

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.)

MAY - 4 2011
PATRICIA PRESLEY, COURT CLERK
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DEPUTY

Case No. CJ-2011-2277

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.

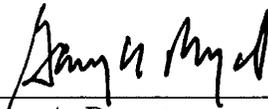
CONCLUSION

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.

Submitted by:

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ATTORNEYS FOR THE BANK OF UNION,
JOHN SHELLEY, MICHAEL BRAUN, AND
TIM HEADINGTON

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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