

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

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4  
5 No. CV-04-25-FVS

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7 In re METROPOLITAN SECURITIES  
8 LITIGATION

9  
10 ORDER RE THE EXPECTED  
11 TESTIMONY OF JENNIFER E.  
12 BETHEL

13  
14 **THIS MATTER** comes before the Court without oral argument based  
15 upon the plaintiffs' motion to exclude the expected testimony of  
16 economist Jennifer E. Bethel, Ph.D.

17  
18 **BACKGROUND**

19 During 2000, 2001, and the first half of 2002, Metropolitan  
20 Mortgage & Securities Co., Inc., ("Met"), and Summit Securities, Inc.  
21 ("Summit") filed nine registration statements with the Securities and  
22 Exchange Commission ("SEC") for the purpose of offering securities to  
23 the public. In a number of instances, the SEC sent a "comment letter"  
24 asking for additional information. The company to whom the SEC issued  
25 the letter filed a response. Sometimes the company's response  
26 appeared to satisfy the SEC's concerns; other times the SEC sent an  
additional comment letter (or letters) posing follow-up questions.  
One can view the comment-letter process in action by examining the  
SEC's response to a registration statement Met filed on February 21,  
2001.

1 On March 23, 2001, the SEC sent a comment letter that posed a  
2 number of questions. Among other things, the SEC wanted more  
3 information about two accounting determinations in Met's FY 2000  
4 financial statement. One determination concerned a tax shelter named  
5 the Foreign Leverage Investment Program ("FLIP"). Another  
6 determination concerned a stream of income Met sold to Summit. The  
7 parties refer to this as "the Koa transaction." Met responded to the  
8 SEC's comment letter on April 6th. On April 18th, the SEC sent  
9 another comment letter. The SEC did not ask any more questions  
10 concerning the FLIP tax shelter. However, the SEC did ask Met to  
11 provide additional information regarding the Koa transaction. Met  
12 submitted a response on May 3rd. The SEC did not send any more  
13 comment letters to Met concerning the registration statement it had  
14 filed on February 21st or the supplemental materials it had filed in  
15 support thereof. Less than two weeks later, the SEC declared the  
16 registration statement effective.  
17

18 The SEC's response to the above-described registration statement  
19 was consistent with its response to the other registration statements  
20 Met and Summit filed during 2001 and 2002. Sometimes the SEC sent  
21 comment letters -- sometimes not; but whether or not the SEC sent  
22 comment letters, it declared effective the registration statements Met  
23 and Summit filed between the beginning of 2000 and the middle of 2002.  
24 This action on the part of the SEC enabled Met and Summit to continue  
25 selling securities, which was of critical importance to both  
26 companies. They depended upon the proceeds from their securities

1 offerings to fund their operations.

2 During the second half of 2002 and the first half of 2003, Met  
3 and Summit filed new registration statements with the SEC. They hoped  
4 the SEC would promptly authorize them to offer new securities to the  
5 public. Their hopes were dashed. Instead of promptly declaring the  
6 new registration statements effective, the SEC sent a series of  
7 comment letters. The plaintiffs allege the SEC's comment letters show  
8 it questioned the validity of accounting determinations  
9 PricewaterhouseCoopers ("PwC") made while auditing Met's and Summit's  
10 Fiscal Year ("FY") 2000 financial statements. PwC disagrees with the  
11 plaintiffs' interpretation of the 2002-2003 comment letters. PwC  
12 intends to call economist Jennifer E. Bethel, Ph.D., to support its  
13 rival interpretation. Among other things, she will opine:

14 (1) "the SEC would not have deemed effective a Metropolitan  
15 registration statement in 2001 if it disagreed with Metropolitan's FY  
16 2000 accounting for FLIP and Koa";

17 (2) "the SEC's approval of registration statements in 2001 and  
18 2002 that incorporated the FY 2000 and FY 2001 financial statements --  
19 which approval was never revoked -- supports [Professor Bethel's]  
20 opinion that the SEC was not concerned about Metropolitan's and  
21 Summit's FY 2000 and FY 2001 accounting in late 2002 and 2003";

22 (3) the SEC's delay in approving the new registration statements  
23 did not cause Met's and Summit's 2003 liquidity crisis;

24 (4) the liquidity crisis was caused by Roth Capital Partners'  
25 withdrawal as Qualified Independent Underwriter ("QIU") and the  
26

1 decision on the part of Metropolitan Investment Securities, Inc.  
2 ("MIS") to accept the sanctions imposed by the National Association of  
3 Securities Dealers ("NASD"), including an order prohibiting MIS from  
4 selling securities; and

5 (5) it is neither inappropriate nor uncommon for a company to use  
6 new debt to pay off old debt.

7 The plaintiffs urge the Court to exclude Dr. Bethel's opinions  
8 pursuant to Federal Rules of Evidence 702 and 403. First, they argue  
9 she is unqualified to say what the SEC meant by issuing a comment  
10 letter. Second, they argue her interpretations of the disputed  
11 comment letters are not based upon a commonly accepted methodology or  
12 standard. Third, they argue her interpretations are inconsistent with  
13 15 U.S.C. § 78z. Fourth, they argue the probative value of her  
14 testimony, if any, would be substantially outweighed by the danger of  
15 unfair prejudice.  
16

#### 17 **RULING**

18 No one from the SEC is going to appear at trial and explain why  
19 the agency delayed declaring effective Met's and Summit's last set of  
20 registration statements. The plaintiffs will ask the jury to infer  
21 the SEC's motivation from the questions it posed in the 2002 and 2003  
22 comment letters. Whether such inferences are valid is debatable. As  
23 the plaintiffs themselves point out, Congress has limited the  
24 inferences one may draw from the SEC's actions or lack thereof:

25 No action or failure to act by the [SEC] . . . shall be  
26 construed to mean that the [SEC] has in any way passed upon  
the merits of, or given approval to, any security or any

1 transaction or transactions therein, nor shall such action  
2 or failure to act with regard to any statement or report  
3 filed with or examined by [the SEC] . . . be deemed a  
4 finding by [the SEC] that such statement or report is true  
and accurate on its face or that it is not false or  
misleading.

5 15 U.S.C. § 78z. Assuming, for purposes of argument, one may infer  
6 from the SEC's 2002 and 2003 comment letters why the agency delayed  
7 declaring effective the last set of registration statements, the Court  
8 must decide which rules govern the interpretation of agency  
9 correspondence. The record is not well-enough developed at this time  
10 to permit the Court to make a comprehensive ruling. What the Court  
11 can say is this: Ordinarily, a writing speaks for itself. See, e.g.,  
12 Michael H. Graham, *Handbook of Federal Evidence* § 1002:3 (6th  
13 ed.2006). If it is permissible for anyone to determine from the  
14 questions the SEC posed in comment letters why it did, or did not,  
15 declare a registration statement effective, then it will be for the  
16 jury, not for experts, to make that determination.

17  
18 **IT IS HEREBY ORDERED:**

19 The plaintiffs' motion to exclude the testimony of economist  
20 Jennifer E. Bethel, Ph.D. (**Ct. Rec. 755**) is **granted in part**. She may  
21 not attempt to interpret the SEC's comment letters.

22 **IT IS SO ORDERED.** The District Court Executive is hereby  
23 directed to enter this order and furnish copies to counsel.

24 **DATED** this 18th day of February, 2010.

25  
26 s/Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge