

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KEITH D. GEARY  
(CRD No. 2996679),

Respondent.

Disciplinary Proceeding  
No. 2011026788801

Hearing Officer—Andrew H. Perkins

**HEARING PANEL DECISION**

March 10, 2015

**The Department of Enforcement failed to prove by a preponderance of the evidence that Respondent Keith D. Geary committed antifraud violations or engaged in unethical conduct in connection with the purchase and sale of securities. Accordingly, the Complaint is dismissed.**

**Appearances**

Sarah B. Belter, Mark J. Fernandez, and David B. Klafter for the Department of Enforcement.

Joe M. Hampton and Amy J. Pierce, Corbyn Hampton PLLC, Oklahoma City, Oklahoma, for Keith D. Geary.

**DECISION**

**I. Introduction**

FINRA's Department of Enforcement initiated this disciplinary proceeding against Keith D. Geary by filing a Complaint with FINRA's Office of Hearing Officers on September 16, 2013. This disciplinary proceeding arose after FINRA staff investigated the facts and circumstances surrounding allegations made by The Bank of Union and TH, two of Geary's former customers, that Geary had engaged in fraud in connection with the sale of securities.

The Complaint in this disciplinary proceeding alleges that Geary defrauded The Bank of Union and TH by making material misrepresentations of fact and by failing to disclose material information in connection with the re-collateralization of six Private Label Collateralized Mortgage Obligations ("Private Label CMOs"), thereby violating the antifraud provisions of the Securities Exchange Act of 1934 ("Exchange Act") and FINRA's Conduct Rules. Alternatively, the Complaint charges that Geary violated his obligation to adhere to the high standards of

conduct required of registered individuals by negligently making the misrepresentations and by negligently failing to disclose material information to The Bank of Union and TH.

Geary answered the Complaint and denied that he made any misrepresentations or failed to disclose any material information to either The Bank of Union or TH. He also raised a number of affirmative defenses challenging the Complaint. Geary requested a hearing on the charges.

The Hearing Panel conducted the hearing in Oklahoma City, Oklahoma, on December 3-4, 2014.

The Hearing Panel concluded that Enforcement failed to prove any of the charges in the Complaint by a preponderance of the evidence. Accordingly, the Hearing Panel dismisses the Complaint.

## **II. Findings of Fact**

### **A. Geary's Background in the Financial Services Industry**

Following his graduation from college with a degree in finance, Geary entered the banking industry. In the early 1980s, he realized that he could take advantage of emerging computer technology and create an asset risk analysis program for banks. The program he developed produced an asset liability report that demonstrated a bank's interest rate risk exposure. He called the program ALPAC.

Geary then left the banking industry and founded ALPAC, Inc. Geary developed a successful business selling ALPAC to banks in Oklahoma. In 1997, UMB Bank recruited him to adapt ALPAC for the bank's investment banking division. Geary agreed and moved to Kansas City to work for UMB.

About 2001, UMB asked Geary to move back to Oklahoma and help the bank expand its business in Oklahoma and the surrounding region. Geary had maintained relationships with his banking customers that purchased ALPAC, and UMB wanted to develop a correspondent banking relationship with those banks. As part of the arrangement, UMB proposed that Geary obtain his securities license so that he could service those customers' securities portfolios. Geary agreed. He returned to Oklahoma City and worked for UMB until 2007.

In early 2007, Geary decided he could make more money if he had his own broker-dealer. Marian Bowman, a local banking attorney and owner of one of Geary's bank customers, suggested that Geary purchase Capital West Securities, Inc. ("Cap West"), a FINRA member firm.<sup>1</sup> Geary took Bowman's advice and purchased Cap West, which he later renamed Geary Securities, Inc. Geary financed the purchase; one of the lenders was The Bank of Union. Geary

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<sup>1</sup> Tr. 258.

owned and operated Geary Securities until he closed the firm in April 2012.<sup>2</sup> Currently, Geary is associated with another FINRA member firm and is registered with FINRA as a General Securities Representative.

### **B. Geary's Relationship with The Bank of Union**

Geary's relationship with The Bank of Union started in 1997 when John Shelley contacted him and asked if he knew of any banks for sale. Shelley had been the president of an Oklahoma bank known as Equity Bank for Savings.<sup>3</sup> Equity Bank had been sold in 1994, and Shelley was looking for an investment opportunity for himself and two other investors—TH and his sister, JK. Shelley and TH have been friends since childhood.

Shelley contacted Geary because Geary had developed a reputation for working on bank mergers and acquisitions while he was with UMB. Geary told Shelley that he did not know of any banks for sale at the time, but he agreed to contact his banking customers and inquire if any had an interest in selling. The Bank of Union's president responded and told Geary that he had some interest. Geary then introduced the two and ultimately worked on the sale of The Bank of Union to Shelley and the other investors. When the sale of The Bank of Union to Shelley and the other investors closed, Shelley became the President and Chief Executive Officer of the bank.

Following The Bank of Union's sale to Shelley and the other investors, Geary obtained the bank as a customer for UMB.<sup>4</sup> And, when Geary left UMB, The Bank of Union remained his customer. Over time, Geary became The Bank of Union's primary broker and a trusted advisor to Shelley and the bank's board of directors.<sup>5</sup> Geary provided The Bank of Union with a number of services in addition to brokerage services. For example, Geary assisted the bank with its budget, and Geary provided the bank with ALPAC.<sup>6</sup> On occasion, Geary attended The Bank of Union board and committee meetings as an advisor. Geary's principal contacts at The Bank of Union were Shelley and Michael Braun, the bank's Chief Financial Officer and Chief Operating Officer.<sup>7</sup> Shelley and Braun also served on the bank's board of directors.

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<sup>2</sup> Geary Securities was a wholly owned subsidiary of The Geary Companies. Geary and his wife owned The Geary Companies.

<sup>3</sup> Shelley also previously served as Commissioner of the Oklahoma Securities Commission.

<sup>4</sup> Tr. 267. Geary testified that Shelley told him that he became interested in Private Label CMOs because he had heard Warren Buffet talk about them at a recent board meeting for another entity. Tr. 268.

<sup>5</sup> Tr. 45.

<sup>6</sup> Tr. 45.

<sup>7</sup> Tr. 41-43.

### C. The Bank of Union's Purchase and Decision to Sell Private Label CMOs

At some point in 2008, Shelley asked Geary about private label mortgage-backed securities because The Bank of Union's board was interested in purchasing some for the bank's investment portfolio.<sup>8</sup> At Shelley's direction, Geary provided the requested information to the bank, and it decided to purchase Private Label CMOs through Geary. Between March 2008 and June 2008, The Bank of Union purchased seven Private Label CMOs through Geary.<sup>9</sup> Geary recommended them because in his opinion they were a good buy. Each was heavily discounted and would therefore yield a high rate of return. In fact, the Private Label CMOs turned out to be good investments. Each performed as expected, and The Bank of Union was satisfied with its investments. However, beginning as early as about June 2008, bank regulators began to raise concern about banks' ownership of CMOs.<sup>10</sup> Then, in April 2009, the Federal Deposit Insurance Corporation ("FDIC")<sup>11</sup> issued a Financial Institution Letter (FIL-20-2009) that raised issues about insured banks holding private label mortgage-backed securities and other forms of collateralized debt obligations and asset-backed securities.<sup>12</sup> The FDIC noted that insured banks were facing heightened losses as a result of significant investment in these securities, and that bank managers failed to conduct appropriate due diligence in investing in these securities. The letter generally reminded insured institutions that they should closely monitor these investments and that FDIC bank examiners were empowered to adversely classify these securities during an examination even though the investments were not in default.<sup>13</sup>

Geary brought the FDIC Financial Institution Letter to The Bank of Union's attention immediately after it was issued and advised the bank that he believed there was a substantial risk that the FDIC would force The Bank of Union to devalue its Private Label CMOs.<sup>14</sup> Geary was particularly concerned about how the FDIC might proceed because another of his bank customers, Frontier State Bank, was in litigation with the FDIC regarding Frontier State Bank's

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<sup>8</sup> Tr. 268. Geary also sold Private Label CMOs to a number of other Oklahoma banks.

<sup>9</sup> Tr. 46-47.

<sup>10</sup> Braun testified that the Oklahoma Banking Department performed an exam in June 2008 following which the examiners criticized The Bank of Union's decision to purchase Private Label CMOs. According to Braun, the examiners told the bank that it had not done sufficient due diligence and that very complex structured products were not suitable for banks to own. Tr. 47-49.

<sup>11</sup> The FDIC is responsible for supervising and regulating commercial banks that are neither federally chartered nor members of the Federal Reserve System. Because The Bank of Union was such a bank, it was subject to periodic FDIC examination. One purpose of the FDIC's examinations is to detect and remedy "unsafe or unsound" banking practices in its supervised banks. *See* 12 U.S.C. § 1818(b)(1).

<sup>12</sup> CX-73.

<sup>13</sup> *Id.*; Tr. 52.

<sup>14</sup> Tr. 276-77.

leverage strategy involving mortgage-backed securities.<sup>15</sup> The FDIC had taken the position that Frontier State Bank's leverage strategy was too risky, primarily due to interest rate risk. Geary was very familiar with the FDIC's positions on banks holding mortgage-backed securities because Frontier State Bank had retained Geary to serve as its expert witness in that litigation. Although it is not clear from the record why Geary concluded that the FDIC would now proceed aggressively against his other bank customers, including The Bank of Union, he apparently passed this opinion on to Shelley and others on The Bank of Union's board of directors.

After The Bank of Union learned of the FDIC Financial Institution Letter, the bank's board of directors began considering the sale of the Private Label CMOs despite the fact that they were not underperforming.<sup>16</sup> The minutes from a May 22, 2009 meeting of the bank's Asset/Liability Committee reflect that Shelley and Braun discussed putting the Private Label CMOs out to bid, and it appears that the full board considered the matter at its meeting on the same day.<sup>17</sup> In addition, The Bank of Union sought Geary's advice and guidance on how to proceed in light of the FDIC Financial Institution Letter. The minutes of the Asset/Liability Committee meeting on June 23, 2009, reflect that Geary attended and discussed the possible sale of the Private Label CMOs.<sup>18</sup> Braun recalls that Geary presented a plan to sell the Private Label CMOs that involved their re-collateralization although he could not recall any details of the plan.<sup>19</sup>

At some point after The Bank of Union board meeting in June 2009, the directors made the final decision to sell six of its seven Private Label CMOs.<sup>20</sup> The bank told Geary that it wanted to get them off its books before September 30, 2009, when the bank expected its next examination.<sup>21</sup> The board of directors concluded that the risk of having the Private Label CMOs written down was too great because, if they were written down, the bank likely would have to ask TH for additional capital. Geary also was concerned about the risk and resulting impact on the bank if the FDIC examiners downgraded the securities.<sup>22</sup> Accordingly, Geary devised a plan to maximize The Bank of Union's return on the sale of the Private Label CMOs, which he also could use to help his other bank customers who held such securities in their investment

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<sup>15</sup> Tr. 272-78.

<sup>16</sup> Tr. 53.

<sup>17</sup> CX-5 at 1

<sup>18</sup> CX-5 at 4.

<sup>19</sup> Tr. 55-56.

<sup>20</sup> Tr. 61. The Bank of Union decided not to sell the seventh Private Label CMO because it had a different structure than the others and it was "AAA" rated. The bond was performing well and it did not pose a risk of being downgraded by the FDIC examiners. Tr. 61-62; CX-8, at 1 (email dated July 16, 2009).

<sup>21</sup> Tr. 52-53.

<sup>22</sup> Tr. 270-71.

portfolios. In essence, Geary planned to purchase Private Label CMOs, put them in a credit enhanced mortgage pool he would create, which Geary called CEMP, add a credit enhancement in the form of Zero-Coupon Treasuries, and then create a new security that would become rated “AAA.”

To maximize the return to his bank customers, Geary suggested that they put the Private Label CMOs out to bid. Geary also recommended that The Bank of Union obtain competing bids because it would demonstrate the bank’s due diligence in obtaining a fair price.<sup>23</sup> Because he had sold the Private Label CMOs to the bank, he knew the securities’ cost and current book value.<sup>24</sup> Geary was confident that he could offer a higher return than any other bidder because he planned to re-collateralize the securities.

#### **D. Geary’s Initial Plan to Purchase and Re-Collateralize Private Label CMOs**

The evidence concerning Geary’s early plans to purchase the Private Label CMOs is vague. As best the Hearing Panel can determine, Geary originally proposed to have Cap West buy Private Label CMOs from The Bank of Union, Yukon National Bank, Frontier State Bank, and Washita State Bank. It further appears that Frontier State Bank and Washita Bank were each owned by J.D. McKean and that McKean and his non-profit foundation called The Eagle Sky Foundation, Inc. at some point acquired some of the bonds Geary thought would be available to purchase. Thus, in the early planning phase, Geary was working on the assumption that Cap West (or another entity he controlled) would acquire six bonds from The Bank of Union, three bonds from Yukon Bank, and additional bonds from Washita State Bank, McKean, and Eagle Sky. In the end, however, Washita, McKean, and Eagle Sky dropped out.

By July 2009, Geary determined that he would need a separate entity to purchase and restructure the Private Label CMOs. Thus, in July 2009, Geary formed CEMP, LLC. CEMP was wholly owned by The Geary Companies.

Geary also soon realized that he would need a team of highly qualified professionals to structure CEMP and complete the contemplated transactions. Geary retained attorney Hays Ellisen, a partner with Katten Muchin Roseman, LLC in New York City. Ellisen then directed Geary to Deloitte & Touche LLP to serve as accountants for CEMP, and Braver Stern Securities Corp. to serve as the structuring agent. Braver Stern in turn recommended DBRS, Inc., a nationally recognized statistical rating organization, to rate the new securities.<sup>25</sup>

As late as the third week of July 2009, Geary continued to work on CEMP’s structure and the necessary documents to accomplish the purchase and re-collateralization of the Private Label

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<sup>23</sup> Tr. 285.

<sup>24</sup> Tr. 286.

<sup>25</sup> Tr. 284.

CMOs. Geary also continued to advise The Bank of Union on the contemplated transactions. At the July 28, 2009 meeting of the bank's Asset/Liability Committee, Geary "explained the mechanics of purchasing the Private Label CMOs from the bank, which will be closing in escrow on July 31."<sup>26</sup> According to Braun, who attended the Asset/Liability Committee meeting, Geary said that they would close in escrow "until we could get the CEMP closed."<sup>27</sup> Geary further reported that the closing would take place on August 11, 2009.<sup>28</sup>

Based on Geary's July 28 report to the Asset/Liability Committee, Braun testified that he understood that the closing date of August 11, 2009—and the actual sale of the bank's six Private Label CMOs—was conditioned on "Geary having the buyers for the CEMP."<sup>29</sup> If for any reason Geary could not close the CEMP sale of the newly created securitized notes, The Bank of Union was entitled to the return of the six Private Label CMOs it deposited into escrow.

Braun further testified that Geary told the Asset/Liability Committee that he intended to "buy the private labels from different banks and Re-REMIC<sup>30</sup> them and ... securitize them with a zero coupon bond."<sup>31</sup> But from Braun's testimony, it does not appear that Geary gave the committee any details on the progress he was making on those deals with the other banks. Nonetheless, Braun assumed that the CEMP sale would close on August 11.

#### **E. CEMP and the CEMP Resecuritization Trust 2009-1**

In basic terms, the final CEMP purchase and offering<sup>32</sup> provided that The Bank of Union would deposit the six Private Label CMOs with CEMP.<sup>33</sup> Then, on the closing date: (i) CEMP would transfer the Zero-Coupon Treasury Note and certificates representing the pooled Private Label CMOs to the CEMP Resecuritization Trust 2009-1 ("the Issuer"); and (ii) the Issuer would pledge the pooled certificates and the Zero-Coupon Treasury Note to The Bank of New York Mellon, as the Indenture Trustee, and issue two classes of notes (the "Class A-1 and Class A-2

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<sup>26</sup> CX-5, at 5; Tr. 67.

<sup>27</sup> Tr. 69.

<sup>28</sup> CX-5, at 5.

<sup>29</sup> Tr. 71.

<sup>30</sup> The term "Re-REMIC" refers to a Real Estate Mortgage Investment Conduit. In simplest form, an investor transfers its ownership of a CMO or other class bond to a special-interest entity which in turn transfers the bonds to a newly formed trust. The securities are re-securitized, and the trust issues two new securities. The new senior security is structured to be triple-A rated, and it receives payments from the underlying security.

<sup>31</sup> Tr. 68.

<sup>32</sup> Initially, CEMP was planned to issue three classes of Notes—Class A-1, Class A-2, and Class M. The structure changed when some of the original depositors pulled their Private Label CMOs out of the pool.

<sup>33</sup> In addition, Yukon Bank would deposit three Private Label CMOs with CEMP.

Notes”) as well as Class C Certificates. The Class C Certificates would be held in trust by Wilmington Trust Company (“Owner Trustee”).<sup>34</sup> DBRS would rate the Class A-1 Notes, but it would not rate the Class A-2 Notes. Cap West would serve as the placement agent for the offering of the Class A-1 and A-2 Notes.

The Class A-1 Notes were to be collateralized by the pooled Private Label CMOs. The Class A-2 Notes, which provided credit enhancement to the Class A-1 Notes, were to be collateralized by the Zero-Coupon Treasury Note.

The central purpose of the escrow arrangement was to provide sufficient time for CEMP to structure the deal and to secure and close with the buyers of the Class A-1 and A-2 Notes. In the event that buyers could not be found, and therefore the deal could not close, The Bank of Union would retain its Private Label CMOs. Ellisen explained that the CEMP structure was dependent on all the bonds going in on the closing date. If a single bond did not go into the deal on the closing date, the entire deal would fail. Ellisen further explained the serious risk of such a failure when the closing is dependent on five or six sellers closing simultaneously. And, if the closing failed, Cap West would end up owning all of the underlying bonds in unsecuritized form.<sup>35</sup>

#### **F. Sale of the CEMP Notes**

The Securities Purchase Agreement between The Bank of Union and CEMP dated July 31, 2009, specified a closing date of August 11, 2009.<sup>36</sup> However, as of July 31, 2009, all of the required documentation for the closing had not been finalized. The various parties were still working on certain accounting and tax issues, and the attorneys were working on the needed trust agreements. Accordingly, on August 5, 2009, Ellisen, the attorney for CEMP, the Issuer, and Cap West, advised that the closing would be moved to August 18, 2009.<sup>37</sup> The Bank of Union then signed the Amended and Restated Securities Purchase Agreement with the new closing date.<sup>38</sup>

Thereafter, the closing was moved two more times for the same reasons—DBRS had not completed the rating of the Class A-1 Notes, the attorneys had not finalized all of the agreements, and Deloitte & Touche had not ironed out the tax and accounting issues.<sup>39</sup> In addition, Geary could not obtain committed buyers for the notes until the documentation was

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<sup>34</sup> See CX-78, at 44-45.

<sup>35</sup> Tr. 368; CX-11, at 3 (email dated July 23, 2009).

<sup>36</sup> CX-15, at 5.

<sup>37</sup> CX-16, at 1; Tr. 77.

<sup>38</sup> Tr. 77.

<sup>39</sup> Tr. 80-83, 87-88.



complete. The closing was first moved to August 21 and then to September 15. Each time the closing was postponed, The Bank of Union signed an amended securities purchase agreement.<sup>40</sup> According to Braun, The Bank of Union did not object to any postponement or request to pull out of the CEMP deal, which he testified it could have done at any time up to September 28, 2009, when the CEMP transaction finally closed.<sup>41</sup>

Geary reported on CEMP's progress at The Bank of Union's Asset/Liability Committee meeting on August 21, 2009. Geary advised the committee that the closing was scheduled for September 15, 2009.<sup>42</sup>

On or about September 11, four days before the September 15 scheduled closing date, McKean and Eagle Sky requested return of their Private Label CMOs that they had deposited into the CEMP pool.<sup>43</sup> In addition, McKean, Eagle Sky, Frontier State Bank, and Washita Bank informed Geary that they would not purchase any of the CEMP notes. This presented a serious problem for Geary and CEMP. Geary testified that up until that point he had been operating on the assumption that Frontier State Bank and Washita State Bank would purchase the top tranche, Eagle Sky would take the middle tranche, and McKean would purchase the third tranche.<sup>44</sup> If CEMP were to proceed, it would need to be restructured as a significantly smaller deal.

Geary immediately sent an email to Braver Stern Securities, the structuring agent, to find out how fast it could cut the structure back to just nine Private Label CMOs (six from The Bank of Union and three from Yukon Bank) valued at approximately \$26.2 million, with a \$20 million 10-year U.S. Treasury STRIP as collateral.<sup>45</sup> Geary also wanted to know if DBRS could re-rate the notes by September 25, which he proposed to be the new closing date for CEMP. Geary

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<sup>40</sup> CX-21, at 3; CX-30, at 3. Braun testified that he understood that Geary was working to get the structuring agent, the attorneys, and the rating agency to complete their work. Geary described the process as being as difficult as "herding cats." Tr. 82-83; CX-29. Significantly, Braun knew as of September 11, 2009, the structuring and necessary documents had not been finalized.

<sup>41</sup> Tr. 147-48.

<sup>42</sup> CX-5, at 6.

<sup>43</sup> Tr. 283.

<sup>44</sup> Tr. 318-19. The Hearing Panel is not able to fully assess Geary's claim. Geary presented no evidence to corroborate his statement, and Enforcement presented no evidence to refute it. Accordingly, based on Geary's long-standing customer relationship with Frontier Bank and Washita Bank, the Hearing Panel finds that it was reasonable for Geary to conclude that the banks, McKean, and Eagle Sky would likely purchase the CEMP notes.

<sup>45</sup> CX-36 at 1. The term "STRIPS" is an acronym for Separate Trading of Registered Interest and Principal Securities. U.S. Treasury STRIPS are fixed-income securities sold at a significant discount to face value and offer no interest payments because they mature at par. They also are commonly referred to as zero-coupon securities. The only time an investor receives a payment from U.S. Treasury STRIPS is at maturity.

further noted that he thought he had buyers for the proposed smaller deal, but he did not note their identities.<sup>46</sup>

At this point, Geary turned his efforts to finding buyers for the smaller, revised CEMP. Geary wanted to save the deal for two reasons. First, The Bank of Union would take a large loss if it retrieved its Private Label CMOs and sold them in the market. Second, Geary had a significant amount of time and money invested in CEMP. Geary testified that by the time CEMP closed, he had incurred fees of approximately \$1.9 million.<sup>47</sup>

To proceed with the smaller CEMP, Geary needed The Bank of Union to agree with the restructuring, and he needed to find buyers for the new CEMP Notes. With only a couple of weeks to go before The Bank of Union's September 30 deadline to get the Private Label CMOs off its books, Geary had limited time and options. Geary concluded that his best option was to sell the Class A-1 Notes to The Bank of Union and the Class A-2 Notes to TH, or other individuals associated with the bank, such as Shelley or Braun.<sup>48</sup>

Geary sent an email to Shelley and Braun on September 15, 2009, asking if The Bank of Union would consider purchasing the Class A-1 Notes. The following day, Geary sent an email to TH<sup>49</sup> and one of TH's financial advisors, with copies to Shelley, Braun, and Michael Shelley,<sup>50</sup> explaining the risks The Bank of Union faced if it continued to hold the Private Label CMOs. Geary concluded by explaining his proposal that The Bank of Union sell its Private Label CMOs to CEMP and buy back the CEMP Class A-1 Notes. Geary then went on to ask TH to consider purchasing the Class A-2 Notes.<sup>51</sup> The email contains no representations regarding the length of time either the bank or TH would hold the notes. TH never responded to Geary.

Also on September 16, Geary sent an email to Ellisen reporting that he was "[n]early certain that all the A1 will go to just The Bank of Union and all the A2 will go to [TH] (his account here at Capital West in his name only)."<sup>52</sup> Geary testified that he had concluded that this was the likely course the bank would take.<sup>53</sup> Geary explained that he had reached this conclusion based on his long working relationship with Shelley as well as his conversation with Shelley the

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<sup>46</sup> *Id.*

<sup>47</sup> Tr. 363.

<sup>48</sup> CX-39, at 1.

<sup>49</sup> After TH purchased The Bank of Union, he became a Cap West customer.

<sup>50</sup> Michael Shelley is John Shelley's son. At John Shelley's request, Geary had hired his son as a broker at Cap West. Michael Shelley was the broker on the restructured CEMP sale, and he received a commission on the sale.

<sup>51</sup> CX-40.

<sup>52</sup> CX-41, at 1.

<sup>53</sup> Tr. 391.

previous day.<sup>54</sup> Geary testified that he had spoken to Shelley about what the deal would look like if The Bank of Union bought the Class A-1 Notes and TH bought the Class A-2 Notes and that at the end of the conversation Shelley asked Geary to send him the details in writing.<sup>55</sup> After Shelley reviewed Geary's email, Shelley told Geary that he thought it would work. Accordingly, Geary concluded that The Bank of Union would buy the Class A-1 Notes and TH would buy the Class A-2 Notes.<sup>56</sup>

Geary explained the reasons underlying his September 16 email to Ellisen in which Geary said he was "nearly certain" that The Bank of Union and TH would buy the CEMP Notes as follows:

[I] had talked [with Shelley] the previous day about what it would look like if [The] Bank of Union bought the A1 and [TH] bought the A2. And [Shelley] asked me to memorialize it, so I did that the next morning and sent that e-mail that we looked at earlier. And after I sent that e-mail, before I sent this, John Shelley had called me and told me that he thought it would probably work. So I was under the belief that The Bank of Union would buy the A1 and [TH] buy the A2.<sup>57</sup>

Braun testified that as of mid-September, he did not understand the basic elements of CEMP's structure.<sup>58</sup> For example, he did not know how many tranches of securities would be offered for sale. In any event, on September 16, 2009, The Bank of Union rejected Geary's proposal that it purchase the Class A-1 Notes.<sup>59</sup>

On September 18, Geary attended a meeting of The Bank of Union's Asset/Liability Committee and reported on the Private Label CMOs.<sup>60</sup> According to Braun, Geary represented that the Class A-1 Notes would be a good investment for the bank and that Braun believed the Asset/Liability Committee told Geary that they were not interested.<sup>61</sup> Braun further claimed that Geary said "that was fine, [I] have other buyers."<sup>62</sup> Braun testified that they did not discuss the sale of the Class A-2 Notes at the September 18 Asset/Liability Committee meeting.<sup>63</sup>

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<sup>54</sup> Tr. 391-92.

<sup>55</sup> Tr. 391-92.

<sup>56</sup> Tr. 392.

<sup>57</sup> Tr. 391-92.

<sup>58</sup> Tr. 94.

<sup>59</sup> Tr. 95.

<sup>60</sup> CX-5, at 7.

<sup>61</sup> Tr. 98.

<sup>62</sup> Tr. 99.

<sup>63</sup> Tr. 99.

Geary attended another meeting of the bank's Asset/Liability Committee on September 22, 2009, at which Geary discussed the pending sale of the bank's Private Label CMOs.<sup>64</sup> The minutes of the meeting reflect a lengthy discussion of the bank's options on selling the Private Label CMOs and that Shelley and Braun planned to discuss the alternatives with TH and then report back to the Asset/Liability Committee.<sup>65</sup> Braun testified that Geary was not present for the discussion concerning the bank's alternatives and this part of the meeting was conducted after Geary disconnected from the conference call.<sup>66</sup> Although not recorded in the minutes, Braun testified that he remembered Geary also asking Shelley if TH would be interested in purchasing the Class A-2 Notes; that they were a great investment; and TH would only have to hold them for a short period of time.<sup>67</sup> Braun also claimed that Shelley then asked Geary if he would "guarantee that [TH] would be out in 90 days with a profit," and Geary responded that if "[TH] didn't want to buy it, that if [TH] would loan him the money he would buy it."<sup>68</sup> Braun characterized Shelley's question to Geary as an "off-the-cuff comment that, you know, if you think this is such a great investment, will you guarantee it."<sup>69</sup> Braun did not understand Geary's response to Shelley's off-the-cuff comment as a guarantee to purchase the Class A-2 Notes from TH within 90 days after the closing. The Hearing Panel finds that this exchange amounted to nothing more than banter. There was no evidence presented that Shelley had authority to negotiate on TH's behalf.

The parties also read into the record designated portions of Shelley's deposition testimony taken November 16, 2011, in a related proceeding against Geary Securities brought by the Oklahoma Department of Securities. Shelley testified under oath that Geary participated in the board of directors meeting on September 22, 2009, at which Geary told the board that "he would personally guarantee that [TH] would only have to hold the A2 for three months or less."<sup>70</sup> Shelley further testified that between September 22 and September 26, 2009, Geary never said he would commit to "repurchase the A2 personally if certain conditions were not met."<sup>71</sup> Rather, Shelley testified that Geary had said: "If someone would loan him the money he would buy the A2s,"<sup>72</sup> which statement is generally consistent with Braun's and Geary's version of events. Shelley further testified that Geary "asked if I would ask [TH] if he would loan him, Mr. Geary,

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<sup>64</sup> CX-5, at 2.

<sup>65</sup> *Id.*

<sup>66</sup> Tr. 103.

<sup>67</sup> Tr. 100-01.

<sup>68</sup> Tr. 101.

<sup>69</sup> Tr. 102.

<sup>70</sup> Tr. 424, 428. The minutes from the September 22 board meeting do not reflect this discussion.

<sup>71</sup> Tr. 424-25.

<sup>72</sup> Tr. 425.

the money to buy the A2s and I rejected that option.”<sup>73</sup> Shelley testified that he emphatically told Geary that he was not going to ask TH to make a loan to Geary.<sup>74</sup>

The CEMP closing did not take place on September 23, 2009. Although Braun claimed that Shelley and he were shocked when it did not close,<sup>75</sup> Braun’s claim is undercut by his testimony that he and the other members of the Asset/Liability Committee became concerned by at least the date of its meeting on September 22 that Geary had not been able to line up buyers committed to purchase the Class A-2 Notes.<sup>76</sup>

Despite Braun’s claim of shock, Braun called Geary the evening of September 23 and asked for Geary’s continued guidance.<sup>77</sup> The Bank of Union still wanted the Private Label CMOs sold by the end of September, and Braun and Shelley knew that the bank’s best option was to complete the CEMP deal. All other alternatives presented unacceptable loss or risk, either to the bank or to TH. In their telephone conversation, Geary again proposed that The Bank of Union purchase the Class A-1 Notes and TH purchase the Class A-2 Notes.<sup>78</sup> No agreement was reached that evening.

Early the following day, September 24, Geary sent an email to Braun and Shelley. The email states in its entirety: “There is a Dealer interested in the A1’s above 98. Just need an A2 Buyer (to hold them for <3 Months).”<sup>79</sup> Geary based this email on a long series of exchanges going back to August 17, 2009, that he had with a broker at Mesirow Financial.<sup>80</sup> Geary testified, and the series of exchanges confirms, that Mesirow had interest in CEMP. In fact, the Mesirow broker had written that he wanted to be involved.<sup>81</sup> Geary thought the Class A-1 Notes should be priced at 102 or higher when it was compared to other bonds, such as Ginnie Mae bonds.<sup>82</sup> Geary was continuing with his efforts to price the notes, and on September 23 he asked Mesirow what its level of interest was. The broker told Geary that he was showing the deal to some internal accounts and he honestly did not know how interested they were in purchasing the notes, but it would be at a price “below 100 for sure.”<sup>83</sup> Mesirow wrote that it was still analyzing the offering,

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<sup>73</sup> Tr. 425.

<sup>74</sup> Tr. 426.

<sup>75</sup> Tr. 104-05.

<sup>76</sup> Tr. 103. Braun testified that no one at the bank conveyed this concern to Geary. Tr. 104.

<sup>77</sup> Tr. 106.

<sup>78</sup> Tr. 106.

<sup>79</sup> CX-47, at 1.

<sup>80</sup> CX-76.

<sup>81</sup> CX-76, at 3.

<sup>82</sup> Tr. 333.

<sup>83</sup> CX-76, at 31.

and it continued to ask Geary for information to assist in that process. Based on these exchanges, and his experience, Geary reasonably concluded that Mesirow had interest at somewhere around 98, or possibly higher. Clearly, Mesirow had not told Geary that it had no interest at any price. Thus, the Hearing Panel finds that Geary's September 24 email truthfully advised Braun and Shelley that he believed he had a dealer with "interest" above 98, and rejects Enforcement's argument that the September 24 email falsely misrepresented that Geary had a dealer "committed" to buy the notes at 98 or above. Further, Geary's estimate that the bank would only have to hold the notes for less than three months was based on his professional assessment of the level of interest potential buyers had in the Class A-1 Notes. Geary provided this information to Braun and Shelley in Geary's role as The Bank of Union's advisor to help Shelley and Braun make an independent decision on whether the bank should go forward with CEMP or take the Private Label CMOs back.

Later in the day on September 24, Braun and Shelley called Geary and asked the identity of the dealer. Braun claims that Geary told them that he had two interested dealers, Mesirow and Braver Stern Securities, but he still needed a buyer for the Class A-2 Notes.<sup>84</sup> Braun further testified that Geary asked them if TH would be interested in the Class A-2 Notes, and Shelley replied by asking Geary whether he would guarantee that TH would not have to hold the notes for more than three months. According to Braun, Geary replied that he would.<sup>85</sup> However, Braun offered no further details of how this guarantee would be structured, and Shelley made no commitment that TH would buy the notes. Indeed, their conversation was nothing more than an exploration of the bank's options. In the same conversation on September 24, Braun and Shelley explored the possibility of the bank taking back the Private Label CMOs and selling them to TH.<sup>86</sup> Geary recommended against it because it raised too many serious issues, such as those Frontier State Bank had faced with the FDIC. Geary told them that if they decided to go with that option, he would not serve as the broker on the sale.<sup>87</sup> Braun stated that Geary told them he had already had enough problems with the FDIC in the Frontier State Bank litigation, and he thought that this option would open up many of the same problems.<sup>88</sup>

Following their conversation with Geary, Braun and Shelley called TH and went over the various options with him. After they reviewed the options, "[Braun and Shelley] recommended ... that the bank buy the A1s and [TH] buy the A2s and have Mr. Geary guarantee it."<sup>89</sup> Geary

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<sup>84</sup> Tr. 109.

<sup>85</sup> Tr. 109.

<sup>86</sup> Tr. 110-11.

<sup>87</sup> Tr. 110.

<sup>88</sup> Tr. 110.

<sup>89</sup> Tr. 112.

was not on the call. In fact, Geary never spoke directly to TH about the purchase, and neither Braun nor Shelley told Geary what they had recommended to TH.

On September 25, 2009, Braun and Shelley called Geary to tell him that they had decided to continue with CEMP. Braun testified that they told Geary that the bank would move forward and buy the Class A-1 Notes if it could resell the notes in a few days, and TH would buy the Class A-2 Notes if Geary guaranteed that TH would not have to hold them for more than three months.<sup>90</sup> Braun further testified that Geary assured them that he had a buyer for the Class A-1 Notes.<sup>91</sup> But, importantly, there is no other credible evidence supporting Braun's claim that Geary made any guarantees of any kind on September 25.

Following The Bank of Union's decision to purchase the Class A-1 Notes, Geary instructed Ellisen to amend the closing documents and set the closing date for September 28. CEMP closed on September 28, 2009. The Bank of Union purchased the Class A-1 Notes (which were rated "AAA" as to principal), and TH purchased the Class A-2 Notes.

## **G. Post-Closing Events**

Enforcement presented no evidence regarding the closing and scant evidence of the events that transpired immediately after the closing.<sup>92</sup> However, from what reliable evidence there is, the Hearing Panel finds that the closing occurred without incident. None of the parties to the closing raised any objections or noted any problems, and Geary continued as an advisor to The Bank of Union until March 2010 when, according to Geary, Shelley terminated the relationship and demanded that Geary resign his position at Geary Securities so that The Bank of Union could take over the firm. The resulting litigation continues to this day.

### **1. Bank Examiners Question the CEMP Notes' Rating**

In or about December 2009 or January 2010, a bank examiner questioned The Bank of Union about the rating DBRS had given the Class A-1 Notes.<sup>93</sup> The Bank of Union turned to Geary for an explanation of why the notes were rated as to principal but not as to interest. This was the first time Geary had heard that there were any questions about the rating. No one on the

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<sup>90</sup> Tr. 113.

<sup>91</sup> Tr. 113.

<sup>92</sup> Several central figures in these events did not testify. Shelley was not able to testify due to his health, and neither TH nor his sister JK testified. Therefore, resolution of most the issues in this proceeding depends upon Braun's and Geary's testimony and credibility.

<sup>93</sup> Tr. 305-06.

CEMP team, including the various attorneys and the structuring agent, had expressed any concern about the rating.<sup>94</sup>

## 2. The Loan Guaranty Agreement

On October 13, 2009, Shelley and Braun went to Geary's office to discuss "how we could get out of the A1 because we weren't out of it in two to three days and we thought we were going to be."<sup>95</sup> Shelley and Braun brought with them a preprinted loan guaranty agreement ("Guaranty Agreement"), which Shelley demanded Geary sign. The Guaranty Agreement is dated September 25, 2009, and it designates Geary as "debtor" and TH as "lender."<sup>96</sup>

At Shelley's insistence, Geary signed the agreement although he had not borrowed any money from TH. Geary testified that he did so for three reasons. First, Geary said he was willing to sign a document that memorialized what he had told Shelley previously.<sup>97</sup> Geary believed that "[Shelley] wanted me to give him some sort of indication that I had made a verbal statement [to Shelley] that if [TH] would lend me the money I would have bought [the Class A2 Notes]."<sup>98</sup> Second, Shelley was insistent and said he needed the document so he could put it in his file for TH.<sup>99</sup> Third, Geary concluded that the agreement was of no consequence because TH had not lent Geary any money.<sup>100</sup> Thus, Geary did not believe the agreement was enforceable.<sup>101</sup> Geary claimed that he signed the agreement to get Shelley out of his office.<sup>102</sup>

Enforcement introduced the Guarantee Agreement into evidence to corroborate Braun's testimony regarding Geary's representations concerning the restructuring of the CEMP deal in September 2009. Enforcement relies on the following typewritten language inserted into the form agreement.

In the approximate amount of Twelve Million Eight Hundred Thousand Dollars (\$12,800,000.00) related to the A2 Class of the CEMP 2009-1 Pool. The A2 Class will be sold within ninety (90) days with no renewals. This Guaranty will be

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<sup>94</sup> Tr. 306.

<sup>95</sup> Tr. 116.

<sup>96</sup> CX-62.

<sup>97</sup> Tr. 328.

<sup>98</sup> Tr. 397.

<sup>99</sup> Tr. 328.

<sup>100</sup> Tr. 397.

<sup>101</sup> Tr. 328-29, 397.

<sup>102</sup> Tr. 328-29.



extinguished upon the sale of the A2 Class.<sup>103</sup>

Enforcement introduced no evidence that TH, or anyone on his behalf, asked Geary to sell the Class A-2 Notes or that TH demanded that Geary purchase the notes at the end of the 90-day period following the CEMP closing. It was not until 2013—after The Bank of Union unwound the CEMP transaction—that The Bank of Union, as assignee, sued Geary to enforce the Guaranty Agreement. The lawsuit is pending in the District Court of Oklahoma County, Oklahoma.<sup>104</sup>

While the Hearing Panel finds that Geary likely told Shelley and other members of The Bank of Union’s board of directors that he believed he could resell the CEMP Class A-2 Notes within 90 days after the closing in September 2009, the Hearing Panel seriously questions the validity and purpose of the Guaranty Agreement. Neither Braun’s nor Shelley’s testimony supports the conclusion that Geary guaranteed that he would purchase the Class A-2 Notes from TH if Geary could not resell them at a profit to TH within 90 days after the CEMP closing. Indeed, their overall story is generally consistent with Geary’s on this point—that Geary told Shelley that he was confident enough about the quality of the Class A-2 Notes that *if* TH lent him the money, Geary would be willing to purchase the notes himself—but no such loan was ever requested or made. Further, there is no evidence of what, if anything, Shelley told TH before the closing on September 28, which leaves open the possibility that Shelley inaccurately described his earlier conversations with Geary when he called TH in late September 2009 to discuss The Bank of Union’s options. However, because Enforcement offered the Guaranty Agreement into evidence for a limited purpose, the Hearing Panel need not, and therefore does not, make any findings regarding the Guaranty Agreement’s enforceability.

### **3. The Bank of Union Terminates its Relationship with Geary**

The only evidence regarding The Bank of Union’s termination of its relationship with Geary and Geary Securities is Geary’s uncontradicted testimony. According to Geary, in March 2010, Shelley, Braun, the bank’s attorney, and two others came to Geary’s office and demanded that he resign so that they could take over Geary Securities.<sup>105</sup> Geary said that this event occurred the day after the Oklahoma Department of Securities announced that it had opened an investigation of Geary Securities.<sup>106</sup> When Shelley told Geary to resign, Shelley said that because he had been on the Oklahoma Department of Securities Board he could make the investigation go away.<sup>107</sup> Geary refused to resign. He told Shelley that he was not in default on The Bank of

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<sup>103</sup> CX-62.

<sup>104</sup> RX-12.

<sup>105</sup> Tr. 299-300.

<sup>106</sup> Tr. 299-300.

<sup>107</sup> Tr. 300.

Union loans he had taken out when he purchased Geary Securities and that he would pay off the balance due the bank.<sup>108</sup>

#### **4. The Bank of Union Unwinds the CEMP Purchase in 2012**

The CEMP Notes performed as expected during the entire time The Bank of Union and TH owned the notes. Then, for reasons not disclosed in the record, The Bank of Union and TH elected to unwind the CEMP transaction so that they could sell the underlying collateral and cash in the U.S. Treasury STRIPS.<sup>109</sup> The Bank of Union and TH unwound the transaction and sold the underlying securities in September 2012.<sup>110</sup>

### **III. Conclusions of Law**

#### **A. Enforcement Failed to Prove that Geary Violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010**

Exchange Act Section 10(b) makes it unlawful for any person directly or indirectly to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of rules of the Securities and Exchange Commission.<sup>111</sup> Exchange Act Rule 10b-5 implements the Commission's authority under Section 10(b)<sup>112</sup> through three mutually supporting subsections.<sup>113</sup> Rule 10b-5(a) prohibits "directly or indirectly... employ[ing] any device, scheme, or artifice to defraud."<sup>114</sup> Rule 10b-5(b) prohibits "directly or indirectly... mak[ing] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made . . . not misleading."<sup>115</sup> And Rule

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<sup>108</sup> Tr. 300.

<sup>109</sup> Tr. 124-25.

<sup>110</sup> Braun presented a loss calculation prepared by The Bank of Union's law firm, but the Hearing Panel found the calculations inaccurate and unreliable. For example, Braun did not take into account certain proceeds The Bank of Union received upon sale of the CEMP Notes. Tr. 335. Absent any other evidence in the record, the Hearing Panel makes no finding regarding whether The Bank of Union or TH lost money when they unwound the CEMP transaction.

<sup>111</sup> 15 U.S.C. § 78j(b).

<sup>112</sup> See *United States v. Zandford*, 535 U.S. 813, 816 n.1 (2002) (the scope of Exchange Act Rule 10b-5 is coextensive with Exchange Act Section 10(b)). A willful violation of these provisions means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted).

<sup>113</sup> *Cady, Roberts & Co.*, 40 S.E.C. 907, 913 (1961).

<sup>114</sup> 17 C.F.R. § 240.10b-5(a).

<sup>115</sup> *Id.* § 240.10b-5(b).

10b-5(c) prohibits “directly or indirectly . . . engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”<sup>116</sup>

Scienter is required to establish violations of Exchange Act Section 10(b) and all three subsections of Exchange Act Rule 10b-5.<sup>117</sup> Scienter is “a mental state embracing intent to deceive, manipulate, or defraud.”<sup>118</sup> Scienter may be established by extreme recklessness—an extreme departure from the standards of ordinary care that presents a danger of misleading buyers, sellers, or investors that is either known to the respondent or is so obvious that he must have been aware of it.<sup>119</sup> Scienter may be inferred from circumstantial evidence.<sup>120</sup>

Exchange Act Section 10(b) and Exchange Act Rule 10b-5 require the use of the means of interstate commerce or the mails.<sup>121</sup>

“FINRA Rule 2020 is FINRA’s antifraud rule and is similar to, yet broader than, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.”<sup>122</sup> Conduct that violates other SEC or FINRA rules is inconsistent with high standards of commercial honor and just and equitable principles of trade, and violates FINRA Rule 2010.<sup>123</sup>

Enforcement alleged that Geary made material misrepresentations and withheld material information in connection with three distinct phases<sup>124</sup> of CEMP’s recollateralization of the six

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<sup>116</sup> *Id.* § 240.10b-5(c).

<sup>117</sup> *Aaron v. SEC*, 446 U.S. 680, 695-97, 701-02 (1980); *SEC v. Steadman*, 967 F.2d 636, 641, 643 & n.5 (D.C. Cir. 1992).

<sup>118</sup> *Aaron*, 446 U.S. at 686 n.5 (internal quotation marks omitted); *cf. Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (describing scienter as a “wrongful state of mind”).

<sup>119</sup> *See. Steadman*, 967 F.2d at 641-42; *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc).

<sup>120</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983).

<sup>121</sup> 15 U.S.C. §§ 77q(a), 78j. The parties stipulated that the sales of securities transactions in this case involved the use of interstate commerce or the mails.

<sup>122</sup> *Dep’t of Enforcement v. Scholander*, No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at \*29 (NAC Dec. 29, 2014), *appeal docketed*, SEC Admin. Proc. No. 3-16360 (Jan. 28, 2015). Pursuant to FINRA Rule 0140(a), FINRA’s Conduct Rules that apply to “members” also apply to associated persons.

<sup>123</sup> *Joseph Abbondante*, 58 S.E.C. 1082, 1103 (2006), *aff’d*, 209 F. App’x 6 (2d Cir. 2006).

<sup>124</sup> Because we dismiss the charges on other grounds, we do not address whether the alleged misrepresentations were temporally connected to the sale or sales, as they must be to find liability under Section 10(b) and Exchange Act Rule 10b-5.

Private Label CMOs owned by The Bank of Union.<sup>125</sup> First, Enforcement alleged that Geary made material misrepresentations in connection with The Bank of Union’s sale of its Private Label CMOs to CEMP. Second, Enforcement alleged that Geary made material misrepresentations in connection with the sale of the CEMP Class A-1 Notes to The Bank of Union. Third, Enforcement alleged that Geary made material misrepresentations in connection with the sale of CEMP Class A-2 Notes to TH. Each phase is discussed below in chronological order.

## **1. Purchase of the Private Label CMOs from The Bank of Union**

### **a. Geary Did Not Make Material Misrepresentations or Omit Material Information in Connection with the Purchase of the Private Label CMOs**

Enforcement contends that Geary: (i) induced The Bank of Union to sell six Private Label CMOs by falsely representing that he had buyers for the CEMP Notes; and (ii) misrepresented the true reason the various closing dates were delayed by telling The Bank of Union that the closing had to be delayed for reasons beyond his control without disclosing that the closings could not proceed as scheduled because he did not have buyers committed to purchase the CEMP Class A-1 and Class A-2 Notes. The Hearing Panel concludes that Enforcement failed to prove these alleged misrepresentations and omissions by a preponderance of the evidence.

Enforcement relied on Braun to establish these alleged misrepresentations and omissions. But Braun’s testimony directly contradicted Enforcement’s theory. Braun testified that The Bank of Union always understood that the sale of the bank’s Private Label CMOs was contingent upon Geary being able to locate buyers for the CEMP Notes, and that if buyers could not be located the bank could pull its Private Label CMOs out of the deal and sell them on its own.<sup>126</sup> Shelley, Braun, and other members of the bank’s board of directors knew that Geary and Geary Securities lacked the funds to purchase the Private Label CMOs, and therefore the various purchase agreements granted The Bank of Union the unilateral right to cancel the transaction at any time for any or no reason up until the simultaneous purchase of the Private Label CMOs and sale of the CEMP Notes. They also knew that CEMP intended to acquire Private Label CMOs from other banks and that the successful acquisition of those securities was an indispensable component of the CEMP structure.

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<sup>125</sup> While the Complaint contains a general allegation that Geary also “employed devices, schemes or artifices to defraud” and “engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon any person,” Enforcement offered no proof of such fraudulent conduct and did not try the case on those separate theories. Enforcement restricted its arguments to allegations of fraudulent statements and omissions that Enforcement contended violated Exchange Act Rule 10b-5(b).

<sup>126</sup> Tr. 148.

Braun also contradicted Enforcement's theory by testifying that Geary never said he had committed buyers.<sup>127</sup> Braun repeatedly said that he and others at The Bank of Union *assumed* that Geary had committed buyers.<sup>128</sup> And, importantly, Braun said that they based their assumption on not much more than the fact that Geary set closing dates.<sup>129</sup> Braun also admitted that neither he nor anyone else at The Bank of Union actually asked Geary if he had committed buyers for the CEMP Notes.<sup>130</sup>

Despite Braun's unequivocal testimony that The Bank of Union just assumed that there were buyers because Geary and the CEMP team set closing dates for the simultaneous purchase of the Private Label CMOs and sale of the CEMP Notes, Braun tried to construe unspecified statements he attributed to Geary as misleading. For example, Braun testified that he and others at The Bank of Union were led to believe that there were buyers "the whole time, once we started this process."<sup>131</sup> But the Hearing Panel finds that this aspect of Braun's testimony lacked credibility.

The Hearing Panel's assessment of Braun's credibility begins with Braun's concession on cross-examination that he was not a neutral witness when it comes to Geary.<sup>132</sup> This is borne out by other evidence. Braun volunteered to assist both the Oklahoma Department of Securities and FINRA in their investigations and enforcement actions against Geary. But Braun defied a court issued witness subpoena that he appear on Geary's behalf at a deposition in litigation Geary brought against Braun, The Bank of Union, and others for damages Geary alleged he suffered by their wrongful attempt to take over Geary Securities.<sup>133</sup> Indeed, Braun was held in contempt of court for failing to honor the subpoena.<sup>134</sup>

Braun's accusations that Geary misled The Bank of Union are further undercut because they make no sense in light of Braun's and Shelley's extensive banking experience. They, as well as the other members of the bank's board, knew that the CEMP team of professionals had not finalized the terms of the CEMP Note offerings at the time Braun claims Geary led the bank to believe that Geary had buyers lined up for the notes. But no reasonable person with their

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<sup>127</sup> Tr. 158.

<sup>128</sup> Tr. 81, 91, 155-56, 170.

<sup>129</sup> Tr. 77 ("Well, we just assumed that there were buyers since we had a closing date."). Shelley similarly testified in a deposition taken in the matter of Geary Securities before the Oklahoma Department of Securities on November 16, 2011, that he was under the impression that Geary had buyers for the CEMP notes. Tr. 421-22.

<sup>130</sup> Tr. 91.

<sup>131</sup> Tr. 72.

<sup>132</sup> Tr. 135.

<sup>133</sup> Tr. 136-37.

<sup>134</sup> Tr. 137.

experience could have reached that conclusion. Not only had the CEMP Notes not been rated, they had not been created. Thus, they could not have been priced, and potential buyers would not have had any idea what they were buying or the cost. They also knew that the bank had not signed any of the documents needed to authorize the sale. Further, as experienced bankers who bought and sold such bonds and notes regularly, they knew that Geary could not have committed buyers before he could provide them with the legally required offering documents. Those offering documents, including the Private Placement Memorandum, were not finalized until late September 2009, after The Bank of Union and TH agreed in principle to purchase the CEMP Notes.

Consequently, the Hearing Panel rejects Braun's assertions that Geary misrepresented that he had buyers for the CEMP Notes. For the same reasons, the Hearing Panel finds no credible evidence supporting Enforcement's charge that Geary misled The Bank of Union by failing to tell the bank that lack of buyers was the real reason the tentative closing dates were delayed. In fact, the closing could not occur until the CEMP Notes and related offering documents were finalized, rated, and priced. Geary accurately relayed this information to Shelley and Braun. And some of the delay was caused directly by the need to restructure the transaction after some sellers pulled out. Here also, Geary accurately advised Shelley and Braun of this development.

**b. Geary Did Not Act with Scienter in Connection with the Purchase of the Private Label CMOs**

We conclude that Geary did not act with scienter with regard to the purchase of the Private Label CMOs as Enforcement alleges. Geary had a long relationship with The Bank of Union, and it was in his and the bank's best interests for him to devise a workable plan that would allow The Bank of Union to dispose of its Private Label CMOs without it incurring a substantial loss.

Geary testified credibly that he created CEMP to help The Bank of Union and his other bank customers. Geary priced the purchase of the Private Label CMOs fairly, and he used his best efforts to fulfill the original plan to sell the CEMP Notes. There is no evidence that he structured CEMP with the intent to deceive or defraud The Bank of Union. To the contrary, Geary retained highly qualified attorneys, accountants, and advisors to ensure that the deal was structured properly. Enforcement does not argue otherwise. Further, there is no evidence whatsoever to conclude that any of the professionals working on CEMP ever advised Geary that he would not be able to sell the CEMP Notes as he planned.

From the scant evidence Enforcement presented of what Geary actually told The Bank of Union, we infer that throughout the relevant period Geary remained very optimistic about CEMP's ultimate success. Based on his professional experience, Geary reasoned that the CEMP Notes—and particularly the CEMP Class A-1 Notes—could be sold at a favorable price because

they would be triple-A rated. Although Geary may have been naïve in his assessment of the market at the time—particularly given the mounting regulatory criticism in 2009 of small banks holding complicated structured products—there is no evidence that Geary received and ignored any information contradicting his belief that he could sell the CEMP Notes. And DBRS never advised him that the CEMP Class A-1 Notes would not receive a triple-A rating.

For all of these reasons, we conclude that Enforcement failed to prove by a preponderance of the evidence that Geary defrauded The Bank of Union in connection with CEMP’s purchase of the Private Label CMOs.

**c. Geary Did Not Act Unethically in Connection with the Purchase of the Private Label CMOs**

We further conclude that Enforcement failed to show by a preponderance of the evidence that Geary acted unethically in connection with CEMP’s purchase of the Private Label CMOs from The Bank of Union. There is no evidence that Geary breached any duty he owed The Bank of Union. To the contrary, the credible evidence shows that Geary worked diligently and faithfully to structure the best deal he could to help The Bank of Union. The Hearing Panel finds it particularly significant that Geary could have walked away from the entire transaction when Washita, McKean, and Eagle Sky pulled out. While true that Geary would have been left owing the fees and expenses CEMP had incurred up to that point, this fact alone does not support a finding that Geary acted unethically. The various purchase agreements The Bank of Union signed all expressly provide that the sale of the Private Label CMOs would only be completed if there was a simultaneous sale of the CEMP Notes. Rather than leave The Bank of Union to its own devices, Geary restructured the CEMP transaction so that The Bank of Union could meet its goal of getting the Private Label CMOs off its books before the next FDIC examination and without the need for additional capital. The fact that Geary ultimately was proven wrong in his belief that the CEMP Notes could be resold quickly to third-party buyers does not alone support a finding that he acted unethically without proof of some other misconduct or breach of duty.

For these reasons, we conclude that Enforcement failed to prove by a preponderance of the evidence that Geary failed to observe high standards of commercial honor and just and equitable principles of trade in connection with CEMP’s purchase of the Private Label CMOs from The Bank of Union.

**2. Sale of the CEMP Class A-1 Notes to The Bank of Union**

Enforcement next alleged that Geary defrauded The Bank of Union in connection with its purchase of the CEMP Class A-1 Notes by making two material misrepresentations: (i) the CEMP Class A-1 Notes would be unqualifiedly rated triple-A and therefore would be beyond bank examiner issues; and (ii) Geary could easily sell the notes in the secondary market so the

bank would only have to hold the notes for three days. Alternatively, Enforcement alleged that Geary acted unethically in making the same statements.

**a. Geary Did Not Make Material Misrepresentations or Omit Material Information in Connection with the Sale of the CEMP Notes to The Bank of Union**

On September 15, 2009, Geary asked The Bank of Union if it would consider purchasing the Class A-1 Notes. In an email he sent that day to Braun and Shelley, he addressed the question of whether it was likely that the FDIC bank examiners would fault the bank for holding the notes. Geary offered his opinion that: “[The Class A-1 Notes] are above and beyond Examiner ‘issues.’”<sup>135</sup> Braun did not clarify in his testimony what Geary had meant by placing the word issues in quotation marks, but he assumed Geary meant that the examiners would not object to the notes because of their rating.<sup>136</sup>

Geary testified at the hearing that he made this statement because he believed the FDIC examiners would not take issue with the notes if they were triple-A rated.<sup>137</sup> Based on the information available to Geary at the time, his opinion was reasonable. Enforcement presented no evidence to the contrary. That the FDIC may at some later time have criticized the bank for holding the CEMP Class A-1 Notes does not support a finding that Geary made a material misstatement of fact with the intent to defraud The Bank of Union when he told the bank in September 2009 that he believed the CEMP Class A-1 Notes would be above and beyond examiner concern.

Enforcement also takes issue with Geary’s statement because the CEMP Class A-1 Notes ultimately were rated triple-A as to the risk of loss of principal but not as to interest. Enforcement contends that Geary’s failure to disclose this distinction constituted fraud. But Enforcement’s argument overlooks the fact that DBRS had not finalized the rating before Geary offered his opinion about how the FDIC would view the Class A-1 Notes if the bank were to purchase them. Thus, it is unclear when Geary first learned that the triple-A rating would apply to principal and not interest.<sup>138</sup> Also, Braun and Shelley knew at the time Geary asked them to consider purchasing the Class A-1 Notes that DBRS had not yet finalized the rating. Accordingly, Geary’s statement was not false at the time he made it. We further conclude that Geary held a good-faith opinion that bank examiners do not routinely object to triple-A rated

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<sup>135</sup> CX-39.

<sup>136</sup> Tr. 90.

<sup>137</sup> Tr. 307.

<sup>138</sup> Moreover, the evidence tends to support the conclusion that the ultimate rating as to principal only was expected by the professionals working on the CEMP transaction.



securities; therefore, he did not foresee “issues” if The Bank of Union purchased the CEMP Class A-1 Notes.

**b. Geary Did not Act with Scienter in Connection with the Sale of the CEMP Class A-1 Notes to The Bank of Union**

As with CEMP’s purchase of the Private Label CMOs, Enforcement presented no evidence that Geary acted with scienter when he asked The Bank of Union if it would consider purchasing the CEMP Class A-1 Notes. We reject Enforcement’s arguments that we can conclude that Geary intentionally defrauded The Bank of Union simply because he stood to profit from the CEMP transactions or because he would have been left with the financial obligation to pay the professional fees incurred in structuring CEMP if the closing failed. The Bank of Union knew that Geary or his companies stood to profit from the CEMP transactions. Enforcement does not argue that Geary ever misled the bank on this point. And the fact that Geary agreed to bear all of the financial risk if the CEMP deal failed is by itself not evidence of fraudulent intent. It is commonplace for a broker-dealer to incur fees when structuring an offering.

For these reasons, we conclude that Enforcement failed to prove by a preponderance of the evidence that Geary engaged in fraud in connection with the sale of the CEMP A-1 Notes to The Bank of Union.

**c. Enforcement Failed to Prove that Geary Acted Unethically in Connection with the Sale of the CEMP Notes to The Bank of Union**

We further conclude that Enforcement failed to show by a preponderance of the evidence that Geary failed to observe high standards of commercial honor and just and equitable principles of trade in connection with the sale of the CEMP Class A-1 Notes to The Bank of Union. As discussed above, we conclude that Geary believed in good faith that the CEMP Class A-1 Notes would be triple-A rated, liquid, and a sound investment for The Bank of Union.

**3. Sale of the CEMP Class A-2 Notes to TH**

Finally, Enforcement alleged that Geary defrauded TH in connection with his purchase of the CEMP Class A-2 Notes by making two material misrepresentations: (i) the CEMP Class A-2 Notes were liquid and therefore TH would only have to hold them for no more than 90 days, which Geary guaranteed, and (ii) TH would profit if he purchased the notes. Alternatively, Enforcement alleged that Geary acted unethically in making the same statements.

We dismiss these claims because there is no evidence that Geary ever made these statements to TH. All of the evidence Enforcement introduced relating to these two causes of action describes Geary’s conversations with Shelley and Braun, or others at The Bank of Union. Shelley then spoke to TH, but there is no evidence of what Shelley told TH. Nor is there any

evidence of what information and representations TH received from Shelley. Accordingly, we conclude that there is insufficient evidence to support Enforcement's allegation that Geary intentionally defrauded TH or that Geary failed to observe high standards of commercial honor and just and equitable principles of trade in connection with TH's purchase of the CEMP Class A-2 Notes.

**IV. Order**

The Complaint against Keith D. Geary is dismissed.

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Andrew H. Perkins  
Hearing Officer  
For the Hearing Panel