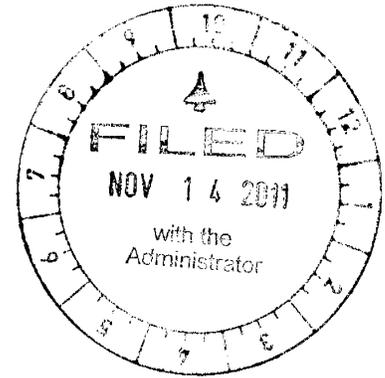


STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

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

Respondents.

ODS File No. 09-141

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

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 Motion to request that the Hearing Officer issue a preclusion order and an order striking and prohibiting any reference to or reliance on a document previously identified as an exhibit by the State of Oklahoma Department of Securities (the "Department"). The subject document was previously identified by the Department as Exhibit 27, and is described as "Guaranty Agreement, dated September 25, 2009, between Keith Geary and Timothy Headington" (hereinafter referenced as "Exhibit 27" or the "Purported Headington Guaranty Agreement"). This Motion additionally requests that the Hearing Officer preclude Mr. Headington and any of his representatives from testifying in this action and preclude the Department from attempting to introduce any evidence concerning the allegations contained in its Recommendation regarding Mr. Headington.

I. PRELIMINARY STATEMENT.

This Motion is based on the actions and inactions of a non-party – Timothy Headington – that expose the Geary Respondents to unfair prejudice and deprivation of their rights to discovery, due process and fundamental fairness in this proceeding. The Department purportedly filed this enforcement action, in part, to redress alleged violations of securities laws in connection with the offer and sale of one security to Mr. Headington. As is detailed in Section II below, The Geary Respondents have made numerous attempts to obtain discovery information from Mr. Headington through the means expressly authorized by the Department’s Rules for over 9 months. Mr. Headington’s evasive tactics warrant the relief requested by this Motion.

II. BRIEF STATEMENT OF FACTS RELEVANT TO THIS MOTION.¹

A. Mr. Headington’s Role in this Enforcement Action.

1. The Enforcement Division’s “Recommendation” represents the charges being brought against the Respondents. The charges fall into two factual categories: (1) the Geary Respondents’ involvement in a resecuritization project that led to the purchase of securities (one each) by BOU and Timothy Headington in September of 2009 (the “CEMP Charges”); and (2) Respondent Geary Securities’ compliance with the net capital rule in May 2009 and February 2010 (the “Net Capital Charges”). Mr. Headington is only involved in the CEMP Charges.

2. The Recommendation contains the following allegations concerning the Geary Respondents’ dealings with Mr. Headington:

¹ The undersigned counsel for the Geary Respondents verifies the accuracy of the facts set forth in Section II. Counsel has not burdened the record with copies of all communications that relate to such facts. Upon request by the Hearing Officer, counsel will gladly provide any or all supporting documentation.

- Respondent Geary convinced Mr. Headington to purchase the CEMP Class A-2 notes by promoting the purchase as a way for Mr. Headington to assist Bank of Union (“BOU”) in its effort to divest itself of other securities that were potentially subject to regulatory scrutiny [Recommendation, p. 12, para. 85];
- Respondent Geary convinced Mr. Headington to purchase the CEMP Class A-2 notes by representing that Mr. Headington would be out of the CEMP investment by the end of 2009 and would realize a profit on the investment [Recommendation, p. 12, para 85];
- Respondent Geary convinced Mr. Headington to purchase the CEMP Class A-2 notes by providing Mr. Headington with a written “Guaranty Agreement” [Recommendation, p. 12, para 86];
- Respondents Geary and Geary Securities made untrue statements of material facts and omissions to Mr. Headington in connection with the offer and sale of CEMP Class A-2 notes [Recommendation, p. 20, para 1-2];
- Respondents Geary and Geary Securities engaged in unethical securities practices by inducing Mr. Headington’s purchase of the CEMP Class A-2 notes by manipulative and deceptive means and by guaranteeing against losses in the securities transaction [Recommendation, p. 21, para 4(d) and (e)].

4. The Department identified Mr. Headington as a witness in its Preliminary Witness List (filed December 22, 2010), describing his anticipated testimony as follows: “[E]xpected to testify concerning Bank of Union’s transactions in CEMP Resecuritization Trust 2009-1, Class A-1 Notes, and his transactions in CEMP Resecuritization 2009 Trust, Class A-2 Notes, communications relating to such transactions, and the Guaranty Agreement by Keith Geary.”

5. The Department identified the following document as Exhibit 27 in its Preliminary Exhibit List (filed December 22, 2010): “Guaranty Agreement, dated September 25, 2009, between Keith Geary and Timothy Headington.”

6. After the Geary Respondents began to pursue discovery from Mr. Headington (see below at paragraphs 7-21), the Department deleted Mr. Headington from its Final and Amended Final Witness Lists (filed March 25, 2011 and March 28, 2011 respectively).

B. The Geary Respondents' Efforts to Obtain Discovery from Mr. Headington.

7. After receipt of the Department's Preliminary Witness List identifying Mr. Headington as a witness, counsel for the Geary Respondents asked whether the Department could voluntarily produce Mr. Headington for deposition. The Department's answer was "no," advising the Geary Respondents they would have to proceed by subpoena.

8. On February 8, 2011, the Geary Respondents submitted proposed subpoenas for documents and a deposition from Mr. Headington to the Hearing Officer (the "First Headington Subpoena"). The Hearing Officer issued the First Headington Subpoena and the Geary Respondents promptly served it on Mr. Headington. Pursuant to the First Headington Subpoena, the deadline for production of documents was February 25, 2011, and Mr. Headington's deposition as set for March 28, 2011.

C. Mr. Headington's Refusal to Comply with Discovery Requests.

9. On March 3, 2011, a Motion to Quash and for Protective Order was filed on behalf of Mr. Headington and others. The Geary Respondents responded and, by Order dated March 24, 2011, the Hearing Officer overruled the Motion to Quash and for Protective Order.

10. Notwithstanding the Hearing Officer's ruling, Mr. Headington refused to comply with the First Headington Subpoena. As a result, on March 25, 2011, the Geary Respondents immediately requested that the Administrator take prompt action to obtain judicial enforcement of the First Headington Subpoena. The Administrator conducted a hearing and granted the Geary Respondents' request.

11. On April 6, 2011, the Administrator initiated an enforcement action in the District Court. On May 4, 2011, a Motion to Quash and for Protective Order was filed on behalf of Mr.

Headington and others in the District Court proceeding. The District Court announced its decision on May 5, 2011. With respect to the First Headington Subpoena, the District Court ruled that it lacked jurisdiction to compel Mr. Headington's attendance at a deposition in Oklahoma. The District Court did enforce the document subpoena served on Mr. Headington. As a result of difficulties encountered in obtaining Mr. Headington's counsel's approval of the form of Order memorializing the District Court's ruling, the Department filed a Motion to Settle Journal Entry on June 10, 2011. As a result, a second hearing was conducted by the District Court. The District Court ultimately entered and filed its Order on July 24, 2011.

12. The Administrator initially indicated he was considering either appealing the District Court's decision on the First Headington Subpoena, or pursuing enforcement action in Dallas County, Texas (Mr. Headington's residence). Ultimately, the Administrator did neither. Instead, the Administrator took the position that he could not determine whether the First Headington Subpoena was properly served on Mr. Headington. The Administrator took this position notwithstanding the fact such issue (validity of service) had never been raised by Mr. Headington before, during or after the District Court hearing. The Administrator's decision led to a series of filings by the Geary Respondents. See, Filings dated July 13, 2011, August 1, 2011, and August 5, 2011.

13. In light of the Administrator's refusal to proceed and take action, and in an attempt to move forward with their discovery efforts, on August 5, 2011, the Geary Respondents asked the Hearing Officer to issue a subsequent subpoena for Mr. Headington's deposition in Dallas County, Texas. The Hearing Officer granted such request without any objection and issued the requested subpoena (the "Second Headington Subpoena").

14. In light of the Administrator's curious position concerning service of the First Headington Subpoena, on August 22, 2011, the Geary Respondents requested that the Administrator undertake service of the Second Headington Subpoena. The Administrator declined.

15. On September 20, 2011, prior to attempting to serve the Second Headington Subpoena on Mr. Headington, the Geary Respondents called and left messages with both of Mr. Headington's attorneys (John Shirger and Matthew Lytle), advising of their intent to serve the Second Headington Subpoena and asking if they preferred to accept service. Mr. Headington's counsel did not respond.

16. The Geary Respondents retained Texas counsel to provide advice and assistance concerning effective service of the Second Headington Subpoena, resulting in service being accomplished on September 26, 2011, for a deposition date of October 6, 2011 in Dallas, Texas.

17. Counsel for Mr. Headington did not communicate with the Geary Respondents' counsel after Mr. Headington was served with the Second Headington Subpoena. On October 4, 2011, the Geary Respondents called Mr. Headington's counsel and left a message asking whether Mr. Headington intended to appear for his deposition on October 6th. Mr. Headington's counsel did not respond or return the call. A short time later on October 4th, the Geary Respondents followed up by sending an e-mail to Mr. Headington's counsel asking the same question. No response. Instead, approximately two hours after leaving a message for Mr. Headington's counsel, the Geary Respondents' counsel was informed by counsel for the Department (Ms. Bonnell) that she had been informed that Mr. Headington did not intend to appear for his deposition and Mr. Headington's counsel would send a letter explaining the reasons.

18. The Geary Respondents' counsel received a letter from Mr. Headington's counsel via e-mail on October 4th at 4:42 p.m. that stated, in its entirety: "*We are in receipt of the deposition subpoena delivered to Mr. Headington. The subpoena is procedurally defective, and its service was ineffective. Accordingly, Mr. Headington will not appear for his deposition on October 6, 2011.*"

19. Mr. Headington did not appear for his deposition on October 6, 2011.

20. In an effort to avoid wasting additional time and money in what had clearly become a prolonged game of keep-away, on October 12, 2011, the Geary Respondents asked counsel for Mr. Headington to "*advise us of (1) all procedural deficiencies in the deposition subpoena, and (2) exactly how service was ineffective*" by October 17th. Counsel for Mr. Headington responded by e-mail on October 17th, stating:

"This email responds to your letter of October 12, 2011. The subpoena for Mr. Headington's deposition was not properly issued in compliance with Texas law relating to deposition subpoenas for use in a foreign jurisdiction and personal service was not made upon Mr. Headington as required by Texas law."

21. Likewise, in a further effort to avoid wasting additional time and money on a potentially futile request for subpoena enforcement to the Administrator, on October 12, 2011, counsel for the Geary Respondents asked counsel for the Administrator to advise them in detail of any deficiencies the Administrator believed existed in connection with service of the Second Headington Subpoena. The Geary Respondents requested a written response by October 17, 2011. On October 17, 2011, counsel for the Administrator called the Geary Respondents' counsel. Counsel for the Administrator did not identify any specific deficiency or non-compliance with applicable law regarding the Geary Respondents' service of the Headington Subpoena and agreed that, in his opinion, Texas law was unclear. Counsel for the Administrator

advised that he would have to confer with the Administrator before taking a firm position. The Geary Respondents heard nothing further from the Administrator or his counsel on this issue until November 7, 2011, when counsel for the Administrator called and indicated he was considering taking some form of action in the District Court concerning Mr. Headington's deposition. Counsel for the Administrator indicated he planned to do something by the end of the week of November 7th, but to date has made no filings.

III. ARGUMENT AND AUTHORITY.

The scope of requested relief sought by the Geary Respondents includes the following:

- An Order striking Department Exhibit 27 and precluding its offer, admission or reference in any pleadings, depositions, and at the hearing on the merits in this proceeding;
- An Order precluding Timothy Headington, or any representative on his behalf, from testifying at the hearing on the merits in this proceeding; and
- An Order precluding the Department from attempting to introduce any evidence concerning the allegations contained in the Recommendation concerning Mr. Headington.

As is discussed below, the requested relief is authorized by the Department's own Rules and is warranted under the facts and circumstances detailed herein.

A. MR. HEADINGTON'S EVASIVE DISCOVERY TACTICS AND ATTEMPTS TO KEEP THE GEARY RESPONDENTS "IN THE DARK" ARE CONTRARY TO APPLICABLE LAW.

Oklahoma law recognizes that, even in administrative proceedings, a litigant is entitled to know the grounds upon which the other party bases their contentions. In *State ex rel. Protective Health Services v. Billings Fairchild Center, Inc.*, 158 P.3d 484, 489 (Okla.Civ.App. Div.

4,2006)(involving an administrative process pursued by the Protective Health Services of the Department of Health in which the State moved to compel interrogatories from the respondent), the Oklahoma Court of Appeals held:

Civil trials no longer are to be conducted in the dark. Discovery, consistent with recognized privileges, provides for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir.1978). "The aim of these liberal discovery rules is to 'make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' "

Id.

As a result of the evasive discovery tactics employed by Mr. Headington and his counsel, the Geary Respondents are having to attempt to defend themselves "blind folded" and completely "in the dark" with respect to the Department's express allegation that the Geary Respondents made material misrepresentations and omissions and employed unethical securities practices in their dealings with Mr. Headington in connection with his purchase of a security from the Geary Respondents.

B. THE DEPARTMENT'S RULES AUTHORIZE THE RELIEF REQUESTED BY THE GEARY RESPONDENTS.

It is clear the Geary Respondents were entitled, under the Department's own Rules, to pursue discovery from, among others, Mr. Headington. *See*, ODS Rule 660:2-9-4(a). The Geary Respondents' right and opportunity to respond to the Department's charges and present evidence and argument "on all issues involved" is expressly granted and guaranteed by Oklahoma statute. 75 Okla.Stat. § 309(C)(Okla. Admin. Procedures Act). In recognition of this absolute right, the

Department's Rules provide for deposition and document discovery to obtain information on issues that may be presented by the Department. *See*, Rule 600:2-9-3(b) and 2-9-4(a).

Depriving the Geary Respondents of their absolute right to pursue and obtain information from Mr. Headington concerning the Department's charges in this matter constitutes an impermissible denial of due process. *See Anadarko Petroleum Corp. v. Corp. Commission*, 1993 OK CIV APP 139, 859 P.2d 535 (failure to afford applicant opportunity and notice to respond to protestor's argument, which Commission treated as evidence, constituted denial of due process, requiring that order of Commission be vacated); *Cyphers v. United Parcel Service*, 3 S.W.3d 698, 703 (Commission's failure to subpoena and require attendance of independent medical examiner who prepared a report relied upon at hearing denied a claimant her due process right of cross examination).

When a person or entity fails to participate in a hearing or the discovery process, the Department's Rules expressly contemplate and provide consequences for such failure. Mr. Headington's persistent refusal to comply with authorized discovery requests constitutes a failure and refusal to participate in good faith in the discovery process, triggering application of the remedies provided by the Rules. *See*, Rule 660:2-9-3 (f). The fact that this Motion is directed at Mr. Headington's refusal to comply with discovery – rather than the Department's refusal – is of no consequence. The result is the same – the Geary Respondents are being denied the opportunity to exercise their discovery rights and fully defend themselves against the Department's charges related to Mr. Headington.

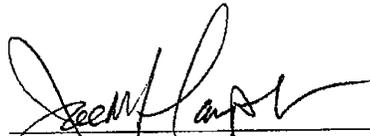
The sanctions provided by the Rule include "striking of any pleading" and "a preclusion order." *See*, Rule 660: 2-9-3 (f) (1) and (2). Under these circumstances, granting this Motion and the remedies expressly authorized by the Department's own Rules is appropriate.

IV. CONCLUSION.

Based on the foregoing discussion, argument and authorities, the Geary Respondents respectfully request that the Hearing Officer:

- A. Issue an Order striking Department Exhibit 27 and precluding its offer, admission or reference in any pleadings, depositions, and at the hearing on the merits in this proceeding;
- B. Issue an Order precluding Timothy Headington, or any representative on his behalf, from testifying at the hearing on the merits in this proceeding; and
- C. Issue an Order precluding the Department from attempting to introduce any evidence concerning the allegations contained in the Recommendation concerning Mr. Headington.

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENTS GEARY
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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2011, a copy of the foregoing document was served on the following via electronic mail:

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