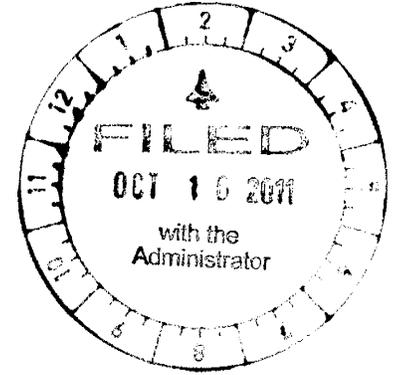


STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



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

**OBJECTION TO MOTION FOR RECUSAL OF HEARING OFFICER BRUCE R.
KOHL AND BRIEF IN SUPPORT**

On October 3, 2011, Respondents Geary Securities, Inc., Keith D. Geary, and CEMP, LLC, joined by Respondent Norman Frager (collectively, the “Respondents”), filed a motion requesting the recusal of the designated hearing officer in this case (Hearing Officer). The stated reasons for the motion are (1) a telephone conversation between the Hearing Officer and counsel for certain non-party witnesses (the “BOU Witnesses”); (2) email communications between the Hearing Officer and counsel for the Department of Securities (Department); and (3) “multiple discovery disputes, delay and inactivity”. The alleged inactivity relates, in part, to the inclusion of the Hearing Officer in communications between counsel for the parties. As more fully set forth below, the Department objects to the Respondents’ motion.

1. The Communications in Question

Upon learning of a telephone conversation on September 26, 2011, between the Hearing Officer and counsel for the BOU Witnesses, the Department requested a hearing

to address whether the Hearing Officer should recuse himself from the pending proceeding. A telephone hearing was held on September 30, 2011. The Hearing Officer described the content of the September 26th communication as a “inconsequential contact” wherein counsel for the BOU Witnesses sought permission to enter an appearance in the proceeding in light of the depositions of certain of the BOU Witnesses scheduled for September 29th and 30th. He reported that counsel for the BOU Witnesses was advised by the Oklahoma Bar Association to address the required process with the Hearing Officer. The Hearing Officer further reported that there was no discussion of evidence or the BOU Witnesses’ upcoming testimony. Finally, the Hearing Officer reported that the communication in question lasted just 3 minutes and 14 seconds.

The Respondents also raise as inappropriate certain email communications between the Hearing Officer and counsel for the Department. However, like the telephone conversation described above, all of these communications strictly related to administrative matters. Specifically, the emails related to (1) the need for the Hearing Officer’s manual signature on the scheduling order; (2) the insertion of the Hearing Officer’s middle initial in the signature block of the scheduling order; (3) the inclusion of the Hearing Officer’s mailing address in the scheduling order; (4) the actual submission of the signed scheduling order to counsel for the Department for filing and distribution to the parties; (5) the scheduling of the hearing in this matter; (6) the rescheduling of that hearing; (7) objections to the issuance of subpoenas; (8) the scheduling of two conference calls; (8) the opportunity for the BOU Witnesses to argue a motion to quash; and (9) the method of submission by the Department of discovery items for *in camera* inspection.

With respect to the disqualification of a hearing officer, the Oklahoma Administrative Procedures Act, Okla. Stat. tit. 75, §250.1 *et seq.* (OSCN 2011), provides as follows:

A hearing examiner or agency member shall withdraw from any individual proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing[.]

Okla Stat. tit. 75, §316. Moreover, the Oklahoma Supreme Court has continually held that “due process requires every litigant receive a decision that is the result of ‘the cold neutrality of an impartial judge.’” *Johnson v. Board of Governors of Registered Dentists of the State of Okla.*, 1996 OK 41, 913 P.2d 1339, 1347 (citing *Sadberry v. Wilson*, 441 P.2d 381, 382, 384 (Okla. 1968); *Craig v. Walker*, 824 P.2d 1131, 1132 (Okla. 1992)). Disqualification of a hearing officer should occur when the circumstances are such “that they might cast doubt and question as to the impartiality of any judgment”. *Sadberry*, 441 P.2d at 384.

The factual history described by the court in *Olson v. Continental Resources, Inc.*, 2007 OK CIV APP 90, 169 P.3d 410, includes a request for recusal of the trial judge based on alleged inappropriate telephone conversations between counsel for the defendant and the judge. The judge did not recuse himself and the presiding judge subsequently denied plaintiff’s recusal motion finding the telephone communications were not inappropriate as they related only to the scheduling of motions and hearings. *Id.* Plaintiff then sought extraordinary relief from the Oklahoma Supreme Court which denied plaintiff’s request to have the trial judge disqualified. *Id.* at 412 (citing *Olson v. Franklin*, Case No. 101,682 (Okla. Feb. 28, 2005) (unpublished), *reh’g denied*). Finally,

the United States Supreme Court denied a writ of mandamus. *Id.* (citing *In re Olson*, 547 U.S. 1068, *reh'g denied* 548 U.S. 920 (2006)). As in *Olson*, there is no evidence of any improper communications in this proceeding and recusal of the Hearing Officer is not required.

2. Discovery Disputes, Delay and Inactivity

Counsel for the Department does not dispute that there have been extensive discovery disputes and delays in this matter to date. Respondents also criticize the Hearing Officer's failure to instruct and admonish counsel for the BOU Witnesses for their inclusion of the Hearing Officer in communications with counsel for the parties. However, the discovery disputes, delays and inaction by the Hearing Officer in no way cast doubt on the fairness or impartiality of the Hearing Officer in this matter.

Conclusion

While recognizing that it is within the discretion of the Hearing Officer to grant Respondents' motion, the Department requests that the motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of October, 2011, a true and correct copy of the above and foregoing motion was emailed and mailed, with postage prepaid, to:

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