should be produced to the Geary Respondents pursuant to their discovery request.

Pershing E-Mails

The Pershing E-Mails consist of an e-mail chain of communications between representatives of the Department and representatives of Pershing, LLC. Pershing is not a party to this proceeding, but apparently was consulted by the Department concerning factual issues involved in this case, and to obtain certain evidence for the investigation. Such e-mails were exchanged between the Department's representatives and Pershing apparently during the course of the Department's investigation of the matters at issue in this proceeding as the Department's personnel were conducting their investigation. The communications at issue were between Carol Gruis, the Department's Director of Examinations, Kim Reed, the Department's Senior Examiner and Samantha Kefford, Pershing's Vice-President for Compliance. Additionally, there were a number of communications between Terra Shamas Bonnell, the Department's Attorney, and Ms. Kefford. Most of the e-mails involve the collection of evidence by the Department in the course of its investigation, and requests to obtain specific records from Pershing concerning certain transactions involving Capital West Securities, Inc./Geary Securities, Inc. The e-mails occurred long before the Department's investigation was concluded and it determined to pursue this administrative action, and thus it is questionable whether they were prepared in anticipation of litigation.¹

One e-mail message dated July 8, 2010 from attorney Bonnell to Pershing's Kefford was captioned "Confidential Work Product", and included statements of attorney Bonnell concerning her understanding of certain transactions, and thus arguably her theory of the case. This is the only document in the Pershing E-mails that arguably could be classified as opinion work product containing the mental impressions, conclusions or opinions of counsel for the Department.

¹ If such investigative inquiries prior to a regulatory agency's determination to pursue an administrative remedy were to be determined to be "ordinary work product" prepared in anticipation of litigation, then virtually all evidence gathered in such an investigation would be privileged and arguably undiscoverable.

The Department has argued that the Pershing E-Mails are work product, and are thus privileged and not discoverable pursuant to 12 O.S. 3226(B)(3) of the Oklahoma Discovery Code. Thus, the first issue is whether such communications and attachments are in fact “work product” as contemplated by the Discovery Code.

A review of the Pershing E-Mails leads to the conclusion that they are a chronicle of the Department’s efforts to investigate certain securities transactions involving the Respondent Geary Securities, Inc. They consist of requests for certain documents and records from Pershing, and explanations by Pershing representatives of certain transactions involving Geary and of their own records. The communications from the Department’s personnel to Pershing and Pershing’s answers, including records and reports provided by Pershing in response to the Department’s requests, are not in the opinion of the Hearing Officer work product as contemplated by 12 O.S. 3226(B)(3) of the Discovery Code. For the most part requests for information were made in the Pershing E-Mails by non-lawyer personnel of the Department directed to Pershing, and Pershing personnel produced records and other information in the possession of the firm responsive to such requests. Basically, the Pershing E-Mails represent the effort by the Department to collect factual evidence in its investigation, and does not contain evidence of the Department attorney’s mental impressions, conclusions, opinions or legal theories of the case. Further, it is not clear whether any records produced by Pershing pursuant to the e-mail requests from the Department were prepared in preparation for or in anticipation of the litigation of this matter, as opposed to being the usual and ordinary records of the firm. Thus, the Hearing Officer concludes that the Pershing E-mails are not privileged under the cited provision of the Discovery Code.

The exception to this may arguably be the July 8, 2010 e-mail from the Department attorney Bonnell to Samantha Kefford. In this e-mail attorney Bonnell states her understanding of the occurrence of certain transactions involved in the case, and asks for explanation or

comment from the Pershing representatives on these transactions. However, it is the Hearing Officer's opinion that this e-mail does not contain expressions of the mental impressions, conclusions, opinions or legal theories of the Department's legal counsel, and therefore should not be privileged as opinion work product.

Finally, the Geary Respondents would be unable to obtain a substantial equivalent of the information contained in the Pershing E-Mails without undue cost and hardship.

For these reasons the Pershing E-Mails should be produced to the Geary Respondents pursuant to their discovery requests.

Pershing Recordings

The Pershing Recordings consist of recordings of three telephone conversations between representatives of the Department and Pershing LLC. The first of such recordings is of a portion of a telephone conversation between a Joan Schwartz² of Pershing and an unidentified representative of the Department³ (recording identified as "062510 Joan Schwartz"). In this recording Ms. Schwartz is explaining the business practices of Pershing as they relate to certain CMO securities transactions involving Capital West Securities. The Department's representative asks questions of Ms. Schwartz to get clarification of these transactions and the procedures followed by Pershing in handling the transactions. While some discussion does take place concerning possible reasons for the transactions or for actions taken by Capital West/Geary, the conversation primarily evidences the collection of evidence by the Department in its investigation and clarification of Pershing's business practices and records, and further does not contain expressions of mental impressions, conclusions, opinions or legal theories of the case by the Department's representative. In the opinion of the Hearing Officer the subject recording is

² It appears from statements made in the conversation that the name of the Pershing representative on the telephone call is Joan Schwartz, although the audio file is named "Joan Schwatz".

³ The Hearing Officer believes that the Department's representative on the telephone call is attorney Terra Bonnell, although that is not entirely clear from the recording.

not work product subject to privilege under 12 O.S. 3226 of the Discovery Code. Additionally, since it is assumed that Pershing did not record the conversation the Geary Respondents would be unable to obtain a substantial equivalent of the Schwartz recording without undue cost and hardship.

The second recording (recording identified as “070810 Sam and Jim @ Pershing”) is of a portion of a telephone conversation between representatives of Pershing, LLC⁴ and a representative of the Department⁵. The conversation involves a further clarification of transactions involving Respondent Geary Securities and Pershing. As with the Schwartz recording above, it evidences a collection of evidence by the Department as part of its investigation, and is not in the opinion of the Hearing Officer privileged from discovery production under the work product doctrine.

Finally the third recording (recoding identified as “10-12-09 151312”) is a telephone conference call between Joan Schwartz, Samantha Kefford, Carol and Jim⁶ from Pershing, and Melanie Hall and Kim Reed⁷ for the Department. The conversation involved discussion of two SAR reports prepared by Pershing, LLC as a clearing broker for Capital West/Geary as the introducing broker, concerning CMO transactions occurring in 2009. In the conversation the Department’s representatives are questioning the Pershing representatives concerning Pershing’s preparation of two SAR reports on CME transactions involving Capital West/Geary. The Pershing representatives go into detail explaining the reasons behind preparation of the SAR reports, and of Pershing’s records of the subject transactions. The Hearing Officer does not believe that the 10-12-09 recording contained statements of the mental impressions, conclusions,

⁴ It is believed that the Pershing representatives are Samantha Kefford and the other is only identified as “Jim”.

⁵ It is believed that the Department’s representative on the telephone call is attorney Terra Bonnell.

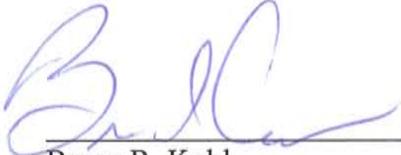
⁶ The Hearing Officer could not make out the last names of these two Pershing representatives.

⁷ Melanie Hall is the Director of Enforcement for the Department, and it is believed that Kim Reed is an investigator/examiner for the Department.

opinions or legal theories of the Department's counsel, and thus cannot be concluded to contain opinion work product. Similarly as with the other two recordings, it does not appear that such were prepared in anticipation of a litigation which was initiated almost a year later, and so should not be viewed as ordinary work product. Finally, for the reasons stated above the Geary Respondents would be unable to obtain a substantial equivalent of the information contained in the recording without undue cost and hardship. Thus, the Hearing Officer concludes that the 10-12-09 recording is not work product subject to privilege under 12 O.S. 3226 of the Oklahoma Discovery Code, and should be produced pursuant to the Geary Respondents' discovery request.

Pursuant to the Agreed Order the Hearing Officer will deliver the disputed discovery documents and recordings directly to the Geary Respondents. Since all of the disputed discovery documents and recordings submitted for *in camera* review have been determined to be discoverable by the Geary Respondents, pursuant to the Agreed Order the Hearing Officer will not be returning any of the documents or recordings to the Department.

Dated October 27th, 2011.



Bruce R. Kohl
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of October, 2011, a true and correct copy of the above and foregoing *Ruling on the Department's Objections to the Geary Respondents' Discovery Requests* was emailed and mailed, with postage prepaid, to:

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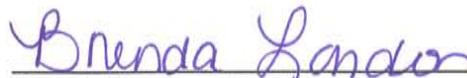
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