

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

**RULING ON THIRD PARTY DIRECTORS' MOTION FOR RECONSIDERATION OF
MOTION TO QUASH DEPOSITION SUBPOENAS**

This matter having come before the Hearing Officer on the Motion for Reconsideration filed by directors of the Bank of Union Jeff Wills, David Tinsley, Steve Ketter, Ray Evans, Earl Mills and Elden Ventris (together the "Third Party Directors"), requesting the Hearing Officer to reconsider the order entered on March 15, 2012 denying the Third Party Directors' Motion to Quash and for Protective Order ("Order"). The Order further established restrictions on the depositions to be taken of the Third Party Directors by the Respondents, and ordered that the depositions be conducted within forty-five days.

On March 30, 2012 the Department of Securities ("Department") filed a Second Amended Final List of Witnesses in which the Department omitted the Third Party Directors as witnesses to be called on behalf of the Department in a final hearing to be held in this proceeding on the Enforcement Division Recommendation.

The Hearing Officer based the decision to deny the Motion to Quash primarily on two grounds; first, that because the Third Party Directors were listed as potential witnesses for the Department, principles of due process and fundamental fairness would dictate that the Respondents have a reasonable opportunity to question such witnesses in preparation for the final hearing, and second that the Rules of the Oklahoma Securities Commission and Administrator of the Oklahoma Securities Department ("Rules") provide in Rule 660:2-9-3(b) that as part of discovery in administrative proceedings any party "... may take the testimony of *a witness* by oral deposition at the expense of that party. . ."[emphasis added].

As to the first grounds, it is obvious that the Third Party Directors were not going to voluntarily submit to questioning by the Respondents¹, so that subpoenaing them for depositions

¹ It should be noted that earlier in these proceedings counsel for the Third Party Directors agreed to produce for depositions the directors of the BOU who signed the March 17, 2011 Affidavit. See the April 4, 2011 email from

was the only viable option to allow the Respondents to question them as potential Department witnesses in this case. This continued to be true so long as the Third Party Directors were identified as witnesses for the Department. However, since the Department has filed an amended list of witnesses that omits the Third Party Directors as witnesses for the Department, this ground for denying the motion is moot.

As to the second grounds for denying the motion, it is not clear to the Hearing Officer from the language of Rule 660:2-9-3(b) whether as part of discovery a party has the right pursuant to this rule to take the deposition of any person who may arguably have information concerning the issues in the case, or whether such applies only to persons who are identified by the parties as being potential witnesses in the final hearing. Even though the language of Rule 660:2-9-3(b) is unclear on this issue, the Hearing Officer would chose to interpret the rule liberally so as to allow persons other than those identified by the parties as potential witnesses to be deposed in discovery, subject to the limitations of Rule 660:2-9-4(a). Additionally, merely because the Third Party Directors have been omitted as witnesses by the Department on its final witness list does not mean that there are not circumstances under which one or more of the Third Party Directors may be called to testify in the final hearing. Omitting them from the final witness list only means that they are not to be called by the Department as part of its case in chief. However, they could arguably be called by the Department as rebuttal witnesses, or they could be called by the Respondents in their defense to refute other testimony presented by the Department, so under either interpretation of the language of Rule 660:2-9-3(b) the Third Party Directors may be subject to discovery depositions.

The testimony of the Third Party Directors is relevant regarding certain statements that were alleged to have been made by Respondent Keith Geary at a meeting of the Board of Directors of the Bank of Union (“BOU”) held on September 22, 2009, at which the Third Party Directors were present.² All of the Third Party Directors subsequently executed an affidavit dated March 17, 2011 concerning such statements (the “Affidavit”). Additionally, Respondents have taken the depositions of John Shelley (who was also a member of the Board of Directors at the time of the subject board meeting), Michael Braun and Bettie Anita Pettijohn, all three of whom were also present at the subject BOU board meeting and able to testify about the statements made at the meeting by Mr. Geary.

The right of parties to subpoena witness under the Rules is not absolute or unlimited, but instead is governed by a standard of reasonableness and fairness, and may be restricted where in the opinion of the Hearing Officer issuance of deposition subpoenas would be unreasonable, oppressive, excessive in scope, unduly burdensome or not relevant. See Rule 660:2-9-4(a). So

Mathew Lytle to Joe Hampton, a copy of which is attached as Exhibit C to the Third Party Directors’ Brief in Support of Motion to Quash and for Protective Order.

² The Geary Respondents in their request for deposition subpoenas directed to the Third Party Directors have not submitted any additional explanation supporting the issuance of the subpoenas or the issues to be addressed with the deponents, or further defining the scope of the proposed depositions.

the question presented is whether, since the Third Party Directors will no longer be called as witnesses by the Department in its case in chief, requiring them to submit to discovery depositions to question them about the statements made at the September 22, 2009 BOU board meeting by Mr. Geary could be characterized as being “unreasonable, oppressive, excessive in scope, unduly burdensome or not relevant”. The Hearing Officer has concluded that discovery depositions of the Third Party Directors would not be oppressive or unduly burdensome on them and would not be irrelevant, so the remaining issue is whether they would be unreasonable and/or excessive in scope.

Counsel for the Third Party Directors has argued that because there have already been three persons deposed by the Respondents who were present at the subject BOU board meeting, and who substantiated the statements made in the Affidavit of the Third Party Directors (one of whom was a signatory to the Affidavit), that further testimony from the Third Party Directors on this issue would be duplicative and redundant. They further argue that because the Affidavit is short and specific no additional elaboration by the Third Party Directors is necessary to explain the facts and circumstances surrounding the subject matter of the Affidavit.³

The Hearing Officer is inclined to agree with the position of the Third Party Directors that if the only purpose of the requested depositions would be to confirm that the affiants were present at the subject board meeting and heard the statements of Respondent Geary as reflected in the Affidavit, that such testimony would be redundant and unnecessary to these proceedings, in light of the testimony of the three witnesses identified above. Since the Third Party Directors are no longer listed as witnesses for the Department, the Hearing Officer concludes that the additional depositions of the Third Party Directors would be unreasonable and excessive, and therefore that the Motion to Quash filed by the Third Party Directors should be granted.

However, this conclusion is based on the premise that the scope of the intended depositions is only to confirm the attendance of the Third Party Directors at the subject BOU board meeting, and to confirm what was set forth in the Affidavit concerning the statements of Respondent Geary. If the Geary Respondents can demonstrate that there are other relevant topics to be addressed with the Third Party Directors then the requested subpoenas for discovery depositions may be warranted. Rule 660:2-9-4(a) further provides that as a condition to issuance of a subpoena the Hearing Officer may require that the party seeking the subpoena show the general relevance and reasonable scope of the testimony being sought.

For these reasons the Hearing Officer rules as follows:

1. The Hearing Officer finds that the depositions of the Third Party Directors as currently proposed would be unreasonable and excessive, so that the Third Party Directors’

³ The Department has acknowledged that it does not intend to introduce the Affidavit in evidence at the final hearing, so that if the Department wishes to introduce evidence of the subject BOU board meeting and the statements of Mr. Geary made at the meeting, such would have to be presented through witness testimony.

Motion for Reconsideration should be granted and that pursuant to Rule 660:2-9-4(a) the deposition subpoenas should be quashed as prayed for in the Third Party Directors' Motion to Quash and for Protective Order.

2. The Hearing Officer will delay entry of an order granting the Third Party Directors' Motion to Quash and for Protective Orders as follows:

A. Pursuant to Rule 660:2-9-4(a) the Geary Respondents will be allowed until the close of business on April 17, 2012 to present a written statement to the Hearing Officer of the specific details of any additional issues or topics that they would propose to question each of the Third Party Directors about in the discovery depositions, and further showing the general relevance and reasonable scope of such proposed examinations.

B. Thereafter the Hearing Officer may either enter an order granting the Third Party Directors' Motion to Quash, or deny the motion and allow the subpoenas subject to such limitations and restrictions as fairness requires.

Dated: April 13, 2012.



Bruce R. Kohl
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of April, 2012, a true and correct copy of the above and foregoing *Ruling on Third Party Directors' Motion for Reconsideration of Motion to Quash Deposition Subpoenas* was emailed and mailed, with postage prepaid, to:

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