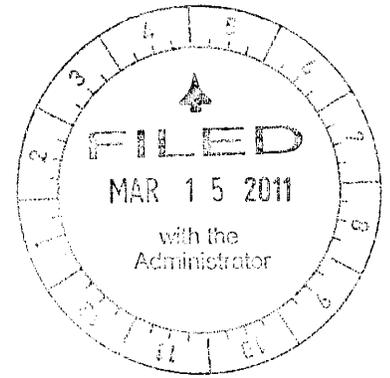


STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



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' (1) MOTION TO STRIKE WITNESSES AND ALLEGATIONS, (2) MOTION FOR PROTECTIVE ORDER TO LIMIT SCOPE OF DEPOSITIONS, (3) RESPONSE AND OBJECTION TO THE BOU NON-PARTIES' MOTION TO QUASH, AND (4) ALTERNATIVE MOTION FOR EXPEDITED ENFORCEMENT OF SUBPOENA IN THE DISTRICT COURT

The Oklahoma Department of Securities ("Department") respectfully submits this response and partial objection to *Geary Respondents' (1) Motion to Strike Witnesses and Allegations, (2) Motion for Protective Order to Limit Scope of Depositions, (3) Response and Objection to the BOU Non-Parties' Motion to Quash, and (4) Alternative Motion for Expedited Enforcement of Subpoena in the District Court* (collectively, "Geary Respondents' Motion").

I. THE GEARY RESPONDENTS' MOTION FOR ORDER STRIKING THE BOU NON-PARTIES AS WITNESSES AND PRECLUDING THE DEPARTMENT FROM PURSUING THE CEMP CHARGES SHOULD BE DENIED.

Rule 660:2-9-3(f) of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (the "Rules") authorizes sanctions including, but not limited to, the striking of a pleading or the issuance of a preclusion order for "[f]ailure 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.” Logic indicates that the sanctions authorized in Rule 660:2-9-3(f) should only be imposed against a party whose actions, or lack thereof, constitute one or more of the specified failures. Presumably realizing that logic, Respondents Geary Securities, Inc., Keith D. Geary, and CEMP, LLC (the “Geary Respondents”) have responded to the *Motion to Quash and For Protective Order* (“Motion to Quash”) filed on behalf of the Bank of Union, John Shelley, Mike Braun, and Timothy Headington (the “BOU Non-Parties”) by alleging that the Department has “failed to participate in good faith,”¹ in an attempt to prevail on the substantive allegations made against the Geary Respondents in the Department’s *Enforcement Division Recommendation*.

The Department has not failed to participate in good faith in any manner.

Neither the Department nor its counsel represent the Bank of Union or any of its directors, officers, employees, owners or affiliates in any capacity outside of the Department’s general duty to protect the “public interest.” The Department did not object² to the issuance of the subpoenas at issue and certainly did not direct, or participate in, the filing of the Motion to Quash. In fact, the Department did not know of the Motion to Quash until after it was submitted for filing. Any implied or explicit representation to the contrary is wrong.

¹ When read in conjunction with the immediately preceding phrases “failure to appear at any hearing or conference,” and “failure to appear substantially prepared,” the phrase “failure to participate in good faith” can be interpreted as relating only to participation at a hearing or conference. *See* Rule 660:2-9-3(f).

² Rule 660:2-9-4(d) only authorizes an objection to a subpoena by the person who is served with the subpoena. Rule 660:2-9-4(a) authorizes the Administrator, or the Hearing Officer, to refuse to issue a subpoena if the Administrator, or the Hearing Officer, determines that the subpoena or any of its terms is “unreasonable, oppressive, excessive in scope, unduly burdensome or not relevant.” No rule or provision of the Act explicitly authorizes the Department to object to the issuance of a subpoena requested by another party.

In its entire sixteen pages, the Geary Respondents' Motion only contains two allegations of misconduct by the Department.³ Those allegations are that the Department's counsel advised the Geary Respondents' counsel "that the Department's counsel: (a) did not have contact information for the BOU witnesses themselves (instead, just listed contact information for counsel for the BOU witnesses), and (b) could not voluntarily produce the BOU Non-Parties for depositions, such that Subpoenas would be required."

The Department does not deny the alleged statements by its counsel. However, those statements in no way constitute a "failure to participate in good faith" as alleged by the Geary Respondents. The conversation in which the two statements were made was a friendly conversation in which Department's counsel and the Geary Respondents' counsel were discussing proposed stipulations. The response by Geary Respondents' counsel to the first of the alleged statements was that the issue could be discussed later if necessary. Counsel for Geary Respondents never mentioned the topic to the Department's counsel again and never filed or even threatened to file a motion to compel. The Department's lack of the personal contact information for the witnesses was not detrimental to the Geary Respondents as they appear to have been able to serve the subpoenas in question upon the BOU Non-Parties. Regardless, the Department participated in good faith by providing the contact information for counsel for the BOU Non-Parties.

³ The first sentence on page 2 of the Geary Respondents' Motion states, "The Geary Respondents file this Motion in order to limit the scope of these proceedings, as well as all future depositions in this action, **in light of the BOU Non-Parties' intentional, bad faith failure, and refusal to comply with subpoenas** properly issued by the Hearing Officer pursuant to the applicable Department Rules." (Emphasis added.) The Geary Respondents' Motion is clearly based on the actions of the BOU Non-Parties and not the actions of the Department.

The second statement made by Department's counsel certainly does not constitute "failure to participate in good faith." Again, neither the Department nor its counsel represent or control the BOU Non-Parties. At the time of the second statement, Department's counsel also told the Geary Respondents' counsel that the Department would voluntarily produce for deposition any of its employees who appear on its preliminary witness list. The Department has also produced over 10,500 documents to the Geary Respondents in response to document requests. The Department has participated in good faith in every aspect of this proceeding and any representation to the contrary is without basis in fact. Sanctions against the Department under Rule 660:2-9-3(f) would be inappropriate.

***Sanctioning the Department would thwart enforcement of
the Oklahoma Uniform Securities Act of 2004.***

The purpose of the Department is to enforce the Oklahoma Uniform Securities Act of 2004 ("Act"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2004). *See* Rule 660:2-3-1. The Department's ability to enforce the Act through administrative proceedings will be significantly hindered if the Department's substantive allegations against a respondent could effectively be dismissed or precluded as a result of a non-party's failure to comply with a subpoena. This is especially true in situations like this where there is no evidence suggesting that the Department directed, participated or influenced the non-parties' conduct. Sanctioning the Department for a non-party's failure to comply with a subpoena issued under the authority of the Administrator of the Department is simply not the proper remedy.

For the foregoing reasons, the Geary Respondents' motion for an order striking the BOU Non-Parties as witnesses and precluding the Department from pursuing the CEMP allegations should be denied.

II. THE GEARY RESPONDENTS' MOTION FOR PROTECTIVE ORDER TO LIMIT THE SCOPE OF ALL FUTURE DEPOSITIONS SHOULD BE DENIED.

As indicated in the first sentence on page 5 of the Geary Respondents' Motion, the Geary Respondents base their motion for a protective order to limit the scope of all future depositions, on "the BOU Non-Parties' refusal to comply with the properly issued Subpoenas." However, limiting the scope of all future depositions to "exclude any questions or reference to the CEMP Charges or BOU Non-parties" would be a sanction against the Department under Rule 660:2-9-3(f). For the same reasons discussed in the foregoing section, the Department should not be sanctioned for a non-party's alleged failures.

III. THE GEARY RESPONDENTS' ALTERNATIVE MOTION FOR EXPEDITED ENFORCEMENT OF THE SUBPOENAS IN OKLAHOMA COUNTY DISTRICT COURT AND REQUEST FOR CIVIL PENALTIES AND CONTEMPT CITATION SHOULD BE DENIED.

A person who has been served with a subpoena is entitled to file a motion to quash with the Administrator under Rule 660:2-9-4(d). The filing of such a motion does not constitute a failure to appear or produce. Here, the application of the Geary Respondents under Rule 660:2-9-4(e) for enforcement of their subpoenas is premature until the Hearing Officer rules on the BOU Non-Parties' Motion to Quash.

Despite the fact that Section 1-602(C) of the Act and Rule 660:2-9-4(e) provide the proper remedy for a non-parties' failure to comply with a subpoena, the Geary Respondents have requested enforcement of their subpoenas under Rule 660:2-9-4(e) as merely an alternative to their requests for an order striking witnesses and allegations relating to CEMP and BOU Non-Parties and limiting the scope of all future depositions. This supports the Department's assertion that the Geary Respondents are attempting to use non-parties' alleged failures to comply with subpoenas to prevail on the Department's substantive allegations against the Geary Respondents.

For the foregoing reasons, the Geary Respondents' motion for expedited enforcement of the subpoenas and request for civil penalties and contempt citation is premature and should be denied.

CONCLUSION

The Department has not failed to participate in good faith in any aspect of this proceeding. The Department should not be sanctioned under Rule 660:2-9-3(f) for the alleged failure of non-parties to comply with subpoenas. To do so would thwart enforcement of the Act. Rather, the proper relief for the Geary Respondents is to apply to the Administrator for enforcement of their subpoenas pursuant to Rule 660:2-9-4(e), after the entry of a ruling on the Motion to Quash and non-compliance with that ruling. For these reasons, the Geary Respondents' motion to strike witnesses and allegations, motion for protective order to limit scope of depositions, and alternative motion for expedited enforcement of subpoena in the District Court should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of March, 2011, a true and correct copy of the above and foregoing was emailed, and on the 16th day of March, 2011, a true and correct copy of the above and foregoing was mailed by first-class mail with postage prepaid thereon, to the following:

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