

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



In the Matter of:

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

Respondents.

File No. 09-141

**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 it 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:  _____

Melanie Hall, OBA #1209

Terra Bonnell, OBA #20838

Oklahoma Department of Securities

120 N. Robinson, Suite 860

Oklahoma City, OK 73102

Phone: 405-280-7700 /Fax: (405) 280-7742

Attorneys for Department

CERTIFICATE OF SERVICE

The undersigned hereby certifies that 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:

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

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

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

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


Melanie Hall
Melanie Hall