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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of

BARBARA DUKA

Respondent.

OPPOSITION TO RESPONDENT'S MOTION *IN LIMINE* TO EXCLUDE CMBS INVESTORS AS WITNESSES

The Division of Enforcement respectfully submits this opposition to Duka's motion *in limine* to preclude testimony of two CMBS investors: Jon Garrett (of the Knights of Columbus) and Glen Kneeland (of Aegon). In sum, the Division should not be foreclosed from eliciting relevant testimony from CMBS investors for the reasons suggested by Respondent.

As the Court is by no doubt aware, there is no shortage of potential witnesses at the upcoming hearing. Having each added two new witnesses[1] on the October 21, 2016 supplemental witness lists, the parties now have a total of 60 potential witnesses (29 for the Division, 31 for the Respondent). For its part, the Division identified a total of five CMBS investor witnesses, while the Respondent's list of witnesses included nine CMBS investors. The

[1] Respondent identified two new witnesses on its supplemental list – Howard Esaki and Darrell Wheeler – who worked in research at the firms of Standard & Poor's and Citigroup respectively. In a meet and confer, Respondent explained that it was necessary to add these witnesses in light of the Division's identification of Richard Parkus, who was formerly in research at Morgan Stanley, as a witness. Like the Division's supplemental witnesses, neither Esaki nor Wheeler testified in the investigation, nor did they produce documents, and Respondent's explanation for their belated inclusion is thin. However, the Division does not intend to object to either witness at this stage, since the Division has no reason to doubt that counsel has acted in good faith in identifying these individuals.

Division's supplemental witness list added two additional CMBS investors, Jon Garrett and Glen Kneeland.

In sum, the Division fully complied in good faith with the Court's order regarding the supplemental witness list. The order read, in relevant part: "Supplemental exhibits or witnesses may be identified in good faith based on a party's review of the original witness or exhibit list submitted by the opposing party." That is exactly what the Division did. First, the Respondent's witness list included expert Dan Richard – and while that list was silent as to the subject of Richard's testimony, the accompanying report identified him as a former CMBS investor who would opine on materiality from the standpoint of a "reasonable" CMBS investor. Prior to the October 14, 2016 filings, and consistent with the Rules of Practice, the Division did not know, and could not anticipate with precision, the topics on which Richard would opine. In addition, the Division's review of Respondent's witness list revealed that she planned to call nearly double the number of CMBS investors as the Division. Finally, the Respondent's original exhibit list identified numerous documents related to CMBS investors. *See, e.g.*, Resp. Ex.'s 136-152, 154-156. As a result, the Division decided to identify two new CMBS investors – Jon Garrett and Glen Kneeland – to provide the Court with testimony from a slightly wider range of CMBS investors. In the Division's view, this was an appropriate response to Respondent's expert who intends to opine about CMBS investing in the abstract—testimony that the Division expects to be squarely contradicted by witnesses, including Garrett and Kneeland, who actually bought the CMBS at issue and are expected to testify about the considerations they considered important, as investment professionals, in making their investment decisions.

Notwithstanding counsel's insinuations, the Division's identification of two additional investor-witnesses[2] is a restrained approach to issues raised by the Respondent's voluminous exhibit list and witness list. While it may be prudent for both sides to reduce the total number of CMBS investor witnesses at the hearing, there is nothing improper or prejudicial about the Division's addition of two CMBS investors, both of whom have been identified in documents previously produced to the Respondent. *See, e.g.*, GS_SP 001131; JPMS SP 00000001-A. Indeed, Respondent has listed numerous CMBS investors as potential witnesses, none of whom have produced any "internal documents ... that can be used to question, impeach, refresh the recollection of, or rebut" their testimony at the hearing. *See* Resp. Mem. at 7.

Moreover, there is nothing in the plain language of this Court's order to suggest that it is improper for the Division to consider the Respondent's expert witness – in addition to lay witnesses – in crafting a supplemental witness list. Richard, is, in fact, listed as a witness for the Respondent, and thus may factor into the Division's thinking about a supplemental witness list. There is no basis for the arbitrary distinction drawn by Respondent between expert and lay witnesses.

Finally, Respondent's claim that she is somehow prejudiced by the "late disclosure" of Garrett and Kneeland falls flat. Witnesses were initially disclosed on October 14 and supplemental witnesses were disclosed on October 21. The timely and good faith disclosure of supplemental witnesses consistent with the Court's scheduling order cannot be said to unfairly prejudice Respondent. The Division and Respondent both listed CMBS investors on their initial lists, and five days later, the Division listed two additional CMBS investors. Respondent's

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[2] In fact, Respondent has included numerous emails to and from Glen Kneeland on its supplemental exhibit list, and it is unclear if those documents will be admissible without Kneeland's testimony to authenticate the documents and explain their relevance. *See* Respondent's Exhibit 696 (53-page compendium of Aegon employee e-mails, including Bloomberg messages to and from Glen Kneeland, along with unidentified witness notes)

hyperbolic claim that this somehow "contravenes the administrative proceeding process" should be rejected. The identification of Garrett and Kneeland hardly constitutes the continuation of the Division's investigation, but is simply the result of the Division's preparation for the upcoming hearing. There is no requirement that the Division subpoena documents and take investigative testimony from every witness. The fact that the Division did so with several investors in this case reflects the thoroughness of the investigation, but does not mean that adducing such evidence is an *a priori* requirement for calling an investor at the hearing.

For all of these reasons, Respondent's motion *in limine* to preclude the testimony of Jon Garrett and Glen Kneeland should be denied.

Dated this 31st day of October, 2016.

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CERTIFICATE OF SERVICE

On October 31, 2016, the foregoing Opposition was sent to the following parties and other persons entitled to notice as follows:

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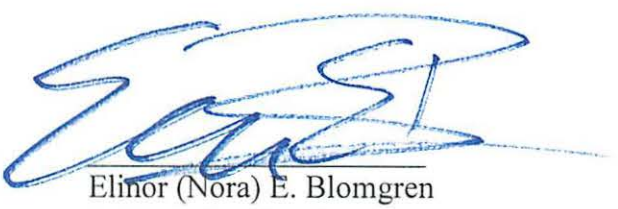

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