

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

Respondents.

ODS File No. 09-141

**GEARY RESPONDENTS' REPLY TO DEPARTMENT'S OBJECTION AND  
RESPONSE TO MOTION FOR PRECLUSION ORDER AND ORDER STRIKING  
DEPARTMENT WITNESSES (BANK OF UNION DIRECTORS) AND EXHIBIT  
(BANK OF UNION DIRECTORS' AFFIDAVIT)**

Pursuant to Rule 660:2-9-3(c) of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (the "Rules"), Respondents Geary Securities, Inc. (formerly known as Capital West Securities, Inc.), Keith D. Geary, and CEMP, LLC (the "Geary Respondents") respectfully submit this Reply to the Department's Objection and Response to the Geary Respondents' previously-filed Motion (the "ODS Objection") that requests that the Hearing Officer issue a preclusion order and an order (A) striking and prohibiting any testimony from six witnesses listed on the Department's Amended Final List of Witnesses as "Members of Bank of Union's Board of Directors" (the "BOU Directors")<sup>1</sup>, and (B) striking as an exhibit and prohibiting any attempt to introduce, refer to or rely on an affidavit signed by the BOU Directors.

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<sup>1</sup> The BOU Directors include Jeff Wills, Ray Evans, Earl Mills, Eldon R. Ventris, Steve Ketter and David Tinsley. See, Department's Amended Final Witness List (filed March 28, 2011).

Buried in the Department's Objection and Response is a telling comment – “[r]egardless of the position of the Enforcement Division of the Department on whether the BOU Directors have complied with the subpoena at issue” – that exemplifies the discovery challenges and games being played by non-parties and, in some instances, the Department.<sup>2</sup>

Conspicuously absent is any direct statement or position taken by the Department on the issue of whether the BOU Directors have complied with the subpoenas issued by the Hearing Officer. In light of the above-quoted statement, it is reasonable to conclude that the Department recognizes that the BOU Directors have not complied. Rather than simply admit this fact, the Department attempts to divert the Hearing Officer's attention by accusing the Geary Respondents of filing their Motion in bad faith – a bold, reckless and curious accusation in light of highly questionable discovery positions previously taken by the Department and expressly rejected by the Hearing Officer.<sup>3</sup> The Geary Respondents have no interest in engaging in such a misplaced debate with the Department. The facts speak for themselves in a clear, loud and compelling manner.

The Geary Respondents respectfully offer the following comments in response to statements made and positions taken by the Department in its Objection.

1. The Department's statement that the Geary Respondents have had an opportunity to

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<sup>2</sup> See, for example, *Hearing Officer's Ruling on ODS' Objections to Geary Respondents' Discovery Requests* (filed October 31, 2011).

<sup>3</sup> See, for example, *Hearing Officer's Ruling on ODS' Objections to Geary Respondents' Discovery Requests* (filed October 31, 2011). The Department's accusation of bad faith conduct includes the charge that the Geary Respondents filed the Motion to divert the Department's "resources" away from the merits of this action. See, *ODS Objection*, p. 1. The Department's accusation in this regard is "interesting" in light of the multiple opportunities the Department has been afforded – but expressly rejected or ignored – to facilitate and expedite the discovery process in a manner that would conserve the resources of all parties.

obtain discovery from the BOU Directors is inaccurate and misleading. Contrary to the Department's suggestion, "partial discovery" and "non-compliant discovery" do not constitute full and fair opportunities to conduct discovery. As discussed in the Motion and below, the Geary Respondents were entitled to compliance with the subpoenas as issued and as modified by agreement of counsel. However, the Geary Respondents are not required to accept unilateral modifications and violations of the subpoenas.

2. The Department fails to distinguish between the document subpoena served on BOU and the separate subpoenas served on six individuals that are members of BOU's board of directors. The subpoenas directed to the BOU Directors requested documents in the possession of those six individuals, none of which are believed to be employees or officers of BOU. The Geary Respondents are entitled to know whether the six individuals do or do not have any responsive documents in their possession.

3. The Department attempts to defend and excuse the BOU Directors' non-compliance by arguing that its Rules and the instructions contained in the subject subpoenas do not require the provision of a privilege log or identification of documents by bates range. See, *ODS Objection*, p. 2. The Department ignores the fact that (a) the Geary Respondents devoted the time and made the effort necessary to accommodate each and every concern voiced by the BOU Directors' counsel concerning the subpoenas as issued and served, and (b) most importantly, counsel for the Geary Respondents and BOU Directors reached agreements concerning compliance with the subpoenas. For example, counsel reached an agreement, with specific deadlines, for the BOU Directors' production of documents, provision of bates numbers if previously-produced documents are relied on, and the provision of privilege logs. See, e-mail dated August 31, 2011 from counsel for the BOU Directors (attached hereto as Exhibit "A").

4. The Department attempts to defend and excuse the BOU Directors' non-compliance by arguing the Geary Respondents declined the opportunity to take the depositions of 4 of the 6 subpoenaed BOU Directors on September 29 and 30, 2011. The Department ignores the fact that the Geary Respondents served subpoenas on 6 – not 4 – of the BOU Directors with specific dates and times for each of their depositions. On the eve of the deposition dates, counsel for the BOU Directors unilaterally refused to produce all 6 Directors and additionally refused to identify which 4 Directors would testify and which 2 would not. The Geary Respondents purposefully scheduled the depositions of all 6 BOU Directors to take place on consecutive dates to avoid the potential for later-deposed Directors to be “educated” and potentially influenced by what transpired in earlier depositions. In addition, the Geary Respondents strongly suspect that at least 2 of the BOU Directors who signed the subject affidavit were reluctant to submit to depositions. The Geary Respondents are not required to surrender their discovery strategy and tactics to the unilateral decision of counsel for the deponents. Instead, the Geary Respondents were entitled to have the opportunity to depose the 6 BOU Directors pursuant to the subpoenas as issued and the agreement of counsel.

5. The Department argues that the Geary Respondents' Motion should be denied because they have not applied to the Administrator to pursue judicial enforcement of the subpoenas issued and served on the BOU Directors. See, *ODS Objection*, p. 3. The Department ignores the language of its own Rule that authorizes a preclusion order in the event of a failure to cooperate with discovery, without any requirement that the Geary Respondents waste additional time and resources pursuing judicial enforcement through the Administrator. These are the Department's Rules and should be construed against the Department. The BOU Directors have refused to comply with the subpoenas. The BOU Directors' non-compliance qualifies as a failure to

cooperate in discovery. The Department's Rule authorizes the relief sought. The Department's attempt to avoid the application and effect of its own Rule should be rejected.

6. The Department argues that the BOU Directors' Affidavit should not be stricken because it has not been listed as an exhibit and will not be used in lieu of testimony at the hearing. See, *ODS Objection*, p. 4. The Department's argument misses the point. If, as requested by the Geary Respondents, the BOU Directors are precluded from testifying as witnesses at the hearing, then their affidavit cannot be allowed as a form of "back door" testimony.<sup>4</sup>

7. The Department argues that the BOU Directors should be allowed to testify at the hearing because the Geary Respondents are on notice that the Directors may be called as witnesses and the Geary Respondents will have the opportunity – *at the hearing* – to cross-examine the Directors and offer evidence in response to their testimony. See, *ODS Objection*, p. 8. In other words, the Department sees no problem or issue with the fact that (a) the Geary Respondents properly exercised their right to obtain *pre-hearing discovery* from the BOU Directors, and (b) the Directors have not complied with the subpoenas.

8. The Department's view of the relief authorized by its own Rule is, at best, confusing. On one hand, the Department concedes that Rule 660:2-9-3(f) "does indeed authorize the imposition of 'sanctions' for certain failures." See, *ODS Objection*, p. 8. On the other hand, the Department contends that the Rule does not authorize the imposition of sanctions against the Department for the failure of third party witnesses to comply with subpoenas. *Id.* The Department ignores the fact that its own Rule does not restrict in any manner the imposition of

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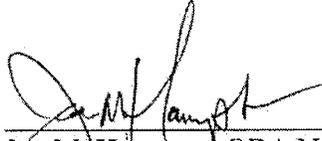
<sup>4</sup> The Department states that the Affidavit was prepared and obtained to support a motion for summary disposition the Department intends to file against the Geary Respondents. See, *ODS Objection*, p. 4. The Department's explanation makes no sense. The Department is fully aware that Respondent Geary has expressly testified in direct contradiction to the statements contained in the Affidavit, such that there is no arguable basis for the Department to file a motion that represents to the Hearing Officer that the material facts are undisputed.

sanctions. The Department's attempt to re-write its Rule to serve its advantage and purpose in this case should be rejected. The Department chose to list the BOU Directors as witnesses. If the Department's witnesses refuse to cooperate in discovery, it is logical and entirely consistent with the plain purpose of the Rule to issue a preclusion order that prohibits those witnesses from testifying at the hearing. Any other result would render the Rule meaningless and deprive the Geary Respondents of their rights to discovery, due process and fundamental fairness.

Based on the foregoing discussion, together with that presented by the initial Motion, the Geary Respondents respectfully request that the Hearing Officer:

- A. Schedule and conduct a hearing on the Motion;
- B. Issue an Order striking as an exhibit the affidavit signed by the 6 BOU Directors and precluding its offer, admission or reference in any pleadings, depositions, and at the hearing on the merits in this proceeding; and
- C. Issue an Order precluding Jeff Wills, Ray Evans, Earl Mills, Eldon R. Ventris, Steve Ketter and David Tinsley from testifying at the hearing on the merits in this proceeding.

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENTS GEARY  
SECURITIES, INC., KEITH D. GEARY, AND  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2011, a copy of the foregoing document was served on the following via electronic mail:

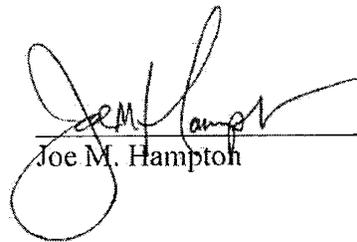
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