

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN - 3 2012

PATRICIA PRESLEY, COURT CLERK

by _____

Oklahoma Department of Securities ex rel. Irving L. Faught,)
)

Plaintiff,)

v.)

Case No. CJ-2011-2277

The Bank of Union, John Shelley, Mike Braun, and Timothy Headington,)
)

Defendants.)

**DEFENDANT TIMOTHY HEADINGTON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR WRIT AND COMMISSION
TO TAKE DEPOSITION OUT OF STATE AND MOTION TO QUASH**

Defendant, Timothy Headington ("Defendant" or "Mr. Headington"), by and through undersigned counsel, and for his opposition to Plaintiff Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator's ("Plaintiff" or the "Department") Motion for Writ and Commission to Take Deposition out of State (the "Motion for Writ"), hereby moves the Court pursuant to Okla. Stat. title 12 §§ 3226B.2.c. and 3226C.1. for an Order denying the Motion for Writ and quashing the subpoena.

INTRODUCTION

The Motion for Writ goes beyond undue burden and expense and constitutes harassment and abuse. The Department admits that it "*will not call Mr. Headington* as a witness at any hearing on the merits of [the Administrative Proceeding] for the very reason that *his testimony will add nothing* to the information in the record" regarding the transactions at issue. (Ex. 1,¹ pp.

¹ Attached hereto as Exhibit 1 is the Department's Response to Geary Respondents' Motion for Preclusion Order and Order Striking Department's Exhibit Number 27 (Purported Headington Guaranty Agreement) filed in the administrative proceeding captioned *In the Matter of: Geary Securities, Inc. fka Capital West Securities, Inc.; Keith D. Geary; Norman Frager; and CEMP, LLC*, ODS File No. 09-141 (the "Administrative Proceeding"), which Mr. Headington incorporates and restates as though fully set forth herein.

4-5 (emphasis added)). Moreover, Respondent² Geary testified that he had no verbal communications with Mr. Headington prior to the transactions, and never communicated with him directly after the transactions. (*Id.*, p. 5). Nevertheless, at Respondents' request the Department burdens this Court with yet another in a series of misguided attempts to secure Mr. Headington's deposition. Under the circumstances, the Department's and Respondents' repeated efforts go beyond the undue burden and expense to Mr. Headington, who is neither an Oklahoma resident nor a party to the Administrative Proceeding. The Department's Motion for Writ should be denied and the subpoena quashed.

BACKGROUND

This is the Department's second trip to this Court seeking to enforce a deposition subpoena issued to Mr. Headington in the Administrative Proceeding. In its first attempt, this Court denied the Department's application for enforcement, and granted Mr. Headington's motion to quash finding that it did not have jurisdiction to compel Mr. Headington, a Texas resident, to appear.³ At that time, the Department decided not to pursue judicial enforcement of the subpoena in Texas. In denying Respondents' motion to reconsider that decision, the Department found *inter alia* that "there was no effective service of process of the Headington Deposition Subpoena," because "the Return of Service ... reflects that the individual whose signature appears on the Return Receipt is the agent of the addressee, not Timothy Headington the addressee." (Ex. 3⁴, p. 2).

² As used herein, "Respondent ____" or "Respondents" refer individually or collectively to Geary Securities, Inc. *aka* Capital West Securities, Inc., Keith D. Geary, and CEMP, LLC, respondents in the Administrative Proceeding.

³ Attached hereto as Exhibit 2 is the Motion to Quash or For Protective Order filed on behalf of Mr. Headington, The Bank of Union, John Shelley, and Mike Braun on May 4, 2011, which Mr. Headington incorporates and restates as if fully set forth herein.

⁴ Attached hereto as Exhibit 3 is the Department's August 4, 2011 Order Denying Motion to Reconsider, which Mr. Headington incorporates and restates as if fully set forth herein.

Undeterred, Respondents requested that the hearing officer assigned to the Administrative Proceeding re-issue a subpoena for Mr. Headington's deposition, which he did. Evidently unaware of their prior procedural fumbblings (despite their having been pointed out by the orders of this Court and the Administrator), and ignorant of Texas subpoena procedure, Respondents attempted to serve Mr. Headington⁵ with a copy of the subpoena accompanied by a Texas subpoena issued only by a notary public. But as the Department admits, because "no court of record in Oklahoma has issued a mandate, writ or commission requiring [Mr. Headington's] oral or written deposition testimony," as is required under Texas law,⁶ the notary subpoena was invalid. (*See Ex. 1, p.4*).

Now, despite having previously decided not to pursue enforcement of a deposition subpoena in Texas and admitting that it "*will not call Mr. Headington as a witness at any hearing on the merits ... for the very reason that his testimony will add nothing to the information in the record,*" and Respondent Geary's own testimony that he never communicated directly with Mr. Headington, the Department again comes to this Court with yet another request to depose Mr. Headington. The Department's request is nothing short of harassment and abuse.

⁵ As the Department found with respect to the initial subpoena after it was quashed by this Court, Respondents failed to obtain effective personal service on Mr. Headington under Texas law, instead leaving the subpoena with Mr. Headington's handy-man. (*See Tex. R. Civ. P. 176.5 (Manner of Service - "A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law." Proof of Service - "Proof of service must be made by filing either ... the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or ... a statement by the person who made the service stating ... the name of the person served.")*)

⁶ *See Tex. R. Civ. P. 201.2* ("If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.")

ARGUMENT

Mr. Headington's Testimony is Unreasonably Cumulative And Duplicative, And Any Relevant Information Sought Has Already Been Obtained From Other, More Convenient, Less Burdensome, And Less Expensive Sources.

Under Oklahoma law:

On motion or on its own, the court *shall* limit the frequency or extent of discovery otherwise allowed if it determines that:

- (1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive,
- (2) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action, or
- (3) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, ... the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Okla. Stat. title 12 § 3226B.2.c. (emphasis added). Moreover, “[u]pon motion ... by the person from whom discovery is sought ... the court may enter any order which justice requires to protect a ... person from annoyance, harassment, embarrassment, oppression or undue delay, burden or expense” Okla. Stat. title 12 § 3226C.1. Here, all three requisites to the Court’s duty to limit discovery are satisfied and, under the circumstances, the Motion for Writ constitutes annoyance and harassment, and subjects Mr. Headington to undue burden and expense.

As relevant here, the Administrative Proceeding involves only the Respondents’ misrepresentations, omissions, and other unethical practices in connection with their September 2009 offer and sale of the CEMP Resecuritization Trust Series 2009-1, Class A-1 and Class A-2 Notes to The Bank of Union and Mr. Headington respectively. In particular, Respondents Geary and Geary Securities, Inc., guaranteed Mr. Headington, in writing, that he would be divested of the A-2 Notes within three months of his purchase and at a substantial profit. Mr. Headington’s

testimony, however, would be unreasonably cumulative and duplicative because the Department and Respondents have already obtained any relevant information from other, more convenient, less burdensome, and less expensive sources, including Respondent Geary.

According to its own filings in the Administrative Proceeding, the Department has already deposed Respondent Geary.⁷ In his deposition, Respondent Geary testified that he did not have any verbal communication with Mr. Headington prior to Mr. Headington's purchase of the A-2 Notes, and that after the transactions he never heard anything from Mr. Headington directly. (*See* Ex.1, p. 5). Respondent Geary "further testified that he learned of Mr. Headington's decision to purchase the A-2 Notes through John Shelley and Mike Braun." (*Id.*)

John Shelley and Mike Braun are officers of The Bank of Union which, in conjunction with Mr. Headington's purchase of the A-2 Notes, purchased the A-1 Notes from Respondents in September 2009. Pursuant to this Court's July 25, 2011 Order, Messrs. Shelley and Braun were deposed by the Department and Respondents on November 15 and 16, 2011. As the Department admits, Mr. Shelley testified that Respondent Geary communicated with and made the representations at issue about Mr. Headington's purchase of the A-2 Notes directly to Mr. Shelley. (*Id.*, p. 6). With respect to Respondent Geary's written guarantee that Mr. Headington would be divested of the A-2 Notes within three months of his purchase, and at a profit, Mr. Shelly testified that he directed the preparation of the guarantee "in accordance with the representations made to him by Respondent Geary." (*Id.*) Mr. Shelly also testified that he delivered the guarantee to Respondent Geary and witnessed him sign it. (*Id.*) Significantly, Mr. Headington is not even a signatory to the guarantee. (*Id.*)

⁷ As a third-party to the Administrative Proceeding, Mr. Headington has not been provided a transcript of Respondent Geary's deposition.

Based on Mr. Shelley's testimony, the Department and Respondents also deposed yet another third party, Betty Pettijohn. Like Messrs. Shelley and Braun, Ms. Pettijohn is an officer of The Bank of Union, and an Oklahoma resident whose deposition was more convenient, less burdensome, and less expensive than deposing Mr. Headington in Dallas, Texas. As both she and Mr. Shelley testified, Ms. Pettijohn prepared the guarantee at Mr. Shelley's direction.

The sum total of the testimony of the four witnesses who have been deposed about Respondents' offer and sale of the A-2 Notes to Mr. Headington is that: 1) Respondent Geary never communicated directly with Mr. Headington; 2) Respondent Geary communicated with and made the relevant representations to Mr. Shelley; 3) Mr. Shelley directed that the guarantee be prepared in accordance with Respondent Geary's representations; 4) Ms. Pettijohn prepared the guarantee at Mr. Shelley's direction; and 5) Mr. Shelley delivered the guarantee to Respondent Geary and witnessed him sign it. Because any relevant testimony has already been obtained from other sources, Mr. Headington is not a necessary witness. In fact, by its own admission, the Department "*will not call Mr. Headington as a witness at any hearing on the merits ... for the very reason that his testimony will add nothing to the information in the record.*" (Ex. 1, pp. 4-5 (emphasis added)).

That four witnesses, three of whom are third parties to the Administrative Proceeding, have already testified about the Respondents' offer and sale of the A-2 Notes, demonstrates not only that Mr. Headington's testimony would be unreasonably cumulative and duplicative, but also that the parties who seek his deposition have had ample opportunity to obtain the information they seek through discovery. Moreover, the deposition would result in substantial, additional burden and expense to not only Mr. Headington, but also to the Department and Respondents, all of whom would be required to waste valuable time and/or needlessly incur

attorneys' fees in preparing and appearing for a deposition, and to incur the cost of counsel traveling from Kansas City and Oklahoma City to Dallas. Because Mr. Headington's testimony will add nothing to the record, the burden and expense certainly outweighs any likely benefit his testimony might provide.

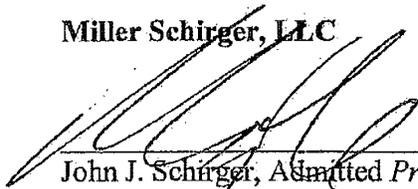
More than seven months have passed since this Court quashed the initial deposition subpoena and the Department decided not to pursue judicial enforcement in Texas. During that time the Department and Respondents have had ample opportunity to obtain and have, in fact, obtained the information they seek from other, more convenient, less burdensome and less expensive sources. In the meantime, Mr. Headington -- a third party to the Administrative Proceeding -- has been forced to endure the burden and expense of opposing two procedurally defective subpoenas. Enough is enough. The Department's and Respondents' efforts go beyond undue burden and expense and instead constitute harassment and abuse. Under these circumstances, the purpose of the present subpoena and Motion for Writ is not legitimate discovery, but instead to subject Mr. Headington to annoyance, harassment, and undue burden and expense. The Motion for Writ should be denied and the subpoena quashed.

CONCLUSION

For all of the above and foregoing reasons, Defendant Timothy Headington respectfully requests that the Court enter its Order: 1) denying the Department's Motion for Writ and Commission to Take Deposition Out of State; and 2) quashing the subpoena, and for such other and further relief the Court deems just and proper.

Respectfully submitted by:

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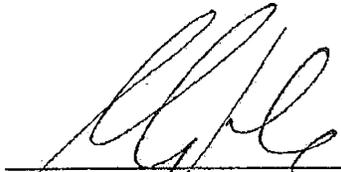
ATTORNEYS FOR DEFENDANT
TIMOTHY HEADINGTON

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2012, a copy of the foregoing document was served on the following by hand-delivery:

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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 RESPONSE TO GEARY RESPONDENTS' MOTION FOR
PRECLUSION ORDER AND ORDER STRIKING DEPARTMENT'S EXHIBIT
NUMBER 27 (PURPORTED HEADINGTON GUARANTY AGREEMENT)**

On November 14, 2011, Respondents Geary Securities, Inc., Keith D. Geary, and CEMP, LLC, (collectively, the "Respondents"), filed a motion in this matter requesting the following relief:

- (1) an order precluding Timothy Headington, and any of his representatives, from testifying at the hearing on the merits of this action;
- (2) an order striking the document, the Guaranty Agreement, dated September 25, 2009, between Keith Geary and Timothy Headington, previously identified as Exhibit 27 on the exhibit list of the Department of Securities (Department), and an order precluding its offer, admission or reference in any pleadings, depositions, and at the hearing on the merits of this action; and



(3) an order precluding the Department from attempting to introduce any evidence concerning the allegations contained in the Recommendation as to Timothy Headington.

The stated reasons for the motion are the actions, inactions and "evasive" tactics of Mr. Headington, a non-party to this matter. Without providing any particulars as to how, Respondents are crying foul by claiming that they have been unfairly prejudiced and deprived of their rights to discovery, due process and fundamental fairness. As more fully set forth below, such is not the case.

Background

This regulatory enforcement proceeding was initiated by the Department following its investigation of allegations that Respondents engaged in fraudulent representations and omissions and other unethical practices in connection with the offer and sale of certain securities. One of the transactions in question is the offer and sale of the CEMP Resecuritization Trust Series 2009-1, Class A-2 Notes (the "A-2 Notes") in September of 2009. Mr. Headington, a resident of Dallas, Texas, purchased the A-2 Notes in a transaction effected through Respondent Geary Securities, Inc. Among the Department's allegations is that Respondents Keith Geary (Geary) and Geary Securities, Inc., guaranteed their customer against loss in the securities transaction involving the A-2 Notes, as memorialized in Exhibit 27. The promised terms, as represented by Respondent Geary, were that Mr. Headington would be divested of the A-2 Notes within three months of his purchase with a profit.

I. Respondents' motion is premature.

The Rules of the Oklahoma Securities Commission and the Administrator of the Oklahoma Department of Securities, effective July 1, 2007 (Rules), establish the prehearing proceedings and processes. *See* 660:2-9-3. One such provision relates to the prehearing conference that is to be held as close to the time of hearing as is reasonable to address certain specified matters. *See* 660:2-9-3(e). Among the matters to be addressed at the prehearing conference are the final lists of witnesses and exhibits to be utilized at the hearing and any discovery disputes. *See* 660:2-9-3(e)(B) and (F). With respect to this proceeding, no hearing date is set. Likewise, no prehearing conference date is set. Therefore, seeking resolution of the matters raised in Respondents' motion at this stage of the proceeding is clearly premature. However, even if the time was right to consider the matters raised in the pending motion, granting the relief requested would be without merit.

II. Mr. Headington has not been served with a valid subpoena.

The Respondents have made requests of the hearing officer to issue subpoenas for Mr. Headington's deposition testimony on two separate occasions. Both subpoenas were issued by the Hearing Officer. At Respondents' request, the Administrator of the Department sought judicial enforcement of the first subpoena in an Oklahoma County District Court. However, the judge found that he did not have jurisdiction to compel Mr. Headington's attendance for a deposition in the state of Oklahoma.

In connection with the second subpoena issued by the Hearing Officer, Respondents arranged for the issuance of a Texas deposition subpoena by a Texas notary public. However, the requirements of Texas law relating to depositions in the state of

Texas for use in a foreign jurisdiction are applicable to this situation. Rule 201.2 of the Texas Rules of Civil Procedure provides as follows:

If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State. (Emphasis added.)

With respect to Mr. Headington, no court of record in Oklahoma has issued a mandate, writ or commission requiring his oral or written deposition testimony in this proceeding. Thus, the deposition subpoena issued by the Texas notary public is not valid. The request for relief made by Respondents in their motion as to the deposition of Mr. Headington is without merit.

III. Mr. Headington is not a necessary witness to this proceeding.

When a Nebraska administrative agency did not invoke the aid of the district court to enforce an administrative subpoena to a non-party witness, the Nebraska Court of Appeals stated, “[I]n order for a party to argue that the denial of a request for a witness’ attendance violates due process, the party must show that the witness’ testimony would add something to the information in the record.” *Bender v. Dept. of Motor Vehicles*, 593 N.W.2d 27, 32 (Neb. Ct. App. 1999) (citing *Davis v. Office of Personnel Management*, 918 F.2d 944 (Fed. Cir. 1990)). For purposes of this motion, Respondents should be required, at a minimum, to demonstrate that Mr. Headington’s testimony “would add something to the information in the record.” *See id.* Respondents have not done so.

The Department will not call Mr. Headington as a witness at any hearing on the merits of this case for the very reason that his testimony will add nothing to the

information in the record regarding the A-2 Notes transaction. Mr. Headington's testimony is not necessary for the following reasons:

(1) When deposed by the Department, Respondent Geary testified that he did not communicate directly with Mr. Headington about his potential purchase of the A-2 Notes. The following excerpts from Respondent Geary's deposition transcript demonstrate this fact:

Q. Did you have any verbal communication with Mr. Headington prior to the time that he purchased the A-2's?

A. No.

* * *

Q. When did you first hear something from Mr. Headington?

A. I don't know that I ever heard anything from him directly.

See Exhibit "A" (Geary Dep. 164:23-165:1, 167:19-22).

(2) Respondent Geary further testified that he learned of Mr. Headington's decision to purchase the A-2 Notes through John Shelley and Mike Braun. The following excerpt from Respondent Geary's deposition transcript demonstrates this fact:

Q. How did you become aware that Mr. Headington was willing to purchase the A-2s?

A. Just in the same conversation that I had had with John and Mike when Bank of Union said they would buy the A-1s.

Q. So at the same time you learned that Bank of Union was going to buy the A-1s you learned that Mr. Headington would buy the A-2s?

A. Yes.

See Exhibit "A" (Geary Dep. 165:20-166:3).

(3) In opening his account with Respondent Geary Securities, Inc., Mr. Headington authorized the firm to follow the instructions of John Shelley, as his authorized agent, in connection with the account. See Exhibit "B" (Trading Authorization and Indemnification Form). Indeed, Respondent Geary communicated with and made the representations at issue directly to John Shelley. See Exhibit "C" (Shelley Dep. 37:20-38:7).

(4) When deposed by the Department, John Shelley also testified that he directed the preparation of Exhibit 27 in accordance with the representations made to him by Respondent Geary, delivered the same to Respondent Geary, and witnessed Respondent Geary's signature thereto. See Exhibit "C" (Shelley Dep. 45:20-46:23, 86:8-11, 86:18-87:4, 88:16-25, 89:15-90:8).

(5) Mr. Headington was not a signatory to the written guaranty agreement. See Exhibit "D" (Guaranty Agreement).

(6) This is a regulatory proceeding brought solely by the Department in the public interest. The Department is not acting on behalf of Mr. Headington, and the proceeding in no way personally benefits Mr. Headington. Further, Mr. Headington does not have a financial stake or interest in whether Respondents are sanctioned in this matter.

Again, Mr. Headington's testimony will add nothing to the information in the record of this proceeding. Respondents have not been denied their due process rights.

IV. Respondents lack credibility in arguing their lack of knowledge of the Department's allegations.

Due process in an administrative proceeding entitles a party to the procedural opportunities of notice and a fair hearing. *Palmetto Alliance, Inc. v. South Carolina*

Public Service Commission, 319 S.E. 2d 695, 698 (citing *Morgan v. United States*, 304 U.S. 1 (1938)). The Court in *Morgan*, ruling on a petition for rehearing, reiterated the following principle:

Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

304 U.S. at 25.

Since the prehearing conference and hearing in this matter are not scheduled, and have not convened, Respondents cannot complain of an unfair hearing at this time. As to notice, opposing counsel grossly misrepresents that Respondents are attempting to defend themselves "blind folded" and that they are "completely 'in the dark' with respect to the Department's express allegations that [they] made material misrepresentations and omissions and employed unethical securities practices in their dealings with Mr. Headington." Nothing could be further from the truth.

In addition to the Recommendation filed in this matter, which provided detailed notice of the Department's allegations against them, Respondents have been afforded the opportunity to sit in on the Department's depositions of John Shelley and Mike Braun regarding their communications with Respondent Geary relating to the A-2 Notes transaction; Respondents have been afforded the opportunity to depose, and did depose, John Shelley and Mike Braun; Respondents have been furnished with the guaranty agreement, the affidavit signed by the members of the Bank of Union Board of Directors affirming the communications between Respondent Geary and the bank board regarding Mr. Headington's purchase of the A-2 Notes, and the list of the Department's prospective witnesses with summaries of their expected testimony. Accordingly, it cannot be argued

credibly that Respondents are "blind folded" and "completely in the dark" as to the Department's allegations regarding the Respondents' misrepresentations and omissions in connection with Mr. Headington's purchase of the A-2 Notes.

The due process rights of a party are not violated "unless he has been prejudiced by the administrative procedures to which he objects" (emphasis added). *Ricci v. Davis*, 627 P.2d 1111, 1122 (Colo. 1981). It is the actions or inactions of the governmental entity that are relevant to a due process complaint. Respondents admit that the pending motion is not directed at inaction by the Department. Instead, the motion is directed at the inaction of Mr. Headington, a private citizen and a nonparty to this proceeding. No action by the Department has deprived Respondents of procedural due process.

V. Punishment of the Department is not warranted or authorized.

Respondents claim that it is the actions, inactions and "evasive" tactics of Mr. Headington that purportedly have exposed them to unfair prejudice and deprived them of their rights to discovery, due process and fundamental fairness in this matter. Rule 660:2-9-3(f) does indeed authorize the imposition of "sanctions" for certain failures.¹ Although the Respondents claim otherwise, Rule 660:2-9-3(f) does not authorize sanctions to be imposed against the Department for the failure of third-party witnesses to comply with administrative subpoenas. *See* Rule 660:2-9-3(f). To do so would thwart enforcement of the Act and render the specified remedy for a third-party witness' failure

¹ Rule 660:2-9-3(f) states, in pertinent part: "Failure to participate and cooperate in the preparation of a scheduling order or prehearing conference order, failure to comply with a scheduling order or prehearing conference order, failure to appear at any hearing or conference, failure to appear substantially prepared, or failure to participate in good faith may result in any of the following *sanctions* . . ."

to comply with administrative subpoenas meaningless. *See* Rule 660:2-9-4(e). As a result, Respondents' request for punishment of the Department is without authority.

VI. Respondents' reliance on their cited authority is misplaced.

The Respondents rely on *State ex rel. Protective Health Services v. Billings Fairchild Center, Inc.*, 158 P.3d 484 (Okla. Civ. App. 2006), in an attempt to support their position that they are entitled to the fullest possible knowledge of the issues and facts before hearing. However, due to a critical factual distinction, Respondents' reliance on *Billings Fairchild Center* is misplaced.

In *Billings Fairchild Center*, an Oklahoma state agency submitted interrogatories to a respondent in an administrative proceeding as authorized by that agency's rules. 158 P.3d 484. A provision of the state agency's administrative rules stated:

The order of procedure in hearings in all individual proceedings shall generally be governed by the Oklahoma Pleading Code and the Discovery Code. . . . Any matter of practice or procedure not specified either by the APA or by these rules will be guided by practice or procedure followed in the district courts of this state.

Id. at 488-89.

When the respondent's answers to the interrogatories were deemed insufficient, the state agency requested that the administrative law judge (ALJ) compel interrogatory answers. *Id.* at 487. After the ALJ determined that there was no authority for him to consider and rule upon a motion to compel answers to interrogatories, the state agency applied to the district court to enforce the administrative interrogatories. *Id.* The state agency appealed the trial court's decision that the respondent had answered the interrogatories sufficiently, and the respondent counter-appealed the trial court's preceding decision finding that the district court had jurisdiction to hear the State's

petition. *Id.* The Court of Civil Appeals of Oklahoma affirmed the trial court's finding that it had jurisdiction and reversed the finding that the discovery responses were sufficient. *Id.* at 490. The Court held "that when an agency has incorporated the Oklahoma Discovery Code into its procedures, the agency also incorporates the underlying policies and purposes associated with the Oklahoma Discovery Code." *Id.* at 489. Because the Oklahoma Discovery Code was incorporated into the agency's rules, the Court of Civil Appeals based its decision that the answers to the interrogatories were insufficient on the answering requirements of the Oklahoma Discovery Code. *Id.* at 489.

Unlike the rules of the state agency in *Billings Fairchild Center*, the Rules do not incorporate by reference the Oklahoma Discovery Code and its underlying policies and purposes. Therefore, the Respondents' reliance on *Billings Fairchild Center* is misplaced.

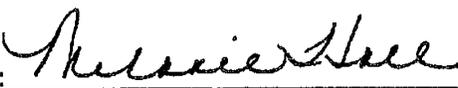
The facts in this proceeding also differ significantly from those in the two remaining cases cited by Respondents in their motion. Respondents have notice of the allegations asserted by the Department and the witnesses and exhibits that will be utilized to support such allegations. Respondents have had, and will continue to have, the opportunity to depose the witnesses identified by the Department.² Respondents will also have the opportunity to cross-examine the witnesses at hearing. As more fully set forth in Section III above, Mr. Headington's testimony would add nothing to the record; therefore, his absence from this proceeding does not substantially prejudice Respondents or infringe upon their due process rights. To punish the Department as Respondents have requested is without foundation or legal support.

² Mr. Headington was not identified as a witness on the Department's final witness list.

Conclusion

For the reasons stated above, Respondents' motion should be denied.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing response was mailed and emailed this 28th day of November, 2011, with postage prepaid, to:

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Melanie Hall

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Oklahoma Department of Securities,)
ex rel. Irving L. Faught,)
Administrator,)

Plaintiff,)

v.)

The Bank of Union, John Shelley, Mike Braun,)
and Timothy Headington,)

Defendants.)

Case No. CJ-2011-2277

MAY - 4 2011
PATRICIA PRESLEY, COURT CLERK
DEPUTY

MOTION TO QUASH OR FOR PROTECTIVE ORDER

Defendants The Bank of Union ("The Bank"), John Shelley, Mike Braun, and Timothy Headington (collectively "Defendants"), by and through undersigned counsel, and for their opposition to Plaintiff Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator's (the "Department") Application for Order Enforcing Subpoenas, hereby moves the Court pursuant to Okla. Stat. title 12 § 3226(C) for an Order quashing the subpoenas, or for a protective order limiting their scope.

INTRODUCTION

The subpoenas issued by the Department to Mr. Headington should be quashed because they are invalid, unenforceable, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The subpoenas issued to The Bank should likewise be quashed because they are overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Alternatively, should the Court



determine that the subpoenas should not be quashed in their entirety, it should issue its protective order restricting their scope to only those matters at issue in the administrative proceeding.

ARGUMENT AND AUTHORITIES

The Subpoenas Issued to Headington are Invalid and Unenforceable.

The Department's authority to issue subpoenas stems from the Oklahoma Administrative Procedures Act, specifically Okla. Stat. title 75 § 315. Under this statute, the Department may issue subpoenas for deposition "in the same manner as is *provided by law* for the taking of depositions in civil actions in courts of record," and may issue subpoenas duces tecum, "which may be served by the marshal of the agency or by any person in any manner *prescribed for the service of a subpoena in a civil action.*" Okla. Stat. title 75 §§ 315A.2 and B.2 (emphasis added).

The issuance of subpoenas in a civil action is governed by Okla. Stat. title 12 § 2004.1, which provides that "[a] subpoena shall issue from the court where the action is pending, and it may be served any place *within* the state." (emphasis added). Thus, "[t]he 'subpoena powers of Oklahoma courts stop at the state line.'" *Blue Tee Corp. v. Payne Well Drilling, Inc.*, 125 P.3d 677, 679 (Okla. Civ. App. 2005). And "neither the Oklahoma Pleading Code, ..., nor the comments thereto, extend the reach of Oklahoma discovery process beyond the state boundaries." *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Ct. App. 1995). Indeed, "it is axiomatic that 'in the absence of a statute, a state court cannot require the attendance of a witness who is a nonresident of and absent from the state.' ... Nor ... can the State compel a nonresident witness to produce records in the State." *Id.* at 1111-12.

Respondents purported to serve Mr. Headington with two subpoenas issued by the

Department. The first was a subpoena *duces tecum* purporting to compel Mr. Headington to produce the requested documents for inspection and copying “at the offices of counsel for Geary Securities, Inc., CORBYN HAMPTON, PLLC, 211 North Robinson, Suite 1910, *Oklahoma City, Oklahoma.*” The second subpoena, issued only by the Department, sought to compel Mr. Headington to appear for a deposition. But neither subpoena has any force or effect. In fact, neither the Department, nor this Court, has any authority to compel Mr. Headington to produce documents or appear for a deposition.

Mr. Headington is not a resident of Oklahoma. Rather, he is a resident of Dallas, Texas. It is “axiomatic,” therefore, that the State of Oklahoma has no authority to compel Mr. Headington – a non-party to the administrative proceedings in which the subpoenas were issued – to produce documents in the State of Oklahoma. *See Craft*, 907 P.2d at 1111-12. The same holds true for a subpoena issued by the Department purporting to compel a Texas resident to appear for deposition. Mr. Headington was not, as required by the Oklahoma Pleading Code, served with the either subpoena anywhere within the State of Oklahoma, and there is nothing in the Oklahoma Pleading Code extending “the reach of Oklahoma discovery process beyond the state boundaries.” *Id.* at 1111.

Even Okla. Stat. title 71 § 1-602 – the very statute that forms the basis of the Department’s application – provides that “the Administrator may apply to the district court of Oklahoma County or the district court in any other county where service can be obtained or a *court of another state* to enforce compliance.” (emphasis added). If the Department wished to ensure its authority to enforce the subpoenas against Mr. Headington, it should have ensured that they were properly issued and served by a Texas court. It did not do so, however, and this Court

has no extraterritorial jurisdiction to compel Mr. Headington's compliance. Further, Mr. Headington's name does not appear on the list of witnesses the Department intends to call at the administrative hearing, which begs the question why the Respondents need any discovery from him in the first instance. For these reasons alone, the subpoenas issued to Mr. Headington should be quashed. But there is more.

The Subpoenas are Overbroad, Unduly Burdensome, and are not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Under Oklahoma law, "[a]dministrative subpoenas are to be 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *State ex rel. Oklahoma Bar Assoc. v. Gasaway*, 863 P.3d 1189, 1199 (Okla. 1993). In addition, a party may only seek *relevant* matter, or matter reasonably calculated to lead to the discovery of admissible evidence. *See* Okla. Stat. title 12 § 3226B.1.a. The subpoenas issued by the Department to the Defendants violate both of these requirements.

The administrative proceeding in which the subpoenas were issued involves only the Respondents' misconduct and business practices related to the sale of certain securities, namely Mortgage Resecuritization Notes, Series 2009-1, Class A-1 and/or Class A-2, issued by CEMP Resecuritization Trust 2009-1 (the "Securities"), to the Defendants, among others. Thus, the only relevant documents and information the Defendants might have would be those documents related to their purchases of the Securities. Despite the narrow scope of the administrative proceeding, however, when given their fair reading, the subpoenas seek *all* documents related to *any* transaction involving the Defendants and the Respondents, whether or not those transactions were in any way related to the Securities.

To realize their exceptional over breadth, the Court need look no further than the

following requests taken from the subpoena *duces tecum* issued to The Bank:¹

1. *All documents that refer, relate to or in any way reference any form of communication between you and GSI, Geary or CEMP;*
2. *All documents that refer, relate to or in any way reference any form of communication by any officer, director, shareholder, employee or representative of BOU concerning GSI, Geary or CEMP;*

4. *All documents that refer, relate to or in any way reference any form of communication related to BOU's purchase or sale, or BOU's consideration of the potential purchase or sale, of any securities through GSI, Geary or CEMP;*

6. *All documents that refer, relate to or in any way reference the performance of any security BOU has purchased or sold through GSI, Geary, or CEMP.*

None of these requests is limited in any way to the Securities at issue in the administrative proceeding. Because The Bank's and Mr. Headington's brokerage relationships with Geary Securities, Inc. and Keith Geary go back several years, requiring the Defendants to comply with these over broad subpoenas would result in their bearing an unreasonable burden given the narrow focus of the administrative proceeding.

Conversely, both the subpoena *duces tecum* served on The Bank and the subpoena *duces tecum* purportedly served on Mr. Headington contain the following identical request:

5. *All documents that refer, relate to or in any way reference any form of*

¹ The requests in the subpoena *duces tecum* issued to Mr. Headington are substantially similar to those in the subpoena issued to The Bank.

communication concerning Mortgage Resecuritization Notes, Series 2009-1, Class A-1 and/or Class A-2, issued by the CEMP Resecuritization Trust 2009-1.

Only one (1) of the eight (8) document requests to The Bank, and only one (1) of the six (6) documents requests to Mr. Headington, therefore, are in any way limited expressly to the Securities. But given the narrow scope of the administrative proceeding, these two requests are the only requests that are “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome,” as required under Oklahoma law. The subpoenas, which were crafted by the Respondents, clearly over-reach, the question is why?

On October 29, 2010, the Defendants, as claimants, filed with the Financial Industry Regulatory Authority (“FINRA”) their First Amended Demand for Arbitration and Statement of Claim (the “Demand”) against, several of the Respondents. Discovery in FINRA arbitration proceedings is, by design, narrowly tailored and limited in comparison to discovery in a civil lawsuit. For example, though exceptions for good cause do exist, depositions of witnesses, including parties, are generally not allowed. Through the over broad subpoenas *duces tecum*, and the deposition subpoenas, therefore, the Respondents apparently sought to use the discovery mechanisms provided in the administrative proceeding to circumvent these limitations to gain discovery not provided for in the arbitration, and the Department unwittingly assisted in that effort.

Recognizing the Respondents’ efforts for what they were, counsel for the Defendants attempted, in good faith, to confer with counsel for the Respondents in an effort to negotiate the scopes of the subpoenas. Although the Respondents and the Department had an obligation to

ensure that compliance would not be “unreasonably burdensome” to the Defendants, the Respondents flatly refused to negotiate the subpoenas’ scopes.

Faced with the Respondents’ unreasonable refusal to negotiate, on April 11, 2011, the Defendants produced to the Respondents and the Department all non-privileged documents related to the Securities, that the Defendants were not otherwise prohibited from producing by applicable statute and/or regulation.² The Defendants, therefore, have already complied with the subpoenas *duces tecum*, when given their proper, reasonable scope, and to the extent they are able. In addition, with respect to the subpoenas for the depositions of Messrs. Shelley and Braun, neither of these potential witnesses has refused to appear for deposition. Instead, as he did with the subpoenas *duces tecum*, counsel for the Defendants attempted, in good faith, to negotiate dates for their testimony, but the Respondents simply rebuffed these efforts.

In short, this matter is before this Court as a direct result of the Respondents’ failure to cooperate in satisfying their obligations to limit the burdensomeness of discovery to the Defendants, who are not parties to the administrative proceeding. The Department issued, and now asks this Court to enforce, subpoenas that are unlimited in scope, irrelevant in purpose, and which seek much more than information related to the Respondents’ sales and the Defendants’ purchases of the Securities. Because the subpoenas are overbroad, unduly burdensome, and are not reasonably calculated to lead to the discovery of admissible evidence, the Court should enter its Order quashing the subpoenas in their entirety or, alternatively, limiting their scope to only those matters directly related to the Securities. In the latter event, the Defendants have already complied.

² To the extent the Court requires further explanation of any statutory or regulatory limitations on the Defendants’ inability to produce documents, the Defendants request an *in camera*, *ex parte*, conference with the Court.

CONCLUSION

For all of the above and foregoing reasons, the Defendants respectfully request that the Court deny the Department's Application for Order Enforcing Subpoenas and, instead, issue its Order:

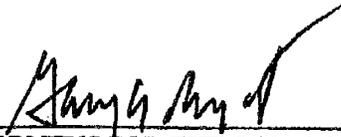
1. quashing the subpoenas to Mr. Headington in their entirety as invalid and unenforceable;
2. quashing the subpoenas to The Bank and Mr. Headington in their entirety on the grounds that they are over broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence; or, alternatively,
3. enter its protective order limiting the scopes of the subpoenas, including any deposition testimony by Messrs. Shelley and Braun, to only those matters directly related to the purchase and sale of the Securities; and
4. awarding the Defendants their costs incurred herein, including their reasonable attorneys' fees, together with such other and further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2011, a copy of the foregoing document was served on the following by hand-delivery:

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ATTORNEYS FOR THE BANK OF UNION
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TIM HEADINGTON

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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

ORDER DENYING
MOTION TO RECONSIDER

On February 14, 2011, pursuant to Section 1-602(B) of the Oklahoma Uniform Securities Act of 2004 (the "Act"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2009) and 660:2-9-4 of the Rules of the Oklahoma Securities Commission and the Administrator of the Oklahoma Department of Securities (the "Rules"), certain subpoenas were issued at the request of and on behalf of Respondents by the designated Hearing Officer in the referenced matter. The subpoenas required the appearances for testimony of John Shelley, Mike Braun and Timothy Headington and the production of documents by The Bank of Union and Timothy Headington (collectively referred to as the "Subpoenas").

On March 25, 2011, pursuant to 660:2-9-4(e)(1) of the Rules, Respondents applied to the Administrator for enforcement of the Subpoenas.

On April 6, 2011, the Administrator applied to the District Court of Oklahoma County for enforcement of the Subpoenas (the "Application"). On that same date



Respondents filed returns of service of the Subpoenas (the "Returns of Service"). The Return of Service for each of the Subpoenas included The United States Postal Service Form 3811 Domestic Return Receipt ("Return Receipts").

On May 5, 2011, the Application was granted in part and denied in part by the Court. The Court denied the Application with respect to the subpoena requiring the appearance for deposition of Timothy Headington, a resident of the state of Texas (the "Headington Deposition Subpoena").

On July 13, 2011, Respondents filed a *Motion for Reconsideration of Administrator's Refusal to Proceed with Subpoena Enforcement* in the referenced matter (the "Motion"). The Motion specifically requests that the Administrator obtain judicial enforcement, in the state of Texas, of the Headington Deposition Subpoena.

The Return Receipt, attached to the Return of Service for the Headington Deposition Subpoena reflects that the individual whose signature appears on the Return Receipt is the agent of the addressee, not Timothy Headington the addressee. The Return Receipt for the Headington Deposition Subpoena contains an illegible signature and provides no printed name.

Having reviewed the evidence and the pleadings filed in this matter, the Administrator hereby finds that there was no effective service of process of the Headington Deposition Subpoena and the date for the appearance of the deponent has past.

IT IS THEREFORE ORDERED that the Motion is DENIED.

Witness my Hand and the Official Seal of the Oklahoma Department of Securities
this 4th day of August, 2011.

(SEAL)


IRVING L. FAUGHT, ADMINISTRATOR OF
THE OKLAHOMA DEPARTMENT OF
SECURITIES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of August, 2011, a true and correct copy of the above and foregoing was emailed and mailed by first-class mail with postage prepaid thereon, to the following:

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