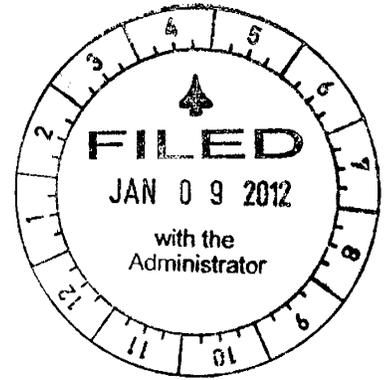


STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



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

OBJECTION TO RESPONDENT FRAGER'S MOTION FOR SANCTIONS
AND BRIEF IN SUPPORT

On December 28, 2011, Respondent Norman Frager ("Respondent" or "Respondent Frager") filed a motion requesting sanctions against the Department of Securities (Department) in connection with the Department's currently pending motion for summary decision against him. Respondent Frager's motion was filed purportedly in reliance on Section 2011 of the Oklahoma Pleading Code, tit. 12, § 2001 *et seq.* However, Respondent Frager failed to comply with the "safe-harbor" period mandated by the statute, causing the motion to be invalid. Respondent Frager's motion is nothing more than a disguised sur-reply filed in further response to the Department's summary judgment motion. Accordingly, the motion for sanctions should be denied.

I. Respondent's motion is procedurally and fatally flawed.

Sanctions may be imposed under Section 2011 by a motion filed in compliance with Section 2011(C)(1)(a). The statute provides in pertinent part as follows:

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection B of this section. It shall be served as provided in Section 2005 of this

title, but **shall not** be filed with or presented to the court **unless**, within twenty-one (21) days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. (Emphasis added.)

The issue decided by the Oklahoma Supreme Court in *Tal Technologies, Inc. v. L.D. Rhodes Oil Co.*, 2000 OK 38, 4 P.3d 1256,¹ was whether a motion for sanctions was untimely when the movants failed to comply with the “safe-harbor” provision of Section 2011. The Court stated that a “motion cannot be filed or presented to the trial court until the party has been served with the motion for sanctions and given twenty-one (21) days in which to withdraw the offending pleading (the so-called ‘safe-harbor’ period)”. *Id.* at 1258. The Court clearly established that compliance with the “safe-harbor” provision is mandatory. *Id.* at 1259. Further, in citing to cases interpreting the federal counterpart to Section 2011, the Court noted that a “failure to comply with the safe harbor provision is **fatal** to a motion for sanctions.” *Id.* (Emphasis added.)

Respondent Frager filed his motion for sanctions before expiration of the 21-day “safe-harbor” period. The motion for sanctions was served on the Department simultaneously with its filing in this matter and submission to the Hearing Officer. See Exhibit 1. Respondent Frager’s motion is procedurally invalid. See *Garage Storage Cabinets, L.L.C. v. Mitchell*, 2007 OK CIV APP 84, 169 P.3d 1211, 1216 (sanctions motion found invalid because, in part, not served on the “offending party” before the filing of the motion with the court). The motion should be denied and should receive no further consideration by the Hearing Officer in connection with the motion for sanctions or the motion for summary disposition.

¹ Respondent Frager cites to *Tal* in his request for sanctions.

II. Defendant's sanctions motion is substantively flawed.

Much of Respondent's request for sanctions is directed to the actual ruling on the summary disposition motion itself. Although not viable, the arguments should have been made in Respondent's response to the Department's motion. Ironically, the methods utilized by Respondent in making his arguments in support of sanctions are the same methods that Respondent unjustifiably accuses the Department of employing.

While 660:2-9-3 of the Administrative Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (Rules) authorizes summary disposition in an administrative proceeding, the rule is silent as to the requisite process or procedure. Rule 13 of the Rules for District Courts of Oklahoma (Rule 13) fills that gap. Subsection (b) of Rule 13 sets forth the requirements to oppose summary disposition. An opposing party must submit a "concise written statement of the material facts as to which a genuine issue exists", together with the reasons for denying the motion, and attach evidentiary material in support thereof. Rule 13(b). Each specific material fact claimed to be in controversy must be set forth and numbered in the written statement and reference must be made to the pages and paragraphs or lines of the evidentiary materials. *Id.*

Contrary to his argument, the amount or volume of evidence presented by Respondent is not a determining factor. Rather, the appropriate question is whether Respondent has specifically controverted, through his own acceptable evidentiary material, all material facts that are supported by the materials submitted by the Department. Respondent Frager has not submitted the required written statement of the material facts he claims to be in dispute or evidentiary materials in support thereof. Instead of sanctions against the Department, the

material facts set forth in the Department's motion for summary decision must be deemed admitted in accordance with Rule 13(b) which provides in pertinent part as follows:

[a]ll material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment or summary disposition **unless specifically controverted** by the statement of the adverse party which is supported by acceptable evidentiary material. (Emphasis added.)

Since he did not specifically controvert the facts contained within the Department's summary disposition motion in his response, Respondent Frager attempts to overcome his failings with accusations of frivolity and misrepresentations. The Department's response to such accusations follows.²

1. Legal research and reasoning

Respondent Frager undertakes desperate measures to challenge the Department's legal authorities relating to the summary judgment process in general. The Department did not rely on these cases for their holdings; rather, the Department cited the cases for the established points of law utilized by the courts in arriving at the ultimate holdings.

The parties do not disagree as to when summary judgment is appropriate, that is, when there is no genuine issue as to a material fact and the movant is entitled to judgment as a matter of law. Okla. Stat. tit. 12, § 2056(C) (OSCN 2011). The Department relies on *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602, for the Oklahoma Supreme Court's definition of "no substantial controversy as to a material fact." The Court's explanation follows:

in order for a court to find that there is no substantial controversy as to any material fact raised by the issues, it must appear not only that there is no dispute as to such facts themselves, but also that reasonable people exercising fair and impartial judgment could not reach differing conclusions upon the undisputed facts.

² The Department incorporates herein by reference its *Motion for Summary Decision Against Respondent Norman Frager and Brief in Support*.

Id., at 605.

Respondent Frager also challenges the Department's reliance on the cases of *Polymer Fabricating, Inc.*, 980 P.2d 109, 112 (Okla. 1998), and *Roberson v. Jeffrey M. Waltner, M.D., Inc.*, 108 P.3d 567, 569 (Okla.Civ.App. 2005). The Department cites to points of law addressed in these cases as additional authority for the principle discussed in *Adams v. Moriarty*, 127 P.3d 621, 624 (Okla.Civ.App. 2005), that is, a summary judgment motion must be decided on the record before the trier of fact.³

2. *Evidentiary materials in the record*

Respondent Frager appears confused as to what materials are contained within the record in this matter. Respondent urges consideration of all materials "submitted" to the Hearing Officer. The Department does not disagree. However, the transcripts of the sworn testimony taken by FINRA are not attached to Respondent Frager's response and have not otherwise been submitted to the Hearing Officer. Any references by Respondent to this testimony may not be considered by the Hearing Officer. Respondent's general references in his pleadings to the testimony do not satisfactorily demonstrate a factual dispute. *See Adams*, 127 P.3d at 624.

On the other hand, the transcripts of the Department's depositions of Respondent Frager and Keith Geary *are* a part of the record in this matter. However, without specific references to pages and lines of the transcripts in support of his contentions, as required by Rule 13(b), Respondent has not satisfactorily demonstrated a factual dispute. He "cannot rely on the allegations in his pleadings alone to demonstrate a dispute of fact." *See id.*

Conveniently, Respondent Frager ignores the significance of the components of the record as discussed in *Adams* and, instead, attacks the Department for its citation to *Hulsey v.*

³ Respondent Frager's challenge to certain of the cases cited by the Department on this point of law are addressed in Section 2 that follows.

Mid-America Preferred Insurance Co., 777 P.2d 932 (Okla. 1989). The summary judgment pleadings at the trial court level in *Hulsey* are pertinent here. The court described the pleadings of the parties as follows: “[a]lthough both parties referred several times to the ‘testimony’ of various witnesses who had apparently been deposed, *no materials extraneous to the pleadings were either tendered for the court’s consideration or even filed with the trial court.*” (Emphasis in original.) 777 P.2d at 935. The Department appropriately cites to *Hulsey* for its obvious inference supporting the proposition set forth in *Adams*: deposition testimony that is not part of the record “may not be used as evidentiary material in the summary judgment process.” 777 P.2d at 935-936.

3. *The Hearing Officer’s Role*

Respondent Frager raises the issue of the weighing of evidence in connection with a summary disposition motion. In doing so, Respondent challenges the Department’s use of a quote from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), cited by the Tenth Circuit in *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988), in connection with the ultimate resolution of a summary disposition motion.⁴

The Court in *Anderson* declared the “threshold” question to be “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” 477 U.S. at 251-252.⁵ The Court distinguished

⁴ The Oklahoma Supreme Court has “observed that Rule 13 was patterned after Rule 56 of the Federal Rules of Procedure. The Federal cases under Rule 56 therefore have undoubted special application and are entitled to such consideration by this Court.” *Northrip v. Montgomery Ward & Co.*, 1974 OK 142, 529 P.2d 489, 496.

⁵ Respondent accuses the Department of misrepresenting the holding in *Anderson*. Respondent correctly identifies the cause of action in *Anderson* as one involving libel. However, contrary to Respondent’s position, the Court in *Anderson* in no way states or infers that the summary judgment standard applied is applicable only to cases of libel involving public figures. The *Burnette* case involved a products liability matter. The Tenth Circuit quoted *Anderson* regarding the summary judgment standard in *Bacchus Industries, Inc. v. Arvin Industries, Inc.*, 939 F.2d 887 (10th Cir. 1991), a RICO case cited by the Oklahoma Supreme Court in *Carmichael v. Beller*, 1996 OK 48, 914 P.2d 1051, in connection with its statement of the standard of review for summary judgments.

between a determination of the truth of the matter and a determination of whether there is a genuine issue for trial. The Court stated:

at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. . . . there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.

477 U.S. at 249. The Court continued:

[t]here is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining **whether there is the need for a trial**-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. (Emphasis added.)

Id. at 250.

The reasonableness factor comes into play when drawing any inferences and conclusions from a set of undisputed facts. To find that there is no substantial controversy as to those facts, "it must appear not only that there is no dispute as to such facts themselves, but also that reasonable people exercising fair and impartial judgment could not reach differing conclusions upon the undisputed facts." *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602, 605 (citing *Northrip v. Montgomery Ward & Co.*, 529 P.2d 489, 493 (Okla. 1974)). Respondent Frager generalizes that facts from which more than one inference may be drawn or facts subject to differing interpretations are, *per se*, in dispute. Respondent ignores the principle that any two or more inferences from, or interpretations of, the material facts presented must be reasonable to defeat summary disposition.

As to this matter, there is no need for a hearing. The Hearing Officer may conclude on the basis of the depositions, affidavits and other evidentiary materials submitted by the Department, and uncontroverted by Respondent, that there are no genuine issues of material fact. The Fifth Circuit in *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978), evaluated whether

the lower court's rendering of summary judgment was appropriate when it determined that the defendant's delay in paying production royalties was justifiable, or whether the question should have been resolved at trial. The *Nunez* court stated that:

[i]f decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, **even though decision may depend on inferences to be drawn from what has been incontrovertibly proved**. . . . A trial on the merits would reveal no additional data. Hearing and viewing the witnesses subject to cross-examination would not aid the determination if there are neither issues of credibility nor controversies with respect to the substance of the proposed testimony. The judge, **as trier of fact**, is in a position to and **ought to draw his inferences** without resort to the expense of trial. (Emphasis added.)

Id. at 1123-24. The Ninth Circuit in *Transworld Airlines, Inc., v. American Coupon Exchange*, 913 F.2d 676 (9th Cir. 1990), stated: “[W]here the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties should go through the motions of a trial if the court will eventually end up deciding on the same record.” 913 F.2d at 684.

Again, Respondent has failed to controvert any of the facts set forth in the Department's summary disposition motion. The Hearing Officer, as the trier of fact, is in a position to draw his inferences without the necessity of a hearing. Furthermore, while the facts are pertinent to a summary disposition ruling, “the ultimate decision turns on the purely legal determination of whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.” *Head v. McCracken*, 2004 OK 84, 102 P.3d 670, 674 (citing *Carmichael v. Beller*, 1996 OK 48, 914 P.2d 1051, 1053). Based on the undisputed facts, summary disposition of this matter is appropriate because the Department, as demonstrated in its summary disposition motion, is entitled to judgment as a matter of law.

4. Pre-emption

Respondent mistakenly argues that the Department is pre-empted from enforcing 660:11-5-17 of the Rules (the “Net Capital Rule”). The parties agree that the states are explicitly prohibited from establishing capital requirements that differ from, or are in addition to, the requirements under federal law. The Net Capital Rule mirrors the federal requirements by simply incorporating by reference the net capital amounts established by the SEC and the formula established by the SEC for performing net capital calculations. This state’s rule clearly complies with the federal mandate as set forth in Section 15(i) of the Securities Exchange Act of 1934.

As to this state’s enforcement of the Net Capital Rule, Respondent uses a “broad brush” to make his argument. Respondent relies on a single sentence from a lengthy article from *Business Lawyer*, “The Impact of NSMIA on State Regulation of Broker-Dealers and Investment Advisers”, in support of his contention. Respondent conveniently ignores a critical portion in the meat of the article. The author states:

NSMIA prohibits any state law from establishing requirements in the specified areas which differ from, or are in addition to, the requirements of federal law. **This formulation was presumably intended to encourage states to enact provisions identical to federal ones, and then share enforcement responsibility.** State-enforcement resources add critical front-line troops to those of the SEC and SROs. Blue-sky authorities are particularly able to respond to investor complaints against smaller regional brokerage firms operating primarily in one or a few states. (Emphasis added.)

Howard M. Friedman, *The Impact of NSMIA on State Regulation of Broker-Dealers and Investment Advisers*, 53 *Bus.Law.* 511, 522 (1998) (discussing the consequences of pre-emption).

Respondent appears to rely on the following excerpt from the article in which the author observes:

In NSMIA, Congress merely precluded states from establishing nonconforming requirements. . . . **When nonconforming state laws exist**, they are unenforceable. With no permission to enforce federal requirements, state blue-sky officials have their hands tied. They have no authority to proceed against a problem broker-dealer firm for violating financial responsibility, reporting, or recordkeeping requirements. Blue-sky authorities may not, for example, issue a state cease-and-desist order prohibiting the broker-dealer from continuing to violate **federal requirements not mirrored in state law**. The state must await a decision by the SEC or one of the SROs to devote resources to the case. (Emphasis added.)

Id. at 523. If Oklahoma's Net Capital Rule did not mirror the federal requirements, the Department would be prohibited from bringing this action against Respondent without the SEC or FINRA acting first. But such is not the case.

The question of the appropriate *method* or *formula* for calculating net capital is not in dispute. As Respondent Frager states, "The calculation of net capital and whether the net capital was reported correctly or incorrectly is the central issue in this matter. The calculation of net capital depends **on whether the PL-CMO's were in the account of Geary Securities, Inc., on May 31, 2009**, which in turn depends, among other factors, on whether the attempted purchase of the securities by Geary Securities, Inc. was cancelled and rebilled or whether the purchase was executed and funds loaned to Geary Securities, Inc. for such purpose." (Emphasis added). In its motion for summary decision against Frager, the Department sets forth undisputed evidence that shows that the PL-CMOs were in the account of Geary Securities on May 31, 2009. See ¶¶ 15-17 (Geary Securities purchased the PL-CMOs in its inventory account and the securities were in that account on May 31, 2009); ¶ 19 (the PL-CMOs were sold from the Geary Securities inventory account on June 1, 2009); ¶¶ 30-32 (Respondent Frager treated the PL-CMOs as if the securities were in customer accounts before the end of May and he marked through the \$79.3

million balance indicated on the firm's inventory report and replaced that figure with a zero); ¶ 33 (Respondent Frager included accrued interest on the PL-CMOs as an asset of the firm as of May 31, 2009); and ¶ 37 (the firm accounted for the payment of interest to Pershing to carry the PL-CMO inventory). These facts have not been properly controverted by Respondent Frager and are not in dispute. In addition, there is only one reasonable inference to be drawn from these facts: the PL-CMOs were in the account of Geary Securities Inc., as of May 31, 2009. As a result, the firm was under net capital by millions of dollars as of May 31, 2009.

The Department uses the affidavit of David Paulukaitis, whose second affidavit establishes his qualifications as an expert in the area of net capital computations⁶, to establish the *method* for calculating the firm's net capital where the PL-CMO's were in the account of Geary Securities, Inc., on May 31, 2009. The Department's reliance on David Paulukaitis' affidavit is appropriate. Respondent Frager is apparently under the misconception that the Department's net capital calculations differ from those of FINRA. However, with respect to the May 2009 deficiency, Respondent Frager's previous admissions demonstrate that this argument is totally without merit. Respondent testified in his deposition before the Department that FINRA informed Geary Securities of a net capital violation involving millions of dollars during its November 2009 examination. Frager Dep. 82:11-83:9. The firm's own records reporting its net capital deficiencies in February 2010 speak for themselves. These records were filed with FINRA by Respondent Frager. Furthermore, as part of his previously filed motion to bifurcate and stay the Department's net capital claims, Respondent incorporated the argument set forth in a similar motion filed by the other respondents in this matter. Directly counter to Respondent Frager's argument is the following statement: "FINRA is pursuing an enforcement action against

⁶ The determination of Mr. Paulukaitis' qualification as an expert is within the discretion of the Hearing Officer. See *Williams National Gas Co. v. Perkins*, 952 P.2d 483, 489 (Okla.1997).

Respondent Frager on the identical Net Capital Claims the Department is pursuing in this action.”

The Department did not act frivolously in filing the pending summary judgment motion. Sanctions against the Department are not warranted.

CONCLUSION

The Department requests that the motion be denied. The Department further requests that the Department’s costs to oppose the motion be assessed against Respondent Frager pursuant to Section 2011(C)(1)(a) of Title 12 of the Oklahoma Statutes.

Respectfully submitted,

By: Melanie Hall

Melanie Hall, OBA #1209
Terra Bonnell, OBA #20838
Oklahoma Department of Securities
120 N. Robinson, Suite 860
Oklahoma City, OK 73102
Phone: 405-280-7700 /Fax: (405) 280-7742
Attorneys for Department

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of January, 2012, a true and correct copy of the above and foregoing motion was emailed and mailed, with postage prepaid, to:

Mr. Bruce R. Kohl
201 Camino del Norte
Santa Fe, NM 87501
Bruce.kohl09@gmail.com

Hearing Officer

Joe M. Hampton, Esq.
Amy J. Pierce, Esq.
A. Ainslie Stanford II, Esq.
Corbyn Hampton, PLLC
211 North Robinson, Suite 1910
Oklahoma City, OK 73102
JHampton@Corbynhampton.com

*Attorney for Respondents Geary Securities, Inc., Keith D. Geary,
and CEMP, LLC*

Donald A. Pape, Esq.
Donald A. Pape, PC
401 W. Main, Suite 440
Norman, OK 73069
don@dapape.com

and

Susan E. Bryant
Bryant Law
P.O. Box 596
Camden, ME 04843
sbryant@bryantlawgroup.com

Attorneys for Respondent Norman Frager



Brenda London

From: Susan Bryant [sbryant@bryantlawgroup.com]
Sent: Wednesday, December 28, 2011 2:49 PM
To: Brenda London
Cc: Donald A. Pape; Bruce R. Kohl ; Melanie Hall; Terra Bonnell; jhampton@corbynhampton.com; astanford@corbynhampton.com; apierce@corbynhampton.com
Subject: ODS Matter file No. 09-141; Geary Securities, et al.
Attachments: Motion for Sanctions.pdf

Dear Ms. London:

Please file the attached in the referenced matter.

Sincerely,

*Susan E. Bryant**
BRYANT LAW,
a Professional Corporation
62 Bayview Street, Suite 21
Post Office Box 596
Camden, ME 04843
Tel: 207-230-0066
fax: 207-230-0077

*admitted in Connecticut, Maine, Massachusetts, Missouri, Nebraska, New York, Oklahoma

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