

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. *aka* Capital West Securities, Inc.;  
Keith D. Geary; Norman Frager; and CEMP, LLC,

Respondents.

File No. 09-141

**DEPARTMENT'S REPLY TO GEARY RESPONDENTS' OBJECTION TO  
DEPARTMENT'S MOTION FOR PARTIAL SUMMARY DECISION**

The Oklahoma Department of Securities ("Department") respectfully submits this reply to the objection filed by Respondents Geary Securities, Inc. ("Geary Securities"), Keith D. Geary ("Geary"), and CEMP LLC (collectively, "Geary Respondents") on February 3, 2012 ("Objection"), in response to the Department's motion for partial summary decision against the Geary Respondents filed on December 23, 2011 ("Motion"). As more fully set forth below, the Department contends that (1) there is no genuine issue as to the material facts, (2) the Department's Motion is not premature, (3) the Department's Motion is consistent with the principles of due process, (4) a summary decision finding that Geary Securities and Geary violated § 1-501 is appropriate, (5) a summary decision finding that Geary Securities violated Oklahoma Rule 660:11-5-17 is appropriate, (6) a summary decision finding that Geary Securities and Geary violated Oklahoma Rule 660:11-5-42 is appropriate, (7) the Administrator can determine whether an order disciplining the Geary Respondents is in the public interest based on the findings of fact and conclusions of law ultimately adopted, and (8) a cease and desist order against CEMP LLC is appropriate.

The Department's Motion, requesting a summary decision finding that the Geary Respondents violated the Oklahoma Uniform Securities Act of 2004 ("OUSA"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (2011), and the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities ("Oklahoma Rules"), Okla. Admin. Code, 660:1-1-1 through 660:25-7-1, should be granted.

**I. THERE IS NO GENUINE ISSUE AS TO THE MATERIAL FACTS**

The Geary Respondents have failed to properly dispute the material facts. A party opposing a motion for summary decision must specify the material facts that the party claims to be in dispute. *See* Okla. Dist. Ct. R. 13(b).<sup>1</sup> All material facts set forth by the movant and supported by acceptable evidential material shall be deemed admitted unless the opposing party specifically controverts the facts and supports his statement with acceptable evidentiary material. *Id.* The opposing party must attach depositions, affidavits or other admissible evidentiary materials to contradict the facts set forth by the moving party. *Adams v. Moriarty*, 127 P.3d 621, 624 (Okla.Civ.App. 2005). The *Adams* court stated:

a summary judgment motion must be decided on the record actually presented, not on a record which is potentially possible; a party opposing summary judgment therefore must present evidence, not mere contentions, justifying a trial on the merits.

*Id.*; *see also Polymer Fabricating, Inc. v. Employers Workers' Compensation Ass'n*, 980 P.2d 109, 112 (Okla. 1998) ("focus 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 material facts . . ."); *Roberson v. Jeffrey M. Waltner, M.D., Inc.*, 108 P.3d 567, 569 (Okla.Civ.App. 2005) ("[a] party resisting a motion for summary judgment may not rely on allegations of its pleadings

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<sup>1</sup> The Geary Respondents rely on Rule 13 as the authority for their request that the Hearing Officer issue an order deferring consideration of the Department's Motion until all discovery is completed. See Objection, p. 20-21.

or bald contentions that facts exist to defeat the motion”); *Davis v. Leitner*, 782 P.2d 924, 926 (Okla. 1989) (“mere contention that facts exist or might exist is not sufficient to withstand summary judgment”).

Respondents’ efforts in opposing the Department’s Motion have failed. The material facts set forth in the Motion should be deemed admitted.

#### **A. Geary Respondents have Ignored Binding Admissions**

Certain of the facts set forth in the Department’s Motion were admitted by Respondents in their initial answer filed on October 15, 2010. Respondents are bound by the admissions in their pleading and may not now create a dispute as to those facts. “[F]actual assertions in pleadings are . . . judicial admissions *conclusively* binding on the party that made them.” *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) (citing *White v. ARCO/Polymers*, 720 F.2d 1391, 1396 (5th Cir. 1983)) (emphasis in original). “Facts that are admitted in the pleadings ‘are no longer at issue.’” *Davis*, 823 F.2d at 108 (quoting *Ferguson v. Neighborhood Housing Services, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986)).

Accordingly, there are no factual issues with respect to Fact Nos. 1, 2, 4, 5, 6, 7, 11, 13, 14, 15, 19, 20, 21, 22, 26, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 41, 50, 61, 64, 65, 66, 67, 80, 81, 85, 118, 119, 120, 121, 122, and 123 as set forth in the Department’s Motion.

#### **B. Geary Respondents cannot Dispute Facts Solely by Claiming They are “Immaterial” and/or “Incomplete”**

In connection with certain of the facts set forth in the Department’s motion for summary decision, Respondents simply respond by stating that these facts are “Immaterial [or immaterial and incomplete] in the context of the ODS Motion and, therefore, disputed” without attaching supporting affidavits, depositions or any other evidentiary material. *See* Fact Nos. 3, 8, 9, 10, 12, 24, 25, 27, 34, 40, 42, 43, 44, 45, 46, 49, 57, 58, 60, 70, 73, 79, 90, 100, 101, 102, 103, 104, 105,

106, 107, 108, 110, 113, 114, and 116. Respondents “cannot rely on the allegations or contentions in [their] pleadings alone to demonstrate a dispute of fact.” *See Adams*, 127 P.3d at 624. Accordingly, no issue has been invoked in connection with these facts.

**C. Geary Respondents’ Adoption of Respondent Frager’s Response to Motion for Summary Decision does not Dispute Material Facts**

In connection with certain other facts set forth in the Department’s summary decision motion, Respondents simply adopt and incorporate by reference Respondent Frager’s response to the summary decision motion filed against him. *See* Fact Nos. 85, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 109, 112 and 115. Rule 13 of the Rules of the District Courts of Oklahoma permits a party opposing a motion for summary judgment to incorporate by reference material attached to the papers of another party. Okla. Dist. Ct. R. 13(b). Yet, there are no supporting affidavits, depositions or other evidentiary materials included as part of Respondent Frager’s response. Again, Respondents “cannot rely on pleadings alone to demonstrate a dispute of fact.” *See Adams*, 127 P.3d at 624. Accordingly, no issue has been invoked in connection with these facts.<sup>2</sup>

**D. Geary Respondents have failed to Dispute Remaining Facts**

There are thirty (30) facts set forth in the Department’s Motion that are not addressed above. A careful review of their Objection reveals that the Geary Respondents have not put any of these facts into controversy. “[I]n order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be a genuine dispute over those

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<sup>2</sup> With respect to Fact No. 85, the required net capital for the firm was admitted by Respondents in their answer and is not a fact in dispute. With respect to Fact Nos. 109, 112 and 115, the Hearing Officer has dispensed with the issue that it is premature to make a determination in connection with the net capital issues until there has been a ruling by FINRA.

facts that could actually affect the outcome of the lawsuit.” *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8<sup>th</sup> Cir. 1998).

**Fact Nos. 16-18.** The response to Fact Nos. 16-17, including the references to Respondent Geary’s deposition transcript and his affidavit, contains nothing more than the background on the creation of the CEMP securities. The response to Fact No. 18 in no way mentions or addresses the email sent by Respondent Keith Geary to J.D. McKean on May 26, 2009. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 23.** The response to Fact No. 23, including the reference to Respondent Geary’s deposition transcript, attempts to explain his thought process with the benefit of hindsight. However, the relevance of this fact has been lost on the Geary Respondents. This fact shows that Respondent Geary intended to buy the PL-CMOs from Frontier State Bank in May of 2009 and to hold them until resecuritized some weeks later. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact Nos. 47 and 48.** Geary Respondents attempt to dispute parts of Fact Nos. 47 and 48 by making self-serving, conclusory statements that Geary did not make any material misrepresentations or omissions. However, the statements of Respondent Geary upon which the Department’s allegations are based were made in emails that are a part of the record in this matter. The emails speak for themselves. Geary said what he said. Geary Respondents cannot now attempt to create a factual dispute by “adding to” or “explaining away” what he previously put in writing to John Shelley and/or Michael Braun. Geary Respondents provide no other materials evidencing Respondent Geary’s version of the communications. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 51.** Geary Respondents attempt to dispute Fact No. 51 without any specific reference to the email addressed therein. Fact No. 51 is based on an email that is a part of the record in this matter. The email speaks for itself. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 52.** Geary Respondents attempt to dispute the fact that Respondent Geary had led officers of the Bank of Union to believe that he had buyers for the notes. Yet, in paragraph 9 of his affidavit, Respondent Geary admits the same (When I told BOU I felt I had someone interested in buying the A-1, that statement was true . . . ). The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact Nos. 53 and 54.** Geary Respondents attempt to dispute Fact Nos. 53 and 54 by recanting his deposition testimony. However, in opposing the summary decision motion, Geary Respondents may not create a factual dispute by contradicting a statement made by Geary in his prior deposition. *See Jones v. General Motors Corp.*, 939 F.2d 380, 385 (6th Cir. 1991). The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 55.** Fact No. 55 (BOU would only have to hold the CEMP notes for two or three days) is based in part on an email sent from Geary Securities to its clearing firm that is a part of the record in this matter. The email states that Bank of Union would be buying the CEMP A-1 Notes for settlement on September 28, 2009, and selling the CEMP A-1 Notes “to the street” to settle on September 29, 2009. Geary Respondents make no mention of this critical piece of evidence in their Objection. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 56.** Except for stating that it is “disputed,” Geary Respondents do not respond, directly or indirectly, to Fact No. 56. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 59.** Geary Respondents state that they dispute Fact No. 59, but they only address two sentences in Fact No. 59. The Geary Respondents address the statement, “Geary represented that Headington would have to own the CEMP A-2 Notes for less than 90 days.” Interestingly however, the Geary Respondents admitted the first sentence of Fact No. 54 that states, “At 7:25 a.m. on September 24, 2009, Geary advised Bank of Union as follows: ‘There is a Dealer interested in the A1’s above 98. Just need an A2 Buyer (to hold them for <3 Months).’” This email to John Shelley and Michael Braun speaks for itself.

The Geary Respondents also address the statement, “Geary represented that if Headington purchased the CEMP A-2 Notes, he (Headington) would be able to sell them at a profit.” The Geary Respondents try to dispute this statement by differentiating between the words “would” and “should.” In the context of the portion of Geary’s deposition transcript quoted in the Objection, to differentiate between “would” and “should” is merely a matter of semantics. Yet, even if there is a difference in meaning in the relevant context, the statement “you should be able to sell them for more than you paid,” is misleading in light of the illiquid nature of the CEMP notes. *See* Motion, ¶ 70, and p. 33. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 62.** Geary Respondents make no effort to dispute that Geary signed the document titled “Guaranty Agreement”. The document speaks for itself. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 63.** Geary Respondents make no effort to dispute the substance of Fact No. 63. The substance of Fact No. 63 is evidenced by two emails that are in the record. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 68.** Except for claiming that it is “immaterial and incomplete in the context of the ODS Motion and, therefore, disputed[,]” the Geary Respondents do not directly or indirectly respond to Fact No. 68. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 69.** Except for claiming that it is “immaterial and incomplete in the context of the ODS Motion and, therefore, disputed[,]” the Geary Respondents do not directly or indirectly respond to Fact No. 69. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 71.** The Geary Respondents respond to Fact No. 71 by saying that part of it is “materially incomplete and misleading and, therefore, disputed” and that part of it is “materially incomplete and, therefore, disputed.” The Geary Respondents further respond by stating, “The Department has failed to present any evidence that BOU and Headington have made any attempt to sell the A-1 and A-2 at any time. The reason for the Department’s omission is simple. The A-1 and A-2 have performed better than expected.” The Geary Respondents’ statement does not dispute Fact No. 71 and is actually quite interesting in light of their prior statement, “Geary did, in fact, try to find subsequent buyers for the A-2 but was unsuccessful, despite his good faith efforts.” *See* Objection, p. 11. Geary also admits in his affidavit attached to the Objection, “To the best of my current knowledge and information, BOU and Mr. Headington still own the A-1 and A-2 CEMP securities.” Objection, Ex. 1, ¶ 15. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 72.** The Geary Respondents attempt to dispute Fact No. 72 by identifying the representative of Geary Securities who received the referenced commission. That information is irrelevant to Fact No. 72. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 74.** The Geary Respondents attempt to dispute Fact No. 74 with conclusory statements and Respondent Geary's deposition testimony. Yet, Fact No. 74 is based on written documents in the record that speak for themselves. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact Nos. 75-77.** The Geary Respondents respond to Fact Nos. 75-77 by making a self-serving, conclusory statement that Geary did not make any material misrepresentation or omission "in the subject press release or otherwise concerning the rating of the A-1 product." In response to Fact Nos. 75-77, the Geary Respondents also make several statements that go to what Geary knew about the "AAA" rating on the CEMP A-1 notes at various times. Yet, the Geary Respondents do not directly or indirectly respond to Fact Nos. 75-77. Further, Fact No. 75 is based on a written document in the record that speaks for itself. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 78.** The Geary Respondents state Fact No. 78 is disputed but do not provide any facts that actually dispute Fact No. 78. Instead, the Geary Respondents make statements concerning what Geary thought. The second sentence of Fact No. 78 is based on an email that speaks for itself. The fact that Geary "fully expected the CEMP bonds to sell at par in the marketplace" does not dispute the fact that he stated the "AAA" rated CEMP A-1 Notes were "Sold to the Street at Par." The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact Nos. 82-84.** The relevance of these facts has been lost on the Respondents. These facts, taken as a whole, show that Geary offered to buy the security at a stated price when Geary Securities was financially unable to pay for the security. The referenced testimony at page 206 of Geary's deposition transcript and the information imparted in the Objection do not create a factual dispute regarding the firm's ability to pay for the security. The fact that the bond was subsequently purchased for a customer from Mesirow some weeks later cannot affect the outcome of this proceeding.

**Fact No. 86.** The response to Fact No. 86, including the reference to Respondent Geary's deposition transcript, attempts to explain his actions with the benefit of hindsight. However, the materiality of this fact has been lost on the Geary Respondents. This fact is material to show that Respondent Geary intended to buy the PL-CMOs from Frontier State Bank in May of 2009 and to hold them until resecuritized some weeks later. The information imparted in the Objection cannot affect the outcome of this proceeding.

**Fact No. 111.** Fact No. 111 shows that Geary Securities recognized that it was undercapitalized on February 10, 2010. Respondents attempt to create a factual dispute by discussing Geary's efforts to avoid a net capital deficiency. Geary's efforts in this regard are not relevant to dispute the existence of a net capital deficiency. The official records of Geary Securities show that Geary's efforts were to no avail. A Rule 17a-11 notice filed by Geary Securities stated that February 10, 2010, was the date on which Geary Securities discovered its net capital deficiency. *See* Frager Dep., Ex. 4 at ODS 09-141/Frager 365-366. The information imparted in Respondents' Objection cannot affect the outcome of this proceeding.

**Fact No. 117.** Fact No. 117 shows that Geary Securities continued its operations while undercapitalized. The deposition testimony that is referenced by Respondents is nothing more

than an admission that the operations of Geary Securities continued throughout the month of February 2010. The information imparted in Respondents' Objection cannot affect the outcome of this proceeding.

## II. THE MOTION IS NOT PREMATURE

The Department brings its pending motion against the Geary Respondents pursuant to Oklahoma Rule 660:2-9-3(d) based on the belief that "there is no genuine issue as to any material fact" and that the Department "is entitled to prevail as a matter of law." The summary judgment standard in 660:2-9-3(d) is identical to that provided under the Oklahoma Pleading Code, Okla. Stat. tit. 12, § 2056(C) (OSCN 2011), and Rule 13 of the Rules of the District Courts (OSCN 2011).<sup>3</sup> The Geary Respondents argue that summary judgment is inappropriate because discovery is not yet complete. This argument lacks merit.

Like federal Rule 56(d),<sup>4</sup> Rule 13(d) authorizes the nonmoving party to request that a summary judgment ruling be denied or deferred to allow time for depositions to be taken or affidavits to be obtained. However, the protection afforded to the nonmoving party by Rule 13(d) does not automatically result. The nonmoving party may not simply state that discovery is not complete; instead, the party must "state *with specificity* how the additional material will rebut the summary judgment motion." *Libertarian Party of New Mexico v. Herrera*, 506 F.3d 1303, 1308-09 (10th Cir. 2007), citing *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000) (emphasis added).

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<sup>3</sup> Since Rule 13 is modeled after Rule 56 of the Federal Rules of Civil Procedure, the federal cases under Rule 56 are specially instructive when interpreting the Rule 13 provisions. *Northrip v. Montgomery Ward & Co.*, 529 P.2d 489, 495 (Okla. 1974).

<sup>4</sup> Prior to December 1, 2010, the provision was set forth in Rule 56(f).

In the Tenth Circuit, the required explanation by the nonmoving party must be produced in an affidavit specifying the reasons why the party cannot present the necessary facts to justify opposition to summary judgment. *Valley Forge Insurance Co., v. Health Care Management Partners, Ltd.*, 616 F.3d 1086, 1096 (10<sup>th</sup> Cir. 2010). The affidavit must identify the following:

(1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain those facts, and (4) how additional time will enable [the party] to obtain those facts and rebut the motion for summary judgment.

*Id.* (internal quotation marks omitted). In summary, “the party must show precisely how additional discovery will lead to a genuine issue of material fact.” *Flores v. U.S. Repeating Arms Co., Inc.*, 19 Fed. Appx. 795, 799 (10th Cir. 2001).

The affidavit produced by Geary as part of the Geary Respondents’ Objection is deficient. First, the affidavit fails to identify any facts that he believes will be discovered in the depositions of Timothy Headington, Chris Martin, Michael Shelley, and the six remaining Bank of Union directors. *See Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1554-55 (10th Cir. 1993). Likewise, the affidavit fails to identify any facts he believes will be discovered in the deposition of David Paulukaitis. *See id.* In addition, the affidavit fails to show how facts discovered during the course of the depositions, if any, will prove beneficial in opposing the summary judgment motion. *See id.* Finally, the affidavit fails to show that further discovery time will establish facts sufficient to create even one genuine issue of fact. *See id.*

The protection afforded by Rule 13(d) should be denied if the nonmoving party has been dilatory or if the information sought by the party is not relevant to the proceeding. *See id.* at 1554. Such is the case here with respect to the issues relating to Mr. Headington. Despite the lengthy passage of time, Geary Respondents have yet to effect legal service on Mr. Headington of a validly issued subpoena under Texas law. As so aptly described in paragraph 7 of the

Hearing Officer's order filed on February 8, 2012,<sup>5</sup> the Respondents had no direct contact or communication with Mr. Headington; all contacts and communications occurred through John Shelley, who has been deposed by Respondents in this matter. As stated in paragraph 9 of the order, "Respondents have failed to show that Headington is an essential witness in this proceeding, and further failed to show that Headington's testimony would add substantively to the record . . . ." Nothing has changed with the filing of their Objection.

With respect to the Bank of Union directors, Geary Respondents are in possession of the directors' affidavit relating to the representations made by Respondent Keith Geary. Yet, with this knowledge, the Geary Respondents do not show how additional discovery time will establish facts sufficient to dispute the directors' affirmations. Further, as found by the Hearing Officer, Geary Respondents' counsel declined the opportunity to take the depositions of certain of the bank directors scheduled on September 29-30, 2011.<sup>6</sup> Furthermore, the Geary Respondents have only recently inquired about a date to depose Chris Martin; no dates have been proposed for the deposition of Michael Shelley.

Finally, while the Department's expert, David Paulukaitis, was listed on the Department's witness lists filed on March 15 and 28, 2011, no effort has been made by Geary Respondents to depose him. Likewise, Geary Respondents have made no effort to submit affidavits of their own experts to oppose the pending motion.

The Geary Respondents are not entitled to time for further discovery under Rule 13(d). In addition to the reasons set forth above, Geary Respondents' failure to seek time for discovery

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<sup>5</sup> See *Order Denying Geary Respondents' Motion for Preclusion Order and Order Striking Department Exhibit Number 27 (Purported Headington Guarantee Agreement)*.

<sup>6</sup> See *Order Denying Geary Respondents' Motion for Preclusion Order and Order Striking Department Witnesses (Bank of Union Directors) and Exhibit (Bank of Union Directors' Affidavit)*.

under Rule 13(d) before filing their Objection is “itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate.” See *New York State Teamsters Conference Pension & Retirement Fund v. Express Services, Inc.*, 426 F.3d 640, 648 (2d Cir. 2005) citing *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 n.1 (2d Cir. 2004).

### **III. THE MOTION IS CONSISTENT WITH THE PRINCIPLES OF DUE PROCESS**

The Geary Respondents argue that any ruling based on summary decision proceedings would violate their right to due process in this matter. This argument is without merit.

An article published in the *Harvard Law Review* addressed whether the use of summary decision in an administrative adjudication would render the right to an administrative hearing meaningless. Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 Harv. L. Rev. 612 (1971). The authors reached the following conclusion:

The short yet complete answer to these protests is that summary judgment is granted only when the papers filed with the motion clearly reveal that an evidentiary hearing would serve no useful purpose. Summary judgment honors the right to be heard by allowing the party opposing the motion to show the necessity for a trial and by placing the burden on the party seeking summary disposition. It protects fairness by relieving the parties of the burdens of a trial in those instances where it is reasonably clear that the ultimate decision will be based on evidence which can be presented without testimony. Just as summary judgment is not in conflict with the right to trial by jury because it is available only when there is nothing for the jury to decide, a rule allowing summary decision in administrative adjudications would not improperly deny the right to a hearing since it would allow the hearing examiner or agency to dispense with an evidentiary hearing only if the absence of a hearing could not affect the decision.

*Id.* at 616-17 (internal references omitted).

The conclusion quoted above is consistent with Oklahoma and federal law. The Oklahoma Rules specifically authorize the issuance of a summary decision when the Hearing Officer finds that “there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.” Oklahoma Rule 660:2-9-3(d). The Oklahoma

Administrative Procedures Act does not prohibit the use of summary decision in administrative proceedings. Okla. Stat. tit. 75, §§ 250.1-323. Further, the Tenth Circuit noted in *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, n. 9 (10th Cir. 1995), that by the time of the administrative hearing, the administrative law judge “had properly eliminated” claims for estoppel and breach of contract through summary judgment.

The Oklahoma Supreme Court case cited by the Geary Respondents in support of their argument did not address the use of summary disposition and certainly did not find that the use of summary decision in an administrative proceeding violated due process rights. See *Corporation Commission v. Okla. State Personnel Bd.*, 513 P.2d 116 (1973). The Department has found no Oklahoma case law holding that use of summary decision in an administrative proceeding is inappropriate. The Geary Respondents’ argument is without merit.

#### **IV. SUMMARY DECISION FINDING THAT GEARY SECURITIES AND GEARY VIOLATED § 1-501 IS APPROPRIATE**

##### **A. Negligence is not an Element of a Cause of Action under § 1-501(2) of OUSA**

In their Objection, the Geary Respondents argue that the Department must establish negligence in order to prevail on a violation of § 1-501 of OUSA. The Geary Respondents are mistaken.

The Geary Respondents rely on the cases of *S.E.C. v. Shanahan*, 646 F.3d 536 (8th Cir. 2011), and *S.E.C. v. Curshen*, 372 Fed.Appx. 872 (10th Cir. 2010), to support their argument. Both *Shanahan* and *Curshen* speak to liability under §§ 17(a)(2) and (a)(3) of the Securities Act of 1933, 15 U.S.C.A. § 77q(a)(2)-(a)(3). *Shanahan* and *Curshen* appear to be based on a misreading of *Aaron v. SEC*, 446 U.S. 680 (1980), which—as it pertains to § 17(a)(2)—holds

that the SEC “need not establish scienter as an element of an action to enjoin violations of 17(a)(2).” *See Aaron*, 446 U.S. at 702.

The Geary Respondents have ignored the decisions of other states that, like Oklahoma, have adopted the Uniform Securities Act of 2002 and the predecessor model act. *See, e.g., Trivectra v. Ushijima*, 144 P.3d 1, 17 (Haw. 2006) (not requiring proof of negligence, or any other degree of scienter, for a violation of Hawaii’s equivalent to § 1-501(2) of OUSA); *Fibro Trust, Inc., v. Brahman Financial, Inc.*, 974 P.2d 288, 293-95 (Utah 1999) (not requiring proof of negligence for a violation of Utah’s equivalent to § 1-501(2) of OUSA).

In addition to the case law of other states, the Geary Respondents have ignored the comments to the Uniform Securities Act of 2002 and the “willfulness” requirement of § 1-411(D)(2) of OUSA. The Official Comments<sup>7</sup> to § 501 of the Uniform Securities Act of 2002, upon which § 1-501 of OUSA was modeled, states:

(1) Section 501, which was Section 101, in the 1956 Act, was modeled on Rule 10b-5 adopted under the Securities Exchange Act of 1934 and on Section 17(a) of the Securities Act of 1933. There has been significant later case development interpreting Rule 10b-5, Section 17(a), and Section 101 of the 1956 Act. Section 501 is not identical to either Rule 10b-5 or Section 17(a).

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(6) The culpability required to be pled or proved under Section 501 is addressed in the relevant enforcement context. *See, e.g.,* Section 508, criminal penalties, where “willfulness” must be proven; Section 509, civil liabilities, which includes a reasonable care defense; or civil and administrative enforcement actions under Section 603 and 604, where no culpability is required to be pled or proven.

The Department is seeking to discipline the Respondents Geary Securities and Geary under § 1-411 of OUSA for, *inter alia*, violations of § 1-501(2) of OUSA. In that context, there

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<sup>7</sup> The Oklahoma Supreme Court has relied on the Official Comments in applying previous versions of the Uniform Securities Act. *E.g., State ex. rel. Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334, 1339 (Okla. 1980); *State ex. rel. Day v. Petco Oil & Gas, Inc.*, 558 P.2d 1163, 1167 (Okla. 1977).

must be a finding that Geary Securities and/or Geary “willfully” violated or “willfully” failed to comply with § 1-501(2) within the previous ten (10) years. *See* Okla. Stat. tit. 71, § 1-411(D)(2) (2011). As set forth in Section VI of the Department’s Motion, Geary Securities and Geary acted “willfully” because they were aware of their actions. *See* Unif. Securities Act 2002, § 508, Official Comments, n. 2 (“All that is required [to prove willfulness] is proof that a person acted intentionally in the sense that the person was aware of what he or she was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required.”); *see also id.* § 412, Official Comments, n. 6 (“The term ‘willfully’ in Section 412(d)(2) and (11)(A) is discussed in Comment 2 to Section 508.”) The imposition of a negligence requirement would contradict the statutory language of § 1-411(D)(2) of OUSA which only requires a showing of “willfulness” for a violation of § 1-501(2) in the context of an enforcement action brought pursuant to § 1-411.

#### **B. Materiality Element Does Not Preclude a Summary Decision**

In their Objection, the Geary Respondents misrepresent the materiality requirement of § 1-501(2) by attempting to create a dispute over the duties owed by the Geary Respondents. The Geary Respondents state, “For a statement or omission to even be material, there must first be a duty to speak on the part of the [person] alleged to have made the material misrepresentation or omission.” Objection, p. 25. In support of such statement, the Geary Respondents rely solely on *SEC v. Pasternak*, 561 F.Supp.2d 459, 500 (D.N.J. 2008). Yet, the relevant discussion in the *Pasternak* decision does not support the Geary Respondents’ argument. *See Pasternak*, 561 F.Supp.2d at 498-499 (stating that two of the five elements required to prove securities fraud under federal law are “(1) the defendant made a misrepresentation, or an omission where there was a duty to speak, or used a fraudulent device” and “(2) that misrepresentation or omission

was material.”) The existence of a duty to speak goes to whether an omission is actionable and is not relevant in the analysis of whether a misstated or omitted fact is material. *See id.* at 499 (stating that “an omission is material, meeting the second prong of the inquiry, ‘if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.’”); *see also TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

Under § 1-501(2), “It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly . . . [t]o make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading[.]” The language of the provision encompasses the principle that “once a party chooses to speak, it has a ‘duty to be both accurate and complete.’” *See SEC v. Goldman Sachs & Co.*, 790 F.Supp.2d 147, 162 (S.D.N.Y. 2011) (citation omitted); *Plumbers’ Union Local No. 12 Pension Fund, v. Swiss Reinsurance Co.*, 753 F.Supp.2d 166, 180 (S.D.N.Y. 2010) (citation omitted).

As set forth in Section II of the Department’s Motion, Respondents Geary Securities and Geary chose to speak but in doing so made untrue statements of fact and omitted to state facts necessary in order to make the statements they chose to make not misleading. The misrepresented and omitted facts were material because there is a “substantial likelihood” that a reasonable investor would consider them important in making their decision to invest. The issue of materiality is appropriately resolved as a matter of law by summary decision because the misrepresentations and omissions of Geary Securities and Geary are “so obviously important to an investor, that reasonable minds cannot differ on the question of materiality.” *See TSC*

*Industries*, 426 U.S. at 450; *see also SEC v. Randy*, 38 F.Supp.2d 657 (N.D. Ill. 1999) (granting summary judgment in favor of the SEC based, in part, on the conclusion that the undisputed evidence established that defendant made material misrepresentations and omissions).

**C. Alleged Misrepresentations and Omissions Are More Than  
“Corporate Optimism”**

The Geary Respondents argue in their Objection that the alleged misrepresentations and omissions are immaterial as a matter of law because they constitute “vague opinions, mere puffing and corporate optimism” and thus “no reasonable investor would consider them important.” The Geary Respondents’ argument is without merit.

In *Grossman v. Novell, Inc.*, 120 F.3d 1112 (10th Cir. 1997), a case cited by the Geary Respondents, the Court analyzed the materiality of certain statements that were made by a corporation in press releases and interview statements in conjunction with a registration statement that contained explicit risk factors and warnings. The Court stated, “In assessing the materiality of the alleged statements and omissions at issue here, we must consider the **context** in which the statements were made.” *Id.* at 1121 (emphasis added). At issue in *Grossman* were 1) the CEO’s statements that the company “had experienced ‘substantial success’ in integrating the sales forces of the two companies, that the merger was moving ‘faster than we thought,’ and that the merger presented a ‘compelling set of opportunities’ for the company;” and 2) the company’s statements “that ‘[b]y moving rapidly to a fully integrated sales force, we are leveraging our combined knowledge of the expanding scope of network solutions,’ and that it ‘expects that network applications will quickly reshape customer expectations.’” *Id.* The Court concluded that the statements at issue were immaterial as a matter of law because there were “soft, puffing statements, incapable of objective verification, that courts routinely dismiss as vague statements of corporate optimism.” *Id.* at 1121-22.

The Geary Respondents have ignored the context in which Geary made the alleged misstatements and omissions. Geary's misstatements and omissions were not made to the public in corporate press releases or interview statements. In his capacity as an agent of Geary Securities and in connection with the offer of the CEMP A-2 Notes, Geary stated in an email to Bank of Union's officers, "There is a Dealer interested in the A1's above 98. Just need an A2 Buyer (to hold them for <3 Months)." *See* Motion, ¶ 54. Geary also stated in an email to Bank of Union's officers, "If you decide to Purchase CEMP 09-1 A1, I'm certain you'd have an [sic] sizeable Unrealized Gain and could easily Sell any portion of it at any time." *See* Motion, ¶ 48. Geary further represented to Bank of Union's officers that if Bank of Union purchased the CEMP A-1 Notes, it would only have to hold them for two or three days after settlement because Geary had dealers lined up to purchase them from the bank at par or better. Geary represented to persons acting on behalf of Mr. Headington that if Mr. Headington purchased the CEMP A-2 Notes, he would be able to sell them within 90 days and at a profit. *See* Motion, ¶¶ 55, 59, and 62.

At the time Geary made the statements described above, Bank of Union had been Geary's client for several years. Braun Dep. 13:5:-25; Shelly Dep. 12:21-14:2, Ex. 21. Geary regularly attended, either in person or telephonically, the bank's monthly board meetings from about 1998 until 2008 or 2009. Braun Dep. 13:5:-25; Shelly Dep. 13:21-14:17. Geary acted as an advisor to the bank. Shelley Dep. 12:24-20. Given Geary's relationship with Bank of Union, Geary's statements were more than mere "corporate optimism." The statements went to the liquidity and profitability of the investments being recommended by Geary to his clients. Geary's statements were capable of objective verification. Any reasonable investor would consider these representations to be important.

The facts omitted by Geary, as set forth in Section II.B of the Department's Motion, were necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Geary's omissions were material because there was a substantial likelihood that the disclosure of the information would have been viewed by the reasonable investors as having significantly altered the total mix of information made available. The omissions are so obviously important to an investor that reasonable minds cannot differ on the question of materiality.

**V. SUMMARY DECISION FINDING THAT GEARY SECURITIES VIOLATED OKLAHOMA RULE 660:11-5-17 IS APPROPRIATE**

In their Objection, the Geary Respondents argue that summary decision on the alleged net capital violations should be denied because it is FINRA's responsibility to calculate net capital and oversee net capital computations and reporting by broker dealers; granting summary decision could result in conflicting decisions; discovery has not been completed; and disputed questions of fact exist. In support of their argument, the Geary Respondents adopt, incorporate and reference provisions of the *Response of Norman Frager to Motion by Oklahoma Department of Securities for Summary Decision Against Norman Frager*, filed on December 1, 2011. As a result, the *Motion for Summary Decision Against Respondent Norman Frager and Brief in Support*, filed on November 1, 2011, and the *Department's Reply to Respondent Frager's Response to Motion for Summary Decision*, filed on December 7, 2011, are incorporated herein by reference. As discussed above in Section I.C, incorporation of Respondent Frager's response does not create a genuine issue with respect to any fact because the response was not supported by evidentiary material.

The issues of whether it is FINRA's responsibility to calculate net capital and oversee net capital computations and reporting by broker-dealers and the risk of conflicting decisions were,

in part, the basis for the Geary Respondents' Motion to Bifurcate and Stay Net Capital Claims and Respondent Frager's Motion to Bifurcate and Stay Proceedings Predicated on Federal Claims. Those two motions were denied by the Hearing Officer in Orders filed on February 1, 2012.

As set forth above in Section II, the Department's Motion should not be denied on the basis of incomplete discovery. The Geary Respondents state that Respondent Frager has retained an expert witness who will testify regarding the net capital deficiency allegations in this matter. Presumably, that would be one of the two experts identified on Respondents' joint final witness list filed on April 5, 2011. The Geary Respondents have had over ten (10) months to conduct discovery regarding the experts but have chosen not to do so.

There are no genuine issues of material fact regarding the alleged net capital violations. In their Objection, the Geary Respondents refer to the purportedly disputed facts in ¶¶ 85, 111, and 117 of the Department's Motion as the disputed questions of fact that preclude summary judgment on the alleged net capital violations. *See* Objection, p. 31. As set forth above in Section I, the Geary Respondents did not adequately dispute Fact Nos. 85, 111 or 117, or any material fact set forth in the Department's Motion.

**VI. SUMMARY DECISION FINDING THAT GEARY SECURITIES AND GEARY VIOLATED OKLAHOMA RULE 660:11-5-42 IS APPROPRIATE**

**A. Geary Respondents Have Fair Notice of Contents of Oklahoma Rules, and Department Is Not Exceeding Its Authority**

The Geary Respondents contend that a summary decision under Oklahoma Rule 660:11-5-42 for violations of FINRA rules is not appropriate because the rule deprives the Geary Respondents of fair notice of the contents of the Oklahoma Rules and the Department is exceeding its authority. Response, p. 32. In support of their contention, the Geary Respondents

quote a sentence in 660:11-5-42(a) that states, “The standards shall be interpreted in such manner as will aid in effectuating the policy and provisions of [OUSA], and so as to require that all practices of broker-dealers, and their agents, in connection with their activities in this state shall be just, reasonable and not unfairly discriminatory.” The Geary Respondents represent that this express language limits the application of 660:11-5-42 to violations of OUSA. Such argument is without merit given the explicit language of 660:11-5-42(b)(1) that states, in part: “A broker-dealer and his agents shall not violate any federal securities statute or rule or any rule of a national securities exchange or national securities association of which it is a member with respect to any customer, transaction or business effected in this state.”

Without any reference to authority, the Geary Respondents dismiss the above-quoted language of 660:11-5-42(b)(1) in a footnote by saying that it is so vague and general as to be unconstitutional and does not provide the Geary Respondents with sufficient notice of the type of conduct that will subject them to discipline. The language, however, is not vague as it clearly puts the Geary Respondents on notice that a violation of any federal securities statute or rule or any rule of a national securities exchange or FINRA will constitute an “unethical practice” under 660:11-5-42. As registered persons, Geary Securities and Geary are presumed to be familiar with federal securities statutes and rules and FINRA rules. *See Heath v. SEC*, 586 F.3d 122, 140 (2d Cir. 2009) (“As an experienced registered representative, plaintiff may be fairly charged with knowledge of the ethical standards of his profession . . . .” (internal citation omitted)).

The Department asserts that the Geary Respondents engaged in unethical practices per the standards set forth in 660:11-5-42 and should therefore be disciplined under § 1-411 of the OUSA. The facts in *Rincover v. State, Dept. of Finance, Securities Bureau*, 866 P.2d 177 (Idaho 1993), the sole case relied upon by the Geary Respondents for purposes of this issue, are

distinguishable from the situation present here. The Department has a rule that sets forth standards of ethical practices for broker-dealers and their agents. Oklahoma Rule 660:11-5-42. In keeping with the mandate of “maximizing uniformity in federal and state regulatory standards” set forth in § 1-608 of OUSA, one of the standards explicitly makes it an unethical practice for a broker-dealer or its agents to violate a federal securities statute or rule or a FINRA rule. Oklahoma Rule 660:11-5-42(b)(1). In *Rincover*, the Court did not reference the existence of a similar standard in Idaho law.

### **B. Department Does Not Have To Prove “Bad Faith”**

The Geary Respondents argue that the Department’s cause of action under 660:11-5-42 fails because the Department “has not alleged or established bad faith on the part of the Geary Respondents.” Objection, p. 34-35. In making such an argument, the Geary Respondents incorrectly state, “The Department contends that SEC or NASD rule violations do not require scienter.” Objection, p. 35. The Geary Respondents also illogically reason that “if the Department is allowed to pursue a violation of its Rule 660:11-5-42, it must establish as a predicate to this Rule that the Geary Respondents violated *another* ODS Rule.”

The Department’s position is that the Geary Respondents engaged in unethical practices per the standards set forth in 660:11-5-42 and should therefore be disciplined as authorized by § 1-411(D)(2) and/or (D)(13). Section 1-411(D)(2) requires a finding of “willfulness” while (D)(13) does not require a finding of any level of scienter or “bad faith.”<sup>8</sup> The language of 660:11-5-42(a) makes it clear that “[a]ny noncompliance with the standards of ethical practices specified in this [rule] will constitute unethical practices in the securities business . . .” The rule is silent with respect to a “bad faith” requirement.

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<sup>8</sup> The undisputed facts establish that Geary Securities and Geary acted willfully. See Motion, p. 52.

An analysis of the two pertinent standards of ethical practice also demonstrates that a showing of “bad faith” is not required. The first standard is set forth in 660:11-5-42(b)(1) which requires a broker-dealer and his agents, in the conduct of their business, to “observe high standards of commercial honor and just and equitable principles of trade” (“Oklahoma’s J&E Rule”). Oklahoma Rule 660:11-5-42(b)(1) makes it an unethical practice to “violate any federal securities statute or rule or any rule of a national securities exchange or national securities association of which it is a member with respect to any customer, transaction or business effected in this state.”

In its Motion, the Department asserts that Geary Securities failed to comply with Oklahoma’s J&E Rule because it violated Exchange Act Rules 17a-5 and 17a-11 and thus FINRA Rule 2010 (FINRA’s J&E Rule). As acknowledged by the Geary Respondents, a violation of FINRA’s J&E Rule does not require a finding of “bad faith” when the predicate for the violation is a violation of another FINRA or Exchange Act rule. *See Avello v. SEC*, 454 F.3d 619, 627 (7th Cir. 2006); Objection, p. 35. Similarly, a violation of Oklahoma’s J&E Rule should not require a finding of “bad faith” when the predicate for the violation is a violation of a FINRA or Exchange Act rule. This approach is logical in light of the fact that Oklahoma’s J&E Rule explicitly prohibits a violation of FINRA and Exchange Act rules.

The Exchange Act rules upon which Geary Securities’ violations of Oklahoma’s J&E Rule are based do not require a finding of “bad faith.” *See, e.g., Fox & Co. Inv., Inc.*, Complaint No. C3A030017, 2005 WL 3054152, at \*9-10 (N.A.S.D.R. Feb. 24, 2005) (“Failing to file accurate FOCUS reports is a violation of Exchange Act Rule 17a-5 and Conduct Rule 2110.” Whether respondents acted in “good faith” was only considered in determining the appropriate sanction for the violations.); *Litwin Sec., Inc.*, Exchange Act Release No. 38673, 1997 WL

274926, at \*4 and n.2 (May 27, 1997) (Without finding “bad faith” and specifically stating that intent is irrelevant, the SEC sustained the NASD’s finding that applicant violated the NASD J&E Rule by failing to comply with Exchange Act Rule 17a-11’s requirement of giving notice of a capital deficiency within twenty-four hours to the NASD and SEC.)

The Department also asserts that Geary Securities and Geary failed to comply with Oklahoma’s J&E Rule because it violated NASD Rule 2440 (still effective) and thus FINRA’s J&E Rule. A violation of NASD Rule 2440 does not require a finding of “bad faith.” *See, e.g.*, NASD IM-2440-1 and IM-2440-2 (No “bad faith” requirement or any other level of scienter is included in the list of factors relevant to the determination of the fairness of a mark-up.)

In addition, the Department bases its violation of 660:11-5-42 on Geary Securities’ and Geary’s failure to comply with Oklahoma’s J&E Rule by causing the issuance of a false press release. The Department maintains that there is no “bad faith” or other scienter requirement for such violation based on arguments set forth above in this subsection and on the fact that there is no such requirement for an actionable untrue statement of material fact as set forth in Section IV.A above. Yet, despite its belief that no “bad faith,” or other scienter, requirement exists, the Department established that Geary knew that the press release was false at the time it was issued. *See Motion, p. 48.*

The second standard of ethical practice at issue is set forth in Oklahoma Rule 660:11-5-42(b)(6) which states, “No broker-dealer or agent of a broker-dealer shall make an offer to buy from or sell to any person any security at a stated price unless such broker-dealer or agent is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.” The language of this standard does not require a showing of “bad faith” or any other level of scienter.

**C. There Is No Genuine Issue as to any Material Fact Relating to Whether Geary Securities and Geary Violated 660:11-5-42**

In their Objection, the Geary Respondents argue that there are material facts at issue that preclude a finding that Geary Securities and Geary violated 660:11-5-42. As set forth in Section I above and in the Department's Motion, there is no genuine issue of material fact relating to whether Geary Securities and Geary violated 660:11-5-42.

**D. Oklahoma Rule 660:11-5-42(b)(6) Is Not Unconstitutionally Vague**

The Geary Respondents argue that Rule 660:11-5-42(b)(6) (set forth in Section VI.B above) is unconstitutionally vague because the phrases "prepared to purchase" and "at such price and under such conditions as stated at the time of such offer," have not been defined. The Department maintains that such terms are clear and do not need to be defined, particularly since FINRA Rule 5220 contains the identical language except that the term "member" is used in FINRA Rule 5220 where "broker-dealer or agent" is used in 660:11-5-42(b)(6).

**VII. ADMINISTRATOR CAN DETERMINE "PUBLIC INTEREST" BASED ON FINDINGS OF FACT AND CONCLUSIONS OF LAW ULTIMATELY ADOPTED**

The Geary Respondents argue that they should not be disciplined pursuant to § 1-411 because the Department is not entitled to summary decision on its claims or, alternatively, the Department has not established that the imposition of the alleged sanctions is in the best interest of the public. The Department is entitled to summary decision on its claims as set forth in the Motion and other Sections of this reply. The Department does not have to establish that the imposition of sanctions is in the "best interest of the public".

A condition to the issuance of an order under § 1-411 (A)-(C) is that "the Administrator [find] that the order is in the public interest." Okla. Stat. tit. 71, § 1-411. The condition is that the order be in the "public interest" not in the "*best* interest of the public" (emphasis added). The

Administrator can determine whether such order is in the public interest based on the findings of fact and conclusions of law he ultimately adopts. The Department does not have to prove that the issuance of an order pursuant to § 1-411 (A)-(C) is in the public interest to establish that it is entitled, as a matter of law, to a summary decision finding that the Geary Securities and Geary violated OUSA and/or the Oklahoma Rules.<sup>9</sup>

### **VIII. IMPOSITION OF CONTROL PERSON LIABILITY IS APPROPRIATE**

With regard to whether control person liability should be imposed against Geary pursuant to § 1-411(H) for the actions of Geary Securities, the Geary Respondents argue that Geary's knowledge of the existence of the conduct is a material fact in dispute and precludes summary decision. Such inquiry is irrelevant to the determination of whether the Department is entitled, as a matter of law, to a summary decision finding that Geary Securities violated OUSA and/or the Oklahoma Rules. Only after a violation by Geary Securities is found, does the inquiry become whether Geary "did not know, and in the exercise of reasonable care could not have known, of the existence of [Geary Securities'] conduct."<sup>10</sup> Okla. Stat. tit. 71, § 1-411(H). Regardless, the undisputed facts demonstrate that Geary as indirect owner, Chief Executive Officer, and President of Geary Securities, knew, or in the exercise of reasonable care could have known, of Geary Securities' actions. The Geary Respondents did not set forth any facts showing otherwise.

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<sup>9</sup> The Department is only seeking the imposition of sanctions against Geary Securities and Geary pursuant to § 1-411. The Department is proceeding against CEMP pursuant to § 1-604.

<sup>10</sup> As demonstrated in its introductory paragraph to the Motion, the Department anticipates a separate hearing to determine the sanctions to be imposed against the Geary Respondents after the entry of a summary decision finding violations of the OUSA and/or Oklahoma Rules.

**IX. A CEASE AND DESIST ORDER AGAINST CEMP LLC IS APPROPRIATE**

The Geary Respondents contend that “material questions of disputed fact” exist regarding whether CEMP LLC transacted business as an unregistered broker-dealer in violation of § 1-401 of OUSA. Yet, the Geary Respondents did not properly dispute any of the material facts establishing that CEMP LLC transacted business as an unregistered broker-dealer. See Section I above.

Instead of disputing the material facts, the Geary Respondents state, “CEMP LLC never sold any securities to any investor,” and “CEMP LLC purchased the PL-CMO’s from the banks, but then sold the PL-CMO’s only to Geary Securities.” Objection, p. 40. To be a “broker-dealer” a person must be “engaged in the business of effecting transactions in securities for the account of **others** or for the person’s own account.” Okla. Stat. tit. 71, § 1-102(4) (emphasis added). It is immaterial whether the “others” are considered to be “investors.” As set forth in Section V of the Motion, the undisputed facts show that CEMP LLC purchased PL-CMOs from two banks and sold the CEMP A-1 and A-2 Notes to Geary Securities for purchase by others. Geary intended for CEMP LLC to purchase and sell securities in similar transactions in the future.

The Geary Respondents also contend that CEMP LLC cannot be considered a broker-dealer effecting transactions in “securities” because the “subject CEMP securities” are exempt from registration. This argument is also without merit. Even if the PL-CMOs and CEMP Class A-1 and A-2 Notes are exempt from the registration provisions of OUSA, they are not excluded from the definition of “securities” provided in § 1-102 of OUSA. Okla. Stat. tit. 71, § 1-102(32).

Finally, the Geary Respondents contend that a cease and desist order against CEMP LLC is not appropriate because “by seeking to **enjoin** CEMP LLC regarding any future acts, the

Department makes scienter an issue” and the Department has not shown scienter with regard to CEMP LLC. Objection, p. 42 (emphasis added). The Geary Respondents cite *Aaron v. SEC*, 446 U.S. 680, 701 (1980), in support of their position. The Geary Respondents, however, have confused the requirements for an injunction in a civil case with the requirements of a cease and desist order in an administrative proceeding. Under § 1-604, a showing that a person “has engaged” in an act constituting a violation of the Act is sufficient for issuance of a cease and desist order. Okla. Stat. tit. 71, § 1-604(A)(1).

### CONCLUSION

The Geary Respondents have not disputed the material facts. As set forth in its Motion and this reply, the Department is entitled to a summary decision finding that Geary Securities violated § 1-501 of OUSA and Oklahoma Rules 660:11-5-17 and 660:11-5-42; Geary violated § 1-501 and 660:11-5-42; and CEMP LLC violated § 1-401 of OUSA. The Department’s Motion is not premature, and summary decision would not violate the Geary Respondents’ due process rights. The Department’s Motion should be granted.

Respectfully,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing reply was emailed and mailed, with postage prepaid, this 17<sup>th</sup> day of February, 2012, to:

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