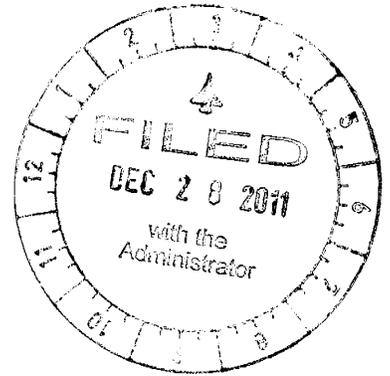


STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



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

MOTION FOR SANCTIONS

Respondent Norman Frager hereby requests that the hearing officer in the referenced matter enter an Order imposing sanctions on the Oklahoma Department of Securities (*Department*) pursuant to Section 2011 of the Oklahoma Rules of Civil Procedure¹ for filing a Motion for Summary Decision against Respondent Frager that (i) has no legal basis as documented by the evidence and authorities included with the Department's own filings; (ii) bases its authority on cases with contrary holdings; (iii) misrepresents authorities and case holdings; and (iv) apparently was filed for no reason other than to harass Respondent and divert the parties from resolving the discovery and preemption issues currently pending in this matter. Respondent Frager hereby submits the following in support of this Motion.

I. INTRODUCTION

On November 1, 2011, the Department filed a Motion (*Motion*) for Summary Decision against Norman Frager in the above referenced matter. On November 30, 2011, Respondent filed a Response (*Response*) to the Motion citing numerous facts that were in dispute based on evidence submitted by the Department, as well as additional evidence submitted by Respondent. On December 12, 2011, the Department served a Reply (*Reply*) on counsel for Respondent, which included additional arguments and supplemental materials intended to correct flaws in the

¹ 12 O.S. Chapter 2, Appendix.

Department's original Motion and purporting to controvert arguments made in the Response. After a thorough review of the filings by the Department, the authorities cited therein and the evidence included therewith, we have concluded that the Motion is unsupported by any authority or evidence, there is no basis for the Department's Motion, and therefore, the Department has filed a frivolous claim, costing Respondent significant amounts in legal fees and expenses. The Department is attempting to try its case in a motion for summary decision, which is contrary to the Oklahoma Administrative Procedures Act,² the Oklahoma Rules of Civil Procedure³ and the case law cited by the Department in support of its Motion.

II. DISCUSSION

The Department has misrepresented the legal effect of the exhibits provided by it, misquoted from cases and misstated findings in those cases to support its Motion. The following documents the legal insufficiency of the Motion, Reply and supporting documentation submitted by the Department.

1. Summary judgments are NOT favored in Oklahoma.

The Department urges the hearing officer to consider the purpose of summary judgment in ruling on its Motion,⁴ citing as authority *Flanders v. Crane Co.*⁵ and *Flick V. Couch*.⁶ The Department states that those cases hold "The very purpose of summary disposition motions is to eliminate the need for a hearing by providing the hearing officer with the opportunity to review evidentiary materials in order to determine whether there is any issue of fact to be addressed at hearing." The statement does not reflect the holding of either case, both of which overturned lower court orders granting summary judgment. The Court in *Flick* actually stated:

² 75 O.S. 250 – 507

³ 12 O.S. Chapter 2 Appendix.

⁴ Page 1 of the Reply.

⁵ *Flanders v. Crane Co.*, 693 P.2d 602 (Okla. 1984).

⁶ *Flick v. Crouch*, 434 P.2d 256, 262 (Okla. 1967).

The object of that rule [Rule 13 of the Oklahoma Rules of Civil Procedure] is to avoid a Useless trial, and a trial is not only Useful but absolutely necessary where there is a genuine issue as to any material fact.⁷

Similarly, the Court in *Flanders* actually stated:

Thus, despite its usefulness in terms of judicial economy, summary judgment must not be allowed to deprive a litigant of a jury trial of disputed issues of fact.⁸

Most notably, the Court in *Flanders* cites additional cases where appellate courts overturned orders for summary judgment stating:

[S]ummary judgments are not favored, *Love v. Harvey*, 448 P.2d 456, 462 (Okl.1968); and, they should be granted only where it is 'perfectly clear' that there are no issues of material fact in a case, Northrip, *supra*,⁹ at 497. Indeed, even when a judge believes that a directed verdict will be necessary, he or she should ordinarily allow the evidence to be heard and then direct a verdict rather than grant summary judgment. Northrip, *supra*. ...Thus, despite its usefulness in terms of judicial economy, summary judgment must not be allowed to deprive a litigant of a jury trial of disputed issues of fact. *Thompson v. Madison Machinery Co.*, 684 P.2d 565, 570 (Okl.Ct.App.1984).¹⁰

We submit that it is a violation of Section 2011 to cite as authority cases that not only do not contain the holding represented by the Department, but which actually hold to the contrary.

2. Very little evidence is required to defeat a motion for summary judgment.

The Department cites as grounds for granting summary decision the fact that Respondent Frager did not produce large amounts of evidence, dispute all of the facts and cite many authorities in his Response, implying that a summary decision should be granted if the Respondent does not submit a volume of evidence and authorities. That position is not supported by Oklahoma law, a fact which was known or should have been known to the Department, since it is evident from the cases cited by the Department. Because summary judgment is not favored, it takes very little

⁷ *Flick v. Crouch*, *supra* at p. 262 (Okla. 1967).

⁸ *Flanders v. Crane Co.*, 693 P.2d 602, 605 (Okla. 1984), citing *Thompson v. Madison Machinery Co.*, 684 P.2d 565, 570 (Okl.Ct.App.1984).

⁹ *Northrip v. v Montgomery Ward*, 529 P.2d 489 (Okla. 1974).

¹⁰ *Flanders v. Crane Co.*, *supra* at p. 605 and cases cited therein.

evidence to defeat a motion for summary judgment. In *Roberson v. Jeffrey M. Waltner, M.D., Inc.*¹¹, a case cited by the Department, the Court stated as follows:

Plaintiff did not file a response to Defendants' motion and the trial court granted it. Because Plaintiff failed to respond to the motion for summary judgment, she presented no evidence to controvert Defendants' evidence, in the form of Dr. Waltner's affidavit, Plaintiff's medical records, and her answers to the interrogatories. However, Defendants were not entitled to summary judgment solely because Plaintiff did not respond. **There can be no summary judgment by default. Even if the party against whom summary judgment is sought files no response, the trial court must ensure that the motion is meritorious.** [emphasis added].

3. All materials submitted should be considered in determining whether there are issues of material fact.

The Department appears to be urging the hearing officer to review only selected evidence, by urging reliance on the affidavit of a yet to be qualified expert, relying on only certain statements in the depositions, apparently ignoring contradictory statements in the same depositions and urging that sworn testimony before the Financial Industry Regulatory Authority (*FINRA*) be excluded. Oklahoma law on the issue is clear, again in a case cited by the Department:

Summary judgment is proper only when the pleadings, affidavits, depositions, admissions, or other evidentiary materials establish that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.¹²

The Department cites *Hulsey v. Mid-America Preferred Insurance Co.*¹³ as authority for the proposition that “deposition testimony that is not part of the record ‘may not be used as evidentiary material in the summary judgment process.’” The quote is incomplete and misleading. The following is the full quote:

Deposition testimony that is not on file in conformity with 12 O.S.Supp.1986 § 3207(G) may not be used as evidentiary material in the summary judgment process.

The case is not on point and has no relevance to the matter at issue. *Hulsey* involved an

¹¹ *Roberson v. Jeffrey M. Waltner, M.D., Inc.*, 108 P.3d 567 (Okla.Civ. App. 2005).

¹² *State ex rel. G.E. Hettel v. Security National Bank & Trust Co*, supra at p. 609.

¹³ *Hulsey v. Mid-America Preferred Insurance Co.*, 777 P.2d 932, 935-36 (Okla. 1989).

appellate court review of a trial court's order granting summary judgment at the end of a trial on the merits. The court was evaluating whether a deposition that was not part of the trial court record could be considered in an appeal. That issue has been considered in a number of cases with the same result and has no bearing on a motion for summary judgment before trial. In *Hulsey*, the deposition transcript was not part of the trial court record and it had never been reviewed or certified. Therefore, the deposition was not subject to review in determining if the trial court had erred in granting summary judgment, not because the deposition related to a different case, but because the deposition had not been certified as required by former rule 3207(G)¹⁴ and made a part of the trial court record. Furthermore, the Court in *Hulsey* does not render its decision based on the rules applicable to summary judgment, but rather on the rules applicable to a dismissal for lack of evidence:

Since, as we appraise the record, no evidentiary materials were tendered below, the insurer's motion below must be treated as though it were one to dismiss for the petition's legal insufficiency rather than as one for summary judgment.¹⁵

Again, the Department seeks to support its Motion using authorities that are not on point and by misleading the hearing officer with partial and incomplete quotations. The use of misleading quotes in this manner should be grounds for sanctions.

In addition to the above, the Department relies on the following language from *Polymer Fabricating, Inc. v. Employers Workers' Compensation Association*,¹⁶ in support of its position that sworn testimony before FINRA should be ignored:

[F]ocus in summary process is not on the facts which might be proven at trial ..., but rather on whether the tendered material in the record reveals only undisputed facts.

The Department, apparently intentionally omits a material portion of the Court's statement

¹⁴ Currently Rule 3230(G) of the Oklahoma Rules of Civil Procedure.

¹⁵ *Hulsey v. Mid-America Preferred Insurance Co.*, at page 936.

¹⁶ *Polymer Fabricating, Inc., v. The Employers Workers' compensation Association*, 980 P.2d 109, 112 (Okla. 1998).

and apparently ignores that the holding of the case was to overturn a lower court's order granting summary judgment. The Court in *Polymer* actually stated:

The focus in summary process is not on the facts which might be proven at trial (i.e., the legal sufficiency of evidence that could be adduced), but rather on whether the tendered material in the record reveals only undisputed material facts supporting but a single inference that favors the movant's quest for relief. Summary process—a special pretrial procedural track to be conducted with the aid of acceptable probative substitutes—is a search for undisputed material facts that, **sans forensic combat**, may be applied in the judicial decision-making process. It is a method for identifying and isolating non-triable fact issues, not a device for defeating the opponent's right to trial by jury. [emphasis added]

The deposition testimony of Mr. Frager and Mr. Geary submitted by the Department make it clear that the central issue in this matter is subject to much dispute and will require extensive “forensic combat.” Furthermore, the full quote is directly on point with the central issue in this matter, whether the facts support only one conclusion or whether there will be extensive “forensic combat” over the interpretation of the facts, such as whether there was a net capital deficit and if so, was it known to Mr. Frager when he prepared the FOCUS report. The depositions used by the Department to support its motion provide direct evidence showing that the calculation of net capital is in dispute and will require “forensic combat” to determine not only the manner in which it was to be calculated, but also the facts on which the calculation must be based - the status of the PL-CMO's, whether they had been purchased, whether there were back office errors, what accounting rules applied, what regulatory rules applied. All of those issues are in dispute as clearly shown by the depositions the Department uses to support its Motion. The Department ignores its own authorities and evidence in requesting summary decision.

4. Weighing the evidence is not appropriate in making a decision about summary judgment in Oklahoma.

The Department makes an argument about weighing the evidence, stating that summary judgment is appropriate if evidence is clearly ‘one-sided.’ At page 17 of its Motion, the Department states: “Here, the Department is entitled to a summary decision as to Respondent

Fragger's liability because the evidence is clearly "*one-sided*" citing *Anderson v. Liberty Lobby, Inc.*¹⁷ Again, the Department misrepresents the holding in the case on which it relies. The issue involved in *Anderson* was the standard that must be used to grant summary judgment in libel cases involving public figures. Its holdings were on that specific issue, not on summary judgment in general and without bearing on a summary judgment decision in a securities matter under Oklahoma law. This information should have been evident to the Department if it had read the case carefully.

The standard in Oklahoma is described clearly in *Flanders*, one of the cases cited by the Department in support of its Motion and in later cases citing *Flanders*:

Since the trial court's role is limited to merely determining whether there are any such issues of fact, there can be no trial of fact issues on a motion for summary judgment. **The court may not weigh the evidence.**¹⁸ [emphasis added]

See also, *Malson v. Palmer Broadcasting Group*, a more recent case citing *Flanders*, in which the Court states:

In reviewing the grant or denial of summary judgment, this Court will examine the pleadings and evidentiary materials to determine what facts are material and to determine whether there is a substantial controversy as to **ONE** material fact. If there is a substantial controversy as to **a material fact**, the grant of summary judgment is improper.¹⁹ [emphasis added]

The Department is urging the hearing officer to ignore the interpretation of the facts included in Respondent's Response and declare that there can only be one interpretation. To do so would be weighing the evidence and contrary to the requirements for summary judgment in Oklahoma, which should have been known to the Department before filing its Motion. The Respondent is only required to show that more than one inference could be reasonably drawn from

¹⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

¹⁸ *Flanders v. Crane Co.*, supra at p. 605, citing *Stuckey v. Young Exploration Co.*, 586 P.2d 726, 730 (Okla.1978).

¹⁹ *Malson v. Palmer Broadcasting Group*, 936 P.2d 940, 943 (Okla. 1997), citing *Ross v. City of Shawnee*, 683 P.2d 535 (Okla.1984); *Flanders v. Crane Co.*, supra; *First State Bank v. Diamond Plastics*, 891 P.2d 1262 (Okla.1995).

the facts on the record. The Department's evidence and authorities, by themselves, support the fact that more than one inference can be drawn from the facts relating to many of the issues, including the calculation of net capital and the factors on which such calculation should be based, *i.e.* the accuracy of trade tickets submitted to Pershing, the knowledge of Mr. Geary in submitting the trade and the issue of whether Pershing made a loan to Geary Securities or not. In a motion for summary judgment, the trier of fact does not have the authority to evaluate the evidence to determine if it is "one-sided," but only to look at the evidence to determine if there are material facts in dispute and whether facts that are not in dispute can lead to more than one inference or conclusion.

5. Facts that are subject to different interpretations are in dispute and cannot support a motion for summary judgment.

Again, in *Flanders* and *Flick*, cases cited by the Department, the Court makes it clear that summary judgment is not appropriate if different interpretations or conclusions could be reached on the same facts:

On motion for summary judgment there can be no trial of fact issues since its function is to determine whether there are any genuine issues as to material facts. Such motion should therefore be denied if under the evidence reasonable men might reach different conclusions from undisputed facts.²⁰

[I]n 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. *Northrip v. Montgomery Ward and Co.*, 529 P.2d 489, 493 (Okl.1974).²¹

Additional authorities support that position:

It must not only appear there is no dispute as to the facts, but that the undisputed facts and inferences, viewed in the light most favorable to the party opposing the motion, are such that reasonable men, in the exercise of

²⁰ *Flick v. Crouch*, supra at p. 262.

²¹ *Flanders v. Crane Co.*, supra at p. 605.

fair and impartial judgment, would not reach differing conclusions from them. *SMS Financial*, 918 P.2d at 401.²²

6. The Hearing officer must adopt the inferences and conclusions of Respondent, not the Department.

The Department urges the hearing officer to adopt the inferences and conclusions of the Department regarding the actions of Mr. Frager and the calculations of net capital. Such a position is contrary to the requirements for summary judgment, again, based on authorities cited by the Department. In *Northrip*, the court stated:

All conclusions drawn from the evidentiary material submitted to the trial court are viewed in the light most favorable to the party **opposing the motion**.²³ [emphasis added]

Similarly, in *Hettel*, the court stated:

Furthermore, all inferences and conclusions to be drawn from the undisputed facts must be viewed in the light most favorable to the party opposing the motion.²⁴

The Department knew or should have known that the hearing officer cannot grant a motion for summary judgment based on the conclusions of the Department, unless no other conclusions are reasonably possible. Nonetheless, the Department urges the hearing officer to declare that its conclusions are “undisputed facts” and warrant summary decision. Such a position is contrary to the authorities on which the Department relies in filing its Motion and therefore its filings are reckless at best and are grounds for sanctions.

7. The Department fails to distinguish between facts and findings.

In its Motion and Reply, the Department urges the hearing officer to grant summary decision because “Respondent Frager fails to controvert the material facts of the pending

²² *Hunter's Modern Appliance, Inc. v. Bank IV Oklahoma, N.A.*, 949 P.2d 701,703 (Okla. Civ. App. Div. 1, 1997).

²³ *State ex rel. G.E. Hettel v. Security National Bank & Trust Co*, 922 P. 2d 600, 609 (Okla. 1996).

²⁴ *Flanders v. Crane*, supra at p. 605, citing *Northrip* at pages 496, 497.

motion.”²⁵ In addition, the Department states in its Reply “Respondent Frager has not demonstrated that he performed his duties as FinOP to inquire into the PL-CMO transactions and their impact on the Firm’s net capital position.” Those statements urge a position that is contrary to every case cited by the Department in its Motion and is contrary to the standard for granting summary judgment in Oklahoma, which the attorneys filing such a motion are charged with knowing.

The cases cited by the Department never require a party objecting to a motion for summary judgment to “controvert” the facts, but only to demonstrate that there are material disputes about the facts or the inferences that could reasonably be drawn from those facts. Apparently, the Department does not understand the difference between “facts” and “findings.” Facts are the undisputed actions of the parties. Findings are the inferences and conclusions that could be drawn from those actions, *i.e.*, whether or not the actions met regulatory standards. The Respondent is not required to demonstrate that he met any standard, only that there is a dispute. The actions of Mr. Frager would be facts, but whether the actions met regulatory standards is a finding or conclusion. Conclusions must be evaluated in favor of the nonmoving party. Not only were the actual obligations of Mr. Frager clearly in dispute as evidenced by the deposition testimony, any finding about whether Mr. Frager met those duties would be a conclusion and beyond the scope of a summary judgment motion.

Summary judgment is appropriate only if there can be only one reasonable inference or conclusion from the undisputed facts. The depositions submitted by the Department with its Motion include assertions by Mr. Frager that his actions were correct. The only contrary information is the affidavit of an unqualified expert contesting only some of the allegations. Again, the documentation submitted by the Department provides clearly that the facts and the conclusions to be drawn from those facts are in dispute. Attorneys filing such a motion should be

²⁵ Page 13 of the Reply.

able to distinguish between facts and findings, inferences and conclusions. Their inability to do so is not a defense to an action for sanctions.²⁶

The Department's position is unsupported by the authority it cites on page 16 of its Motion where it states the following in reliance on *Vitkus v. Beatrice Co.*²⁷:

The movant has 'the burden of showing the absence of a genuine issue of material fact' but is not required to 'negate the nonmovant's claim.

The Court in *Vitkus*, in overturning a lower court order granting summary judgment actually stated:

The moving party bears the initial burden of showing that there is an absence of any issue of material fact. [citations omitted] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that there are genuine issues for trial.

Conclusions about the facts are not authorized to be made by the trier of fact, yet the Department urges the hearing officer to make findings to grant its motion for summary decision. It was clear or should have been clear to the attorney filing the Motion that the Department was urging the hearing officer to grant a motion that was not supported by the cited authorities and that required adopting findings that were beyond the authority of the hearing officer to adopt. Under NO circumstances is a party opposing a motion for summary judgment required to prove or disprove any substantive issue. We submit that the Department failed to meet its burden of showing that there is an absence of ANY issue of material fact. By its inability to distinguish between facts and findings/inferences and conclusions, the Department has filed a motion for summary decision that is without any basis and should subject it to sanctions.

8. Affidavits must be considered with other evidence and are not facts on their face.

The Department in its Motion submits that a simple affidavit of an individual no longer associated with a regulatory authority has the ability to establish a fact beyond dispute. Such

²⁶ *State ex rel Tal v. City of Oklahoma City*, 61 P.3d 234, 240 (Okla. 2002).

²⁷ *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993).

argument is frivolous and offensive. Under Oklahoma law, the trier of fact must rule on the competency of a party to testify by affidavit.²⁸

The value of such evidence [expert opinion testimony] is ordinarily for the trier of the facts. But where such evidence is not corroborated or supplemented by other evidence, and where the fact necessary to be established must be proved by testimony of a qualified expert, such evidence, standing alone, is generally held to be insufficient to make out a prima facie case.²⁹

The Department knew that there was a dispute about the calculation of net capital, since the factors are included in its Motion. The Department admits at pages 2 and 3 of its Motion that Mr. Frager has been in the business since 1967 and has significant experience in compliance, yet in that same Motion, the Department seeks to contradict Mr. Frager's position on calculating net capital with an affidavit of an individual who is not a FinOP, has no accounting experience, has experience in "verifying" not "calculating" net capital and swears that he serves as an expert only on compliance and supervisory issues, not on issues. He does not mention net capital.

The Department has attached to its Reply a new affidavit of Mr. Paulukaitis supplementing his background, apparently to address questions raised in the Response about the qualifications of Mr. Paulukaitis. In the new affidavit Mr. Paulukaitis reiterates the fact that his consulting activities involve compliance and supervisory issues, again not indicating any consulting work involving accounting issues or in the actual calculation of net capital.³⁰ The Department could have used any expert in the industry to support its position and yet the Department has selected a person without any direct experience on the issue that is central to the case. To present Mr. Paulukaitis as an expert in an area where he admits he is not one, is frivolous and warrants sanctions.

²⁸ Rule 13.b of the Oklahoma Rules of Civil Procedure (Title 12 O.S. Chapter 2, Appendix)

²⁹ *Smith v. Hines* 2011 OK 51 (Okla., 1990), quoting from *Oklahoma Natural Gas Co. v Kelly*, 153 P.2d 1010 (Okla. 1944).

³⁰ The Affidavit of David E. Paulukaitis, dated December 6, 2011 at page 3 states that the focus of his consulting activities is "in the area of regulatory compliance, particularly with respect to supervision, supervisory controls and internal compliance systems. I routinely provide guidance to broker-dealer clients regarding issues pertaining to compliance with The Net Capital Rule."

9. The calculation of net capital is reserved to the SEC and FINRA.

The Department bases its claims against Mr. Frager on an Oklahoma Rule that incorporates by reference Rule 15c3-1 adopted by the SEC under the Securities Exchange Act of 1934. The Department states in its Reply that it has calculated net capital according to “the formula established by the SEC in Rule 15c-3-1.” Such a statement is so naïve as to be frivolous and the statement clearly demonstrates that the Department has no understanding of the intricacies of net capital computation.

There is no “formula” in Rule 15c3-1. The SEC has delegated to FINRA the oversight of broker-dealers, including the calculation and reporting of net capital under Rule 15c3-1. Although the rule offers general guidance and some specific requirements, the calculation of net capital is the subject of numerous interpretations by FINRA. FINRA examiners undergo lengthy training before they carry out such calculations. The many interpretations involve the treatment of various types of securities, loans, agreements, contracts, haircuts, margin, derivatives, exempt securities, unlisted securities, accounting rules and other matters. FinOP’s and FINRA examiners are required to know, understand, and be capable of applying the interpretations in calculating net capital. The Department has not offered any evidence that any staff member of the Department has undergone such training or has any of the knowledge, experience or financial background necessary to overrule the calculations of Mr. Frager, who according to the Motion filed by the Department has been in the business since 1967.³¹

In fact, state regulators have been prohibited from imposing any net capital requirements that differ from those imposed under federal law by FINRA since the adoption of *The National Securities Markets Improvements Act of 1996 (NSMIA)*. Section 15(i) of the Securities Exchange Act of 1934 adopted under NSMIA states as follows:

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital,

³¹ Pages 2-3 of Department’s Motion.

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.³² [emphasis added].

Quoting from the Website of the Wisconsin Department of Financial Institutions, the agency that regulates broker-dealers in the state of Wisconsin:

NSMIA impacted state broker dealer and investment adviser licensing provisions. With respect to broker-dealers, NSMIA prohibits states from enacting or enforcing any broker-dealer licensing requirement that differs from federal requirements relating to specified areas such as net capital, bonding, and books and recordkeeping.

See also *The Impact of NSMIA on State Regulation of Broker-Dealers and Investment Advisers (The National Securities Markets Improvements Act: One Year Later)*³³ in which the author states:

With a broad brush, Congress clearly invalidated all or parts of numerous scattered state statutes and rules.

The Department is explicitly preempted from calculating net capital under FINRA rules. States cannot establish a net capital requirement that differs from the standard set by FINRA, which includes the manner in which FINRA calculates net capital. To reach any other conclusion would allow states to set a net capital requirement that differs from the federal requirement and accordingly would violate Section 15(i).

We have found no cases since 1996 involving a net capital violation based on the calculations of a state regulatory authority. All state actions that we found involving violations of net capital requirements appeared to use net capital calculations reported by or through FINRA. This information was known to the Department when it filed its Motion as is evident by the Department's misleading attempt to support its position. On page 12 of its Reply, the Department states "the Department's position against pre-emption is supported by the actions of other state

³² Section 15(i)(1) of the Securities Exchange Act of 1934

³³ By Howard Friedman, Business Lawyer, February 1998.

securities regulators in enforcement of their respective capital requirements” citing five regulatory actions as authority for its position. All of those actions were brought before 1996, before the adoption of NSMIA and Section 15(i) and therefore none of those cases can be used as authority for any post NSMIA net capital cases. Furthermore, none of the cases we could find involved a question about net capital computation. Of the cases cited, one could not be located at all and the others involved consent orders simply citing net capital violations. At least two explicitly relied on third party determinations of the net capital violations. For the Department to support its position with cases that have been overruled by subsequent legislation is offensive and clearly grounds for sanctions.

In its Reply, apparently as an additional grounds for defeating preemption, the Department states that Respondent has not identified which type of preemption is involved in the application of Section 15(i) of the Exchange Act, citing a Connecticut Appellate Court Case,³⁴ which in turn cites a Supreme Court Case, which latter case was decided before the adoption of NSMIA. Those cases describe three types of preemption: (i) explicit preemption; (ii) preemption resulting from conduct that Congress intends to be exclusive to the federal government; and (iii) preemption resulting from an actual conflict of state law with federal law. The Department’s argument appears to be another attempt by the Department to obfuscate and to divert the hearing officer from the real issue. If the Department is preempted, it makes no difference which kind of preemption is the basis for the preemption. We note that, for the record, Section 15(i) is clearly an explicit preemption, which should have been obvious to the attorney for the Department filing the Reply.

All of the above provides additional evidence that the Department has filed a frivolous Motion and should be subject to sanctions.

³⁴ *Papic v. Burke*, 965 A.2d 633, 641 (2009), which in turn cites *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990).

III. SANCTIONS ARE APPROPRIATE

The Department states that Respondent's failure to controvert the material facts is grounds for granting the Motion for Summary Decision. This statement by the Department shows a clear lack of understanding of the basis for summary judgment, a failure to read or understand the authorities cited by the Department and consequently, a disregard of the law. The Department's position would require the hearing officer to make *findings* based on the evidence as interpreted by the Department.³⁵ Whether Mr. Frager reported the net capital correctly and whether he carried out his activities as FinOP are conclusions that must be based on evidence. For summary judgment to apply there must be no dispute as to the underlying facts or as to the conclusions to be made from those facts. The depositions on which the Department relies in both its Motion and Reply contain numerous statements indicating a dispute or lack of clarity as to many of the underlying facts and clearly with respect to the inferences and conclusions that could be reached from the facts.

All of the cases cited by the Department and all those discussed above make it clear that summary judgment is not appropriate if there is any DISPUTE as to the material facts, which requires only a demonstration that there is disagreement over the facts, not that the material facts have been CONTROVERTED, which would require a weighing of the evidence. 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 purchase. Throughout the depositions of both Mr. Frager and Mr. Geary the witnesses made statements indicating that those issues are at best unclear and without question, in dispute. For example, Mr.

³⁵ The Department argues at page 14 of its Reply, that "Respondent Frager has not demonstrated that he performed his duties as FinOP..." As with the issue of the purchase of securities, whether Mr. Frager carried out his activities as FinOP appropriately is a conclusion to be determined from the evidence, it is not a "fact."

Fragar states clearly at page 69 of his deposition that the securities were put into the account wrongly and that as a result he should not account for them in the FOCUS report. Whether or not the Department agrees with the statement, the statement indicates a dispute over a material fact, which alone is sufficient to defeat summary judgment.

The question of the appropriate method for calculating net capital is clearly in dispute and clearly warrants the imposition of sanctions for submitting that factor as a basis for summary decision. The Department's continued attempt to establish an "undisputed" fact based on the affidavit of an unqualified expert and its own unqualified calculation of net capital is frivolous. Filing a motion that is based on evidence that contradicts the position advocated is frivolous and grounds for sanctions. The Department should be held accountable under Section 2011 for not evaluating the qualifications of its "expert" and the evidence contradicting his assertions more carefully.

Furthermore, the Department is well aware that the net capital issue is currently being evaluated by FINRA, the regulator responsible for calculating net capital under the Securities Exchange Act of 1934. Again based on this single fact, the Department would have known that there is a material dispute as to the material facts and as to the conclusions and inferences that could be reached based on those facts. The Department, nonetheless, filed its Motion claiming that there was no dispute, making the filing frivolous and a means of harassing Respondent. In this case, there is absolutely no basis for even requesting summary judgment and the Department should be subject to sanctions for pursuing a frivolous motion and harassing the Respondent.

The actions of the Department that would be grounds for ordering sanctions include: (a) filing a Motion stating that there are no issues in dispute and then to base that Motion on deposition testimony clearly reflecting many disputes over both the facts and the conclusions to be reached from the facts; (b) supporting that Motion with legal authorities, most of which found contrary to the Department's position or were not on point at all; (c) misquoting from authorities to support a

position that was not supported by the cited authority; (d) misstating holdings of cases; (e) using only certain portions of deposition testimony as “fact,” while intentionally ignoring other portions of the same testimony when that testimony conflicted with the position of the Department; (f) categorizing evidentiary findings as “facts” and urging the hearing officer to accept those findings with the goal of depriving the Respondent of its right to a hearing on the evidence; and (g) ignoring federal law preempting the Department from making findings with respect to federal law.

Those actions support a finding that the Department filed its Motion either intentionally ignoring the law or without understanding the law applicable to summary judgment cases. Either conclusion subjects the party making the filing to sanctions under Section 2011 of the Oklahoma Rules of Civil Procedure. The frivolous nature of the filing is further supported by the fact that immediately after filing its Reply, the Department attempted to set a date for a hearing on the issues on which its Motion was based, indicating that the Department had no expectation of prevailing on its Motion. The only conclusion to be reached from the actions of the Department is that the Department filed a frivolous Motion with the intent of delaying or harassing the Respondent, attempting to force him to settle with the Department. Those are clear grounds for the imposition of sanctions.³⁶

The hearing officer has the authority to impose Sanctions in this case in reliance on Section 2011 of the Oklahoma Rules of Civil Procedure, in the same manner as the hearing officer is authorized to apply other provisions of the Oklahoma Rules of Civil Procedure to the extent they are applicable. Courts in Oklahoma have enunciated the requirements of Section 2011 as follows:

Like its federal counterpart Rule 11, § 2011 requires an attorney make reasonable inquiry to assure all motions, pleadings and papers filed with a court have a factual basis, are legally tenable and are not submitted for an improper purpose. See *Cooter & Gell v. Hartmarx Corp.*, supra, 496 U.S. at 393, 110 S.Ct. 2447. Boiled down, § 2011 attempts to discourage presenting to a court (whether by signing, filing, submitting or later

³⁶ See *Garage Storage Cabinets, LLC v. Mitchell*, 169 P.3d 1211, 1216 (Okla. 2007), in which the court found sanctions appropriate for litigation that was “vexatious and frivolous.”

advocating) a pleading, written motion or other paper that is legally and/or factually frivolous, or for an improper purpose, such as delay.³⁷

Sanctions are appropriate even if the Department did not act with malice or with an improper or frivolous purpose.

The propriety of sanctions under § 2011 in regard to legal or factual frivolity of a claim or defense does not depend on the attorney's subjective good faith and having a pure heart, but empty head provides no defense to a sanction order under the statute. *Warner v. Hillcrest Medical Center*, supra, 914 P.2d at 1064; *First Nat. Bank and Trust Co. of Vinita v. Kissee*, 1993 OK 96, 859 P.2d 502, 512. When faced with deciding if sanctions should be imposed under § 2011, a court must view the matter through the eyes of a competent attorney who is advocating the claim of his/her client(s).³⁸

Whether or not the acts of an attorney are done in good faith is no longer the test. " [T]he new test represents an intentional abandonment of the subjective focus of [§ 2011] in favor of an objective one."³⁹

The appropriate sanction under Section 2011.C.2. is the costs incurred by the Respondent in answering the frivolous Motion.⁴⁰

IV. CONCLUSION

Filing the Motion and pursuing it, when the depositions of Mr. Geary and Mr. Frager, alone, evidence disputes over many of the facts in this matter and conclusions to be reached from those facts, was frivolous and harassing; has resulted in the incurrence of significant legal expenses for Respondent; and has diverted all the parties from addressing the issues yet to be resolved in this matter. Such actions violate Section 2011 of the Oklahoma Rules of Civil Procedure and are the basis for sanctions as provided in that Rule. Hearing officers in administrative proceedings have broad authority to review and respond to motions and to issue orders in response to those motions.

³⁷ *State ex rel Tal v. City of Oklahoma City*, supra, although the Court found that sanctions were not appropriate, the Court enunciates the criteria for imposing sanctions in Oklahoma, which are based on federal law.

³⁸ *State ex rel Tal v. City of Oklahoma City*, supra at p. 244; cited with approval in affirming sanctions in *Allen v. City of Chickasha*, 211 P.3d 241, 245 (Okla.2009).

³⁹ *Warner v. Hillcrest Medical Center*, 914 P.2d 1060, 1064 (Okla. App. Div. 4, 1995) where sanctions were upheld.

⁴⁰ *Warner v. Hillcrest Medical Center*, supra at p. 1064

The hearing officer in this matter has the authority to order the Department to reimburse Respondent for the legal fees incurred by him in responding to the Department's Motion.⁴¹

Respectfully Submitted,



Susan E. Bryant, OBA #5842
Bryant Law, a Professional Corporation
62 Bayview Street, Second Floor
Camden, Maine 04843
Telephone: 207-230-0066
E-mail: sbryant@bryantlawgroup.com

Donald A. Pape, OBA #6883
Donald A. Pape, P.C.
of counsel to Phillips Murrah PC
401 West Main Street, Suite 440
Norman, OK 73069
Telephone: 405-364-3346
E-mail: don@dapape.com

Attorneys for Respondent Norman Frager

⁴¹ 75 O.S. 310(1).

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2011, a copy of the foregoing document was served on the following via electronic mail:

Hearing Officer:

Mr. Bruce R. Kohl
201 Camino del Norte
Santa Fe, NM 87501
e-mail: bruce.kohl109@gmail.com

Oklahoma Department of Securities

Brenda London, e-mail: blondon@securities.ok.gov

OKLAHOMA DEPARTMENT OF SECURITIES
120 North Robinson, Suite 860
Oklahoma City, OK 73102

Attorneys for Oklahoma Department of Securities:

Melanie Hall, Director of Enforcement, e-mail: mhall@securities.ok.gov
Terra Shamas Bonnell, Enforcement Attorney, e-mail: tbonnell@securities.ok.gov

OKLAHOMA DEPARTMENT OF SECURITIES
120 North Robinson, Suite 860
Oklahoma City, OK 73102

Attorneys for Respondents Keith D. Geary, Geary Securities, Inc. and CEMP, LLC:

Joe M. Hampton, e-mail: jhampton@corbynhampton.com
Amy Pierce, e-mail: apierce@corbynhampton.com
Ainslie Stanford II, e-mail: astanford@corbynhampton.com

CORBYN HAMPTON PLLC
One Leadership Square
211 North Robinson, Suite 1910
Oklahoma City, OK 73102
Facsimile: (405) 702-4348



Susan E. Bryant