

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

The Oklahoma Department of Securities ("Department") submits the following objection and response to *Geary Respondents' Motion for Preclusion Order and Order Striking Department Witnesses (Bank of Union Directors) and Exhibit (Bank of Union Directors' Affidavit)*, filed on November 9, 2011 ("Motion").

I. THE GEARY RESPONDENTS' MOTION IS MADE IN BAD FAITH

The Geary Respondents' claims that the actions and inactions of The Bank of Union's ("BOU") Board of Directors and counsel have exposed them "to unfair prejudice and deprivation of their rights to discovery, due process and fundamental fairness in this proceeding" are meritless and premature. The Geary Respondents filed the Motion in bad faith and for the purpose of diverting the Department's attention and resources away from the merits of this proceeding.

Through subpoenas issued by the Hearing Officer in this proceeding, the Geary Respondents have had the opportunity to obtain discovery information from BOU's Board of

Directors.¹ At the request of the Geary Respondents, and without any objection by the Department, the Hearing Officer issued a Subpoena Duces Tecum and a Deposition Subpoena on August 16, 2011, to six of the BOU's Directors: David Tinsley, Earl Mills, Eldon Ventris, Jeff Wills, Ray Evans, Steve Ketter. The Directors' compliance, or lack thereof, with those subpoenas is the purported basis of the Geary Respondents' Motion.

In response to the Subpoenas Duces Tecum issued to the six BOU Directors, counsel for the BOU Directors informed Geary Respondents' counsel that "there are no additional documents to be produced by the directors, thus, you currently have all documents in your possession," as quoted in the Geary Respondents' Motion. This information is not surprising in light of the fact that BOU previously produced over 1,700 pages of documents relating to the transactions at issue to the Geary Respondents in response to a subpoena issued to BOU in which the definition of "You" and "Your" included BOU's representatives and agents. See Exhibit "A".

The Geary Respondents complain that the BOU Directors did not produce a privilege log or an identification of previously-produced documents by bates range. Yet, the Subpoenas Duces Tecum were issued pursuant to 660:2-9-4 of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities ("Rules") and neither Rule 660:2-9-4 nor any instructions to the Subpoenas Duces Tecum issued to the BOU Directors require such a privilege log or an identification of documents by bates range. See Exhibit "B".

¹ BOU's Board of Directors consists of Earl D. Mills, Ray Evans, Jeff Wills, Eldon R. Ventris, Steve Ketter, David Tinsley, and John Shelley. All seven individuals signed the Affidavit, dated March 17, 2011, at issue. The parties deposed John Shelley on Wednesday, November 16, 2011.

The Geary Respondents declined the opportunity to take depositions of four of the BOU Directors on September 29 and 30, 2011.² On September 26, 2011, counsel for BOU and its Directors informed Geary Respondents' counsel of the following:

As for the order of witnesses, given that there will be three sets of counsel questioning the directors, it seems unlikely that all 6 depositions will be completed in 2 days. Rather than having the Bank's directors wait around for hours to be deposed, we will produce 2 directors on September 29th and 2 others on September 30th, with depositions beginning at 9:30 a.m. and 1:30 p.m. each day. We can discuss rescheduling the other 2, if necessary, when we are all together later this week.

See Exhibit "C". Rather than take the depositions of four BOU Directors on September 29th and 30th and reschedule the depositions of two other BOU Directors as suggested by BOU's counsel, Geary Respondents' counsel declined to proceed with the scheduled depositions. See Exhibit "C". Had the Geary Respondents proceeded with the depositions of four of the BOU Directors on September 29th and 30th, the depositions of at least five³ of the seven BOU Directors who signed the Affidavit at issue and are identified on the Department's final witness list would have been taken by now.

Regardless of the position of the Enforcement Division of the Department on whether the BOU Directors have complied with the subpoenas at issue, the Geary Respondents' remedy for insufficient compliance with the subpoenas is to apply to the Administrator of the Department for judicial enforcement of the subpoenas. See Rule 660:2-9-4(e)(1). The Geary Respondents are aware of the procedure set forth in Rule 660:2-9-4(e)(1);⁴ yet, the Geary Respondents have

² See *supra* note 1.

³ Again, the parties deposed John Shelley on November 16, 2011.

⁴ See *Geary Respondents' (1) Motion to Strike Witnesses and Allegations, (2) Motion for Protective Order to Limit Scope of Depositions, (3) Response and Objections to the BOU Non-Parties' Motion to Quash, and (4) Alternative Motion for Expedited Enforcement of Subpoena in the District Court*, filed March 14, 2011; *Order Denying Respondents' Motion to Strike Witnesses and Allegations, Motion for Protective Order to Limit Scope of Depositions, and Motion for Expedited Enforcement of Subpoena In the District Court*, filed March 24, 2011; and *Notice of Application for Judicial Enforcement of Subpoenas Pursuant to Order dated March 21, 2011*, filed March 25, 2011.

not made such an application regarding the subpoenas at issue in their Motion. By not doing so, the Geary Respondents filed their Motion in bad faith.

For the foregoing reasons, the Geary Respondents' Motion should be denied. In the event the Geary Respondents' Motion is not denied on the basis of the foregoing reasons, the Geary Respondents' Motion should be denied for the reasons that follow.

II. GEARY RESPONDENTS' MOTION TO STRIKE AFFIDAVIT OF BOU'S DIRECTORS AND PRECLUDE ITS OFFER, ADMISSION OR REFERENCE IN ANY PLEADINGS, DEPOSITION, OR AT THE HEARING ON THE MERITS SHOULD BE DENIED

In their Motion, the Geary Respondents request 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." The affidavit at issue was not listed on the Department's preliminary exhibit list⁵ and has not been attached to any motion or pleading (except for this response) by the Department. There is nothing from which to strike the affidavit.

Further, although the Geary Respondents claim otherwise, the affidavit in question was never intended to be used in lieu of testimony at a hearing on the merits. The Department's counsel has absolutely no recollection of advising the Geary Respondents' counsel that the affidavit was intended for that purpose. Rather, the affidavit in question was intended to support a motion for summary decision against the Geary Respondents. Even though the Department has not filed such a motion against the Geary Respondents, the Department provided an executed copy of the affidavit to the Geary Respondents shortly after receiving it to supplement its response to a request by the Geary Respondents for production of documents. See Exhibit "D".

⁵ Final exhibit lists have not been filed in this matter. The Affidavit was created after the Department filed its preliminary exhibit list on December 22, 2010.

In *Tingey v. Radionics*, 193 Fed.Appx. 747, 765 (Aug. 2006), the United States Court of Appeals for the Tenth Circuit stated:

Parties may file affidavits in support of summary judgment without providing notice or an opportunity to cross-examine the affiant. *See* Fed.R.Civ.P. 56(c). The “remedy” for this non-confronted affidavit testimony is to file an opposing affidavit, not to complain that one was not present and permitted to cross-examine when the affidavit was signed.

The affidavit in question concerns representations made by Respondent Keith Geary. In the event the affidavit in question is used by the Department to support a motion for summary decision, the Geary Respondents’ “remedy” is to file an opposing affidavit. It would be inappropriate to preclude the usage of the affidavit in support of a motion for summary decision on the basis that the affiants have not been deposed.

It would also be inappropriate to preclude the usage of the affidavit in question in a deposition. To preclude the affidavit from being used during a deposition would be directly contrary to the Geary Respondents’ purported desire to “exercise their discovery rights.” The Geary Respondents’ due process rights certainly would not be violated by the usage of the affidavit at a deposition in this proceeding where the Geary Respondents would have the opportunity to examine the deponent regarding the affidavit.

Finally, the affidavit should not be precluded from being offered, admitted or referenced at a hearing on the merits on the grounds that the affiants were not deposed if the affiants are present at the hearing as witnesses and available for cross-examination. Assuming *arguendo* that due process requires the Geary Respondents to have the opportunity to take the deposition of the BOU Directors prior to their testimony at trial, due process has been afforded. As set forth above in Section I, Deposition Subpoenas were issued to the BOU Directors and no application has been made with the Administrator of the Department to enforce those subpoenas.

For the forgoing reasons, the Geary Respondents' motion to strike the Affidavit of BOU's Directors and preclude its offer, admission or reference in any pleadings, deposition, or at the hearing on the merits should be denied.

III. GEARY RESPONDENTS' MOTION TO PRECLUDE THE BOU DIRECTORS FROM TESTIFYING AT HEARING SHOULD BE DENIED

The Geary Respondents also request an order "precluding Jeff Wills, Ray Evans, Earl Mills, Eldon R. Ventris, Steve Ketter and David Tinsely from testifying at the hearing on the merits in this proceeding." In their Motion, the Geary Respondents rely on *State ex rel. Protective Health Services v. Billings Fairchild Center, Inc.*, 158 P.3d 484, 489 (Okla. Civ. App. 2006), *Anadarko Petroleum Corp. v. Corp. Commission*, 859 P.2d 535 (Okla. Civ. App. 1993) and *Cyphers v. United Parcel Service*, 3 S.W.3d 698 (Ark. Ct. App. 1999). None of the cited cases have facts similar to the facts presently before the Hearing Officer.

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 of procedure followed in the district courts of this state.

Id. at 488-89.

When the respondent's answers to the interrogatories were 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 state 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. Therefore, the Geary Respondents' reliance on the *Billings Fairchild Center* opinion is faulty.

The facts in *Anadarko Petroleum Corp.* and *Cyphers* are also different from the facts in this proceeding. In *Anadarko Petroleum Corp.*, a petroleum company's application to the Oklahoma Corporation Commission for authority to use a well as a noncommercial salt water disposal well was objected to by local property owners. 859 P.2d at 536. The Corporation Commission treated the property owners' argument at hearing as evidence and denied the application. *Id.* at 538. The Oklahoma Court of Appeals held that the applicant had been denied due process because it was not afforded prior notice and opportunity to respond to the property owners' argument. *Id.* at 538-39. In *Cyphers*, the Court of Appeals of Arkansas held that a Workers' Compensation claimant was denied her right to cross-examination where the Workers'

Compensation Commission refused claimant's request to issue a subpoena to appear at a hearing to an expert witness upon whose report the Commission relied. *Cyphers*, 3 S.W.3d 698.

Here, the Geary Respondents have notice that the BOU Directors may be called as witnesses at the hearing on the merits. If the Directors testify at the hearing, the Geary Respondents will have the opportunity to cross examine such witnesses and offer evidence in response. No one has refused to issue a subpoena to the BOU Directors.

The Geary Respondents are not being forced to defend themselves "in the dark." As explained above in Section I, Subpoenas Duces Tecum and Deposition Subpoenas were issued at the Geary Respondents' request to Jeff Wills, Ray Evans, Earl Mills, Eldon R. Ventris, Steve Ketter and David Tinsley. If compliance with the subpoenas was not to the Geary Respondents' satisfaction, the Geary Respondents should apply to the Administrator of the Department for judicial enforcement of the administrative subpoenas pursuant to Rule 660:2-9-4(e).

For the forgoing reasons, the Geary Respondents' motion to preclude 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 should be denied.

**IV. THE REQUESTED RELIEF IS NOT AUTHORIZED BY THE RULES OF THE
OKLAHOMA SECURITIES COMMISSION AND THE ADMINISTRATOR OF THE
DEPARTMENT OF SECURITIES**

An agency's interpretation of its own rules is given great deference. *Estes v. ConocoPhillips Co.*, 184 P.3d 518, 524 (Okla. 2008). Rule 660:2-9-3(f) does indeed authorize the imposition of "sanctions" for certain failures.⁶ Although the Geary Respondents' claim otherwise, Rule 660:2-9-3(f) does not authorize sanctions to be imposed against the Department

⁶ 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* . . ." (Emphasis added.)

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. Instead, Rule 660:2-9-4(e) provides the remedy for a third-party witness' failure to comply with administrative subpoenas. *See* Rule 660:2-9-4(e). The Hearing Officer issued subpoenas to the BOU Directors at the Geary Respondents' request, and the Geary Respondents have not applied to the Administrator of the Department for judicial enforcement of the subpoenas issued by the Hearing Officer to the BOU Directors pursuant to Rule 660:2-9-4(e). The Department has not denied the Geary Respondents of their due process rights.

CONCLUSION

For the foregoing reasons, the Geary Respondents' Motion should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of November, 2011, a true and correct copy of the above and foregoing was emailed and mailed by first-class mail with postage prepaid thereon, to the following:

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