

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 EXPECTED
11 TESTIMONY OF JOHN R.
12 NILSON

13 **THIS MATTER** comes before the Court without oral argument based
14 upon PricewaterhouseCoopers' motion to exclude the expected testimony
15 of John R. Nilson.

16 **BACKGROUND**

17 PricewaterhouseCoopers LLP ("PwC") sold a tax shelter to
18 Metropolitan Mortgage & Securities Co., Inc. ("Met"). The shelter was
19 named the "Foreign Leveraged Investment Program" ("FLIP"). It
20 consisted of series of investments in a Swiss bank and other foreign
21 corporations. PwC indicated the FLIP would result in an \$80 million
22 loss that would generate \$28 million in tax savings for Met. During
23 1999, PwC issued a written opinion indicating, on a "more likely than
24 not" basis, Met would be permitted to retain the tax savings generated
25 by the FLIP in the event the Internal Revenue Service ("IRS")
26 challenged the transaction.

John R. Nilson is a retired IRS Revenue Agent. The plaintiffs

1 intend to qualify him as an expert concerning tax shelters. He is
2 prepared to testify that, as of 1999, the FLIP was not "more than
3 likely than not" to survive an IRS challenge. PwC urges the Court to
4 exclude Mr. Nilson's expected testimony in that regard. As PwC
5 observes, the plaintiffs do not contest Met's Fiscal Year ("FY") 1999
6 financial statement. Rather, it is Met's FY 2000 financial statement
7 and PwC's audit thereof that are in dispute. The plaintiffs have
8 retained a different expert, Harris L. Devor, to evaluate the FY 2000
9 financial statement and audit. He did not rely upon Mr. Nilson's work
10 in formulating his opinions, and, indeed, he does not dispute PwC's FY
11 1999 treatment of the FLIP. Given Mr. Devor's opinion regarding PwC's
12 FY 1999 treatment of the FLIP, and given the fact the plaintiffs are
13 not contesting Met's FY 1999 financial statement and PwC's audit
14 thereof, PwC argues Mr. Nilson's expected testimony is irrelevant and
15 prejudicial.
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17 **RULING**

18 The plaintiffs' accounting expert, Mr. Devor, does not think PwC
19 made any material accounting errors when auditing Met's FY 1999
20 financial statement. Rather, according to him, the errors occurred
21 during the FY 2000 audit. Mr. Nilson's expected testimony does not
22 support Mr. Devor's opinions regarding the FY 2000 audit, and it is
23 inconsistent with Mr. Devor's opinions regarding the FY 1999 audit.
24 Thus, Mr. Nilson's testimony regarding the IRS's reaction to the FLIP
25 is irrelevant. Fed.R.Evid. 401 (evidence is relevant if it has a
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1 "tendency to make the existence of any fact that is of consequence to
2 the determination of the action more probable or less probable than it
3 would be without the evidence"). The plaintiffs may not offer Mr.
4 Nilson's testimony on this issue during their case in chief. However,
5 if PwC's witnesses defend its 1999 tax advice regarding the FLIP, then
6 the plaintiffs may call Mr. Nilson as a rebuttal witness.

7
8 **IT IS HEREBY ORDERED:**

9 PricewaterhouseCoopers' motion to exclude the expected testimony
10 of John R. Nilson (**Ct. Rec. 745**) is **granted in part**. During the
11 plaintiff's case in chief, Mr. Nilson may not testify that, as of
12 1999, the FLIP was not "more than likely than not" to survive an IRS
13 challenge.

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

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

17
18 s/Fred Van Sickle
19 Fred Van Sickle
Senior United States District Judge