

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

**THIRD PARTY DIRECTORS' REPLY BRIEF IN FURTHER
SUPPORT OF MOTION TO QUASH AND FOR PROTECTIVE ORDER**

The Third Party Directors, by and through undersigned counsel, and for their reply in further support of their Motion to Quash and for Protective Order state as follows:

INTRODUCTION

The subpoenas issued to the Third Party Directors should be quashed. The Geary Respondents' opposition ignores the *facts* and, instead, relies on twisted misconceptions about the District Court's Order, and a desperate, bald faced falsehood about the purported destruction of evidence that has no basis in fact. In a nut shell, the Geary Respondents argue that the *facts* are "irrelevant" because, in their eyes, "the District Court has already addressed and decided the issue presented" by the Third Party Directors' Motion. But the facts *are* relevant. The Geary Respondents miss the issue.

The relevant facts are these: 1) the Geary Respondents unilaterally cancelled previously scheduled depositions of the Third Party Directors; 2) the Geary Respondents deposed Mike Braun and Betty Pettijohn, both of whom were present at the September 22, 2009, board meeting and testified about Keith Geary's representations during that meeting; and 3) the Geary Respondents deposed John Shelly who was also present at the September 22nd board meeting and

testified about Keith Geary's representations, and who, as a member of the board, signed the Affidavit.

Given these facts, the issue is that the subpoenas are unreasonably cumulative and duplicative, unduly burdensome, and harassing. Issued almost seven months before the subpoenas, the District Court's Order did not, because it could not, address this issue. The Geary Respondents' arguments are misguided. The subpoenas should be quashed.

ARGUMENT

THE DISTRICT COURT'S ORDER DOES NOT PRECLUDE THE RELIEF THE THIRD PARTY DIRECTORS SEEK.

As the foundation of their opposition, the Geary Respondents cite that portion of the District Court's Order "limiting the scopes of those depositions" of Messrs. Shelley and Braun, and extending that limitation to "any future depositions of the Bank's officers, directors, employees, or representatives." Opp. at ¶ 1. The Geary Respondents cling to this single statement as the basis for their arguments that: 1) "[t]he Hearing Officer lacks jurisdiction and authority to vacate, modify or otherwise interfere with the District Court's Order;" 2) the depositions of the Third Party Directors are somehow required "pursuant to the District Court's Order;" 3) an order quashing the subpoenas would somehow violate the District Court's Order; and 4) "the District Court has already addressed and decided the issue presented by the BOU Directors' Motion." See Opp. at ¶¶ 4, 8, 6, 7, 8.a.-d., 8.f. In essence, the Geary Respondents contend that the District Court's Order somehow gave open ended enforcement of, and precluded the Hearing Officer from quashing, any subpoena that may be issued, at any time, for "any future depositions of the Bank's ... directors." Each of the Geary Respondents' wrong-headed arguments fails under the facts they so quickly dismiss as "irrelevant."

The District Court's Order does not limit the Hearing Officer's authority, nor does it prospectively compel the depositions of the Third Party Directors.

The District Court's Order does not, in any way, shape, or form, express or implied, limit the Hearing Officer's authority to quash the subpoenas. The District Court's Order was issued in an action by the Department against only the Bank, and Messrs. Shelley, Braun and Headington, in which the Department sought enforcement of only those subpoenas issued to the Bank—not *its directors*, and Messrs. Shelley, Braun and Headington. With respect to depositions, the District Court's Order expressly enforced only the subpoenas issued to Messrs. Shelley and Braun, and only as limited by the terms of the protective order. With the exception of extending the terms of the protective order, the District Court's Order does not mention or contemplate future depositions, let alone preclude the Third Party Directors from seeking, or the Hearing Officer from issuing, an order quashing the subpoenas.

Moreover, the Third Party Directors' subpoenas were not even issued until February 21, 2012. They could not, therefore, have been contemplated by the District Court's Order that was issued on July 25, 2011—a full seven months earlier. And because the Bank and Messrs. Shelley and Braun fully complied with the District Court's Order, the Court closed the case on February 2, 2012. Under these facts, the District Court's Order cannot be read to prevent the Hearing Officer from quashing the subpoenas, particularly where Oklahoma law expressly provides that “[o]n motion or on its own, the court *shall* limit the frequency or extent of discovery otherwise allowed if it determines that: (1) the discovery sought is *unreasonably cumulative or duplicative* ..., [or] (2) the party seeking discovery has had *ample opportunity to obtain the information* by discovery in the action.” Okla. Stat. title 12 § 3226 B.2.c. (emphasis added).

The District Court's Order neither "addressed" nor "decided" the issues presented by the Third Party Directors' Motion.

The issues presented in the District Court Proceeding and, therefore, the issues "addressed and decided" by the District Court's Order related only to the breadth and propriety of the subpoenas issued to the Bank, and Messrs. Shelley, Braun and Headington. The unreasonable cumulative and duplicative nature of the present subpoenas was not at issue when the District Court entered its Order. The subpoenas were not even issued until seven months later.

As the *facts* demonstrate, during the intervening seven months, the Geary Respondents conducted ample third-party discovery concerning the September 22nd board meeting and the representations Keith Geary made at that meeting. Moreover, the Geary Respondents had ample opportunity to depose the Third Party Directors. But the Geary Respondents unilaterally chose to cancel depositions that were already scheduled. Indeed, as the Hearing Officer found, "Respondents' counsel declined the opportunity to take the depositions of certain of the BOU Directors scheduled for September 29th and 30th, 2011." Feb. 8th Order at ¶ 4. Instead, for five months, the Geary Respondents sat idle before taking any further action.

As the Hearing Officer noted in his February 8, 2012 Order Denying Geary Respondents' Motion for Preclusion Order, "Respondents' right to discovery under the Rules is not unlimited, but instead is to be judged by a standard of reasonableness as necessary to comport with principles of due process." Feb. 8th Order at ¶ 8. Under the *facts* here, the subpoenas are unreasonably cumulative and duplicative, an issue neither addressed nor decided by the District Court's Order. And due process considerations do not require that the Hearing Officer deny the Third Party Directors' Motion.

To prevail in its proceeding against the Geary Respondents, the Department must prove only “that Geary Securities and Geary, directly or indirectly, made an untrue statement of material fact in connection with the offer, sale, or purchase of the CEMP Class A-2 note and/or that Geary Securities and Geary omitted to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading.” Department’s Response to Geary Respondents’ Supplemental Motion for Preclusion Order and Order Striking Department’s Exhibit Number 27 at p. 6. The Geary Respondents seek the Third Party Directors’ Depositions to discover facts related to the representations Keith Geary made during a September 22, 2009, meeting of the Bank’s board of directors. Those representations dealt primarily with the Geary Respondents’ sale and Mr. Headington’s purchase of the CEMP Class A-2 note. The Geary Respondents already have the testimony of three persons who were present at the September 22nd meeting, all of whom testified about Keith Geary’s representations and the circumstances under which they were made.

Due process does not require that the Hearing Officer give the Geary Respondents unlimited discovery. They have had enough. The depositions of the Third Party Directors would be unreasonably cumulative and duplicative, such as to be unduly burdensome and harassing. The subpoenas should be quashed.

THE GEARY RESPONDENTS’ ACCUSATION THAT THE BANK OR ANY OF ITS OFFICERS, DIRECTORS, OR EMPLOYEES DESTROYED EVIDENCE IS A BALD FACED FABRICATION.

Finding no support for their position in actual *fact*, the Geary Respondents resort to false accusations that the Bank “blatantly destroyed” evidence. The Geary Respondents’ accusations are bald faced fabrications completely unsupported by *fact*. The Geary Respondents’ false accusations should be dismissed for what they are, an improper, desperate attempt to soil the reputations of the Bank, its officer, directors, and employees.

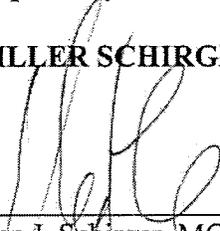
CONCLUSION

For the above and foregoing reasons, as well as those set forth in the Third Party Directors' Motion to Quash and for Protective Order, which are incorporated and restated as though fully set forth herein, the subpoenas should be quashed or, alternatively, a protective order should issue limiting their scope.

Dated: March 12, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2012, a copy of the foregoing document was served on the following by facsimile and email:

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