

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

The Oklahoma Department of Securities ("Department") submits the following response and objection to *Geary Respondents' Supplement to Motion for Preclusion Order and Order Striking Department's Exhibit 27 (purported Headington Guaranty Agreement)* filed by Respondents Geary Securities, Inc. ("Geary Securities"), Keith D. Geary ("Geary"), and CEMP, LLC, (collectively, the "Geary Respondents"), on January 17, 2012 ("Supplement to Preclusion Motion"). The Geary Respondents filed their original Motion for Preclusion Order and Order Striking Department's Exhibit Number 27 on November 14, 2011 ("Preclusion Motion"). The Department's response to the Preclusion Motion was filed on November 28, 2011, and is incorporated herein by reference. In addition to the reasons stated in the Department's November 28<sup>th</sup> response to the Preclusion Motion, the Geary Respondents' Preclusion Motion should be denied for the reasons that follow.

**I. Timothy Headington is not required to *voluntarily* participate in discovery in this disciplinary action against Respondents.**

The Geary Respondents state that their Preclusion Motion "is based on Mr. Headington's refusal to cooperate in discovery authorized by the Department's Rules." Supplement to

Preclusion Motion, p. 1. To be clear, Timothy Headington is not a party to this administrative enforcement action against the Geary Respondents. The Department has not brought this enforcement action on behalf, or for the protection, of Mr. Headington. Rather, the Department, acting in and for the public interest, initiated this disciplinary proceeding to impose sanctions against the Geary Respondents for their violations of the Oklahoma Uniform Securities Act of 2004 (“Act”), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2010), and the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (“Rules”), Okla. Admin. Code §§ 660:1-1-1 through 660:25-7-1.

Mr. Headington, a resident of Texas, has not been properly served with a valid subpoena requiring his appearance for a deposition.<sup>1</sup> Texas law relating to depositions in the state of Texas for use in a foreign jurisdiction requires that a court of record of Oklahoma issue a mandate, writ, or commission that requires Mr. Headington’s deposition testimony in Texas before Mr. Headington can be compelled to appear for a deposition in Texas. *See* Tex. R. Civ. P. 201.2. To date, no court of record of Oklahoma has issued a mandate, writ or commission requiring Mr. Headington’s deposition testimony in this proceeding. Because Mr. Headington has not been properly served with a valid *subpoena ad testificandum*, Mr. Headington is under no legal obligation to appear for a deposition, or other testimony, in this proceeding. Mr. Headington

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<sup>1</sup> On February 14, 2011, at the request of the Geary Respondents, the Hearing Officer issued a subpoena to Mr. Headington to appear for a deposition (“First Headington Subpoena”). On April 6, 2011, the Administrator of the Department filed an application in the Oklahoma County District Court to, among other things, enforce the First Headington Subpoena. The Court declined to extend the jurisdictional reach of the First Headington Subpoena beyond the boundaries of the state of Oklahoma. On August 19, 2011, again at the request of the Geary Respondents, the Hearing Officer issued another subpoena requiring Mr. Headington to appear for a deposition (Second Headington Subpoena). In connection with the Second Headington Subpoena, the Geary Respondents arranged for the issuance of a Texas deposition subpoena by a Texas notary public. However, the Geary Respondents did not meet the requirements of Texas law relating to depositions in the state of Texas for use in a foreign jurisdiction. Instead, the Geary Respondents filed the Preclusion Motion. On December 1, 2011, at the request of counsel for the Administrator of the Department on behalf of the Geary Respondents, the Hearing Officer issued another subpoena to Mr. Headington to appear for a deposition (Third Headington Subpoena). With the Third Headington Subpoena, the Administrator filed a motion in the Oklahoma County District Court for a writ and commission to take Mr. Headington’s deposition.

does not have to *voluntarily* participate in discovery in this disciplinary proceeding to which he is not a party. Mr. Headington's refusal to *voluntarily* participate in discovery is not a valid basis for the relief requested by the Geary Respondents. Further, while claiming he has not been cooperative, the Geary Respondents ignore the fact that Mr. Headington has produced documents in this proceeding to the Geary Respondents in compliance with an Order of the District Court of Oklahoma County.

The Geary Respondents apparently do not desire to obtain a valid subpoena for Mr. Headington's deposition testimony. After unsuccessful attempts by the Geary Respondents to have Mr. Headington properly served with a valid subpoena, the Department pursued the issuance of a writ and commission to take the deposition of Mr. Headington, in the District Court of Oklahoma County on behalf of the Geary Respondents. However, in a letter dated January 10, 2012, to counsel for Mr. Headington, Geary Respondents' counsel stated the following:

You are well aware of the fact that ODS, not my clients, is currently pursuing Mr. Headington's deposition through the proceedings in Oklahoma County District Court that you attended on January 4, 2012. My clients did not request or cause ODS to request the deposition subpoena for Mr. Headington that the Hearing Officer issued on or about December 1, 2011.

Supplement to Preclusion Motion, Ex. 2 at ¶ 8. On January 11, 2012, Geary Respondents' counsel again made it clear that his clients are not seeking a valid subpoena for Mr. Headington's deposition testimony when he stated:

In response to the question posed by paragraph 8(a) of your January 11<sup>th</sup> [letter], I cannot say what ODS thought or intended at the time it submitted its November 29, 2011 request to the Hearing Officer for the issuance of a deposition subpoena for Mr. Headington. I do know that we did not submit a request to ODS to seek such a subpoena.

Supplement to Preclusion Motion, Ex. 4 at ¶ 8.

In summary, Mr. Headington is not a party to this disciplinary proceeding; Mr. Headington has produced documents in compliance with an Order of the District Court of Oklahoma County; Mr. Headington has not been properly served with a valid *subpoena ad testificandum*; and the Geary Respondents apparently are not interested in a valid subpoena requiring Mr. Headington's deposition testimony. Mr. Headington's refusal to *voluntarily* participate in discovery in this proceeding is not a valid basis for granting the Preclusion Motion.

**II. The Geary Respondents do not have an absolute right to take Timothy Headington's deposition in this administrative proceeding.**

The Rules do not provide an absolute right to take a deposition in this proceeding. The authorization for a party to take a deposition in this proceeding is provided in 660:2-9-3(b)(2) of the Rules. To require a witness to appear for a deposition, a party must seek the issuance of a subpoena under Rule 660:2-9-4(a). That rule states that a party has the right to have subpoenas issued to require the attendance and testimony of witnesses but indicates that such right is conditional as the Administrator or Hearing Officer may refuse to issue the subpoena if any of its terms are unreasonable, oppressive, excessive in scope, unduly burdensome or not relevant. If a subpoena is issued under Rule 660:2-9-4(a), it can be quashed under Rule 660:2-9-4(d). Further, the Administrator's enforcement of a subpoena is optional under Rule 660:2-9-4(e). As indicated by these provisions, the Geary Respondents do not have an absolute right to take Timothy Headington's deposition in this proceeding.

Due process does not require that the Geary Respondents be afforded the opportunity to take Timothy Headington's deposition prior to the hearing on the merits in this proceeding.<sup>2</sup> The

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<sup>2</sup> As set forth in Section I of this response, the Geary Respondents have not been denied the opportunity to take Mr. Headington's deposition but instead have failed to properly serve him with a valid subpoena.

Oklahoma Supreme Court has stated the following in its determination of whether due process was afforded in an administrative hearing:

An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be full, fair and adequate; right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. There must be adequate notice of the issues, and the issues must be clearly defined in order that an administrative hearing is fair. All parties must be apprised of the charges so they may test, explain or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence.

*Wolfenbarger v. Hennessee*, 520 P.2d 809, 812 (Okla. 1974) (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).

Mr. Headington is not on the Department's final witness list and was only "conditionally" listed on the Geary Respondent's witness list as a result of the Department not listing him. *See Respondents' Joint Final List of Witnesses Subject to and without Waiving Joint Application for Modification of Scheduling Order*, n. 3. The Department has not deposed or interviewed Mr. Headington, who acted through John Shelley<sup>3</sup>, in purchasing the security at issue. As set forth below, Mr. Headington's knowledge concerning the security or the misrepresentations and omissions made in connection with the offer and sale of such security is not relevant to this proceeding. To proceed without granting the relief requested in the Preclusion Motion, will not deny the Geary Respondents a full, fair and adequate hearing. A preclusion order based on the fact that the Geary Respondents have not taken Mr. Headington's deposition is not appropriate or warranted.

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<sup>3</sup> John Shelley was an authorized agent with full trading authorization on Mr. Headington's brokerage account at Geary Securities. The parties have taken the deposition of John Shelley in this proceeding.

### **III. Timothy Headington's knowledge is irrelevant in this disciplinary proceeding against Respondents.**

The Geary Respondents admit that their "only interest" in obtaining Mr. Headington's deposition "has been in exploring Mr. Headington's knowledge concerning the security at issue and the alleged misrepresentations and omissions attributable to Mr. Geary by the Department in connection with such security." Supplement to Preclusion Motion, p. 4. For purposes of this disciplinary proceeding and in light of the alleged violations, Mr. Headington's knowledge concerning the security at issue or the alleged misrepresentations and omissions made by Geary in connection with such security is simply irrelevant.

Mr. Headington's knowledge is irrelevant for purposes of the Department's allegation that Geary Securities and Geary violated Section 1-501(2) of the Act. For purposes of its causes of action under Section 1-501(2) of the Act, relating to the offer and sale of the CEMP Class A-2 note to Mr. Headington, the Department must prove that Geary Securities and Geary, directly or indirectly, made an untrue statement of material fact in connection with the offer, sale, or purchase of the CEMP Class A-2 note and/or that Geary Securities and Geary omitted to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading, in connection with the offer, sale, or purchase of the CEMP Class A-2 note. The Department does not have to prove that Mr. Headington relied on the material misstatements and omissions or was injured by the material misstatements and omissions. *See, e.g., SEC v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008) (the SEC does not have to prove reliance or injury in enforcement actions); *Sec'y of State v. Tretiak*, 22 P.3d 1134, 1141 (Nev. 2001) (citing multiple opinions of other state and federal courts in support of their holding that reliance is not a required element of securities fraud in state enforcement actions initiated under NRS 90.570(2) and (3), which are substantially identical to Section 1-501(2) and

(3) of the Act). Because of the objective materiality standard provided in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), the Department does not even have to prove that the statements and omissions were material to Mr. Headington himself. A fact is material if there is a substantial likelihood that a reasonable investor would consider it important. *TSC Industries*, 426 U.S. at 449. For purposes of the Department's cause of action under Section 1-501(2), Mr. Headington's knowledge is irrelevant.

Likewise, Mr. Headington's knowledge is irrelevant for purposes of the Department's allegations that Geary Securities and Geary violated 660:11-5-42 of the Rules in connection with the offer and sale of the CEMP Class A-2 note to Mr. Headington. Specifically, the Department has alleged that Geary Securities and Geary violated 660:11-5-42(b)(16)(E) and 660:11-5-42(b)(15).

Rule 660:11-5-42(b)(16)(E) states: "No broker-dealer or agent of a broker-dealer shall guarantee a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transactions affected by the broker-dealer or agent with or for such customer." Mr. Headington's knowledge is irrelevant to the determination of whether Geary Securities and/or Geary guaranteed Mr. Headington against loss. Geary's actions are at issue not Mr. Headington's knowledge. This is especially true in light of the fact that Mr. Headington acted through John Shelley in connection with his purchase of the security at issue. Geary himself testified that he did not ever talk directly to Mr. Headington in connection with the offer and sale of the security at issue and instead spoke to John Shelley. See Department's November 28<sup>th</sup> response to the Preclusion Motion, pp. 5-6. Any written document, specifically the Guaranty Agreement signed by Mr. Geary for the benefit of Mr. Headington, speaks for itself.

Rule 660:11-5-42(b)(15) states: “No broker-dealer or agent of a broker-dealer shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device, practice, plan, program, design, or contrivance.” Mr. Headington’s knowledge would be irrelevant in the determination of whether Geary Securities and/or Geary effected a transaction in the security at issue by means of a fraudulent practice. It is important to note, however, that the Department did not pursue a violation of Rule 660:11-5-42(b)(15) in its motion for summary decision against the Geary Respondents filed on December 23, 2011, and is not otherwise pursuing this specific violation.

Mr. Headington’s knowledge is irrelevant in this enforcement action in light of the violations being pursued by the Department with respect to the security offered and sold by Geary Securities and Geary to Mr. Headington. What Mr. Headington knew in making his decision to purchase the security at issue does not matter for purposes of this proceeding.

### **Conclusion**

The Geary Respondents’ Preclusion Motion is a desperate attempt to save Geary Securities and Geary from the imposition of sanctions for Geary’s egregious actions in connection with the offer and sale of the CEMP Class A-2 note for approximately \$12.8 million. For the reasons stated above and in the Department’s November 28<sup>th</sup> response to the Preclusion Motion, the requested preclusive relief is inappropriate and the Preclusion Motion should be denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "Terra Bonnell". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing response was emailed and mailed this 23<sup>rd</sup> day of January, 2012, with postage prepaid, to:

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