



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of

BARBARA DUKA

Respondent.

DIVISION'S OPPOSITION TO MOTION
***IN LIMINE* TO EXCLUDE TESTIMONY**
OF CMBS INVESTOR ETHAN PENNER

The Division writes in opposition to Duka's November 29, 2016 letter-motion, seeking to exclude the testimony of CMBS investor-witness Ethan Penner.¹ For the reasons stated herein, Duka's motion should be denied, as it is wholly flawed in its reasoning, as well as untimely.

As a threshold matter, Duka's motion should be denied as untimely, since Duka has been on notice for over a month that Penner is a witness, and neglected to raise a purported "relevance" objection until mid-hearing. As required by this Court's pre-hearing order, the Division filed a witness list on October 14 that identified Ethan Penner as a witness, and set forth the subject matter of his testimony – namely, "his professional experience investing in CMBS, and the concerns that he raised with David Jacob and others at S&P in 2011 concerning one of the offerings rated by S&P that is at issue in this proceeding." While Duka cites to the Division's opening statement and prehearing brief as the impetus for now moving to exclude Penner, there is exactly nothing in the opening statement that should have been surprising, given the previous description of Penner's testimony in the Division's October 14 witness list.

¹ Mr. Penner resides in California, and has already made travel arrangements to appear at Monday's hearing.

Moreover, the Division identified multiple exhibits relating to Penner on its October 21 exhibit list, including emails and articles quoting Penner, and a recording of an investor conference call that includes Barbara Duka responding to concerns outlined in an e-mail submitted by Penner. *See, e.g.*, Division Exhibits 106 (July 15, 2011 e-mail from Penner to Jacob), 146 (July 22, 2011 e-mail between S&P employees, circulating Commercial Mortgage Alert article that quoted Penner), 272 (April 2011 e-mail from Standard & Poor's to Penner attaching multiple articles and publications relating to CMBS), 325 (audio of conference call hosted by Standard & Poor's).

Turning to the substance of Duka's motion, Penner's testimony is unquestionably relevant, first and foremost because it was Penner's email to David Jacob that precipitated the discovery of the CMBS Group's use of blended constants and the subsequent withdrawal of the GSMS 2011-GC4 offering. This is relevant to provide context for the events in question. Moreover, the fact that CMBS investors like Penner expressed skepticism about the GSMS 2011-GC4 offering is relevant, because it highlights the importance of both consistency and transparency in the ratings process, as well as the inadequacy of S&P's presale disclosures. As this Court has noted, and as the Commission has held, "all evidence which 'can conceivably throw any light upon the controversy' should normally be admitted." *Charles P. Lawrence*, Securities Exchange Act of 1934 Release No. 8213, 1967 WL 86382, at *4 (Dec. 19, 1967).

Duka's effort to narrow the scope of relevance to the "DSC figures reported in the 2011 Presale Reports" misses the forest for the trees. Penner was one of several investors who raised concerns about the overall low levels of subordination in the GSMS offering that did not appear justified by the S&P presale report or the 2009 criteria. While the portion of the GSMS presale cited by Penner in Division Exhibit 106 (July 15, 2011 email to David Jacob) did not relate specifically to loan constants, the e-mail reflected Penner's concern that something was missing

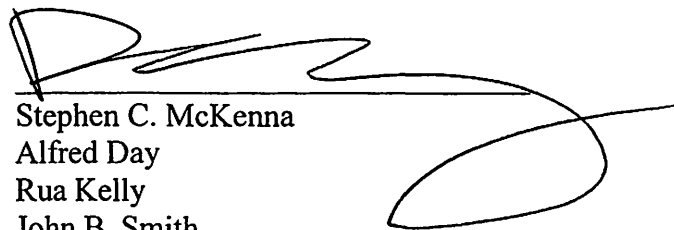
from the presale report, and that the numbers simply did not add up. The fact that Penner did not place a laser-beam focus on DSCR figures, but simply flagged the incongruity of the numbers in the presale report, does not render his testimony irrelevant. Rather, it highlights the point made in the Division's prehearing brief: "The fact that the decline in credit enhancement levels caused by Duka's conduct was so dramatic as to catch the attention of CMBS professionals underscores the materiality of the change in methodology." It also further underscores the utter lack of adequate disclosure insofar as even an experienced CMBS investor like Penner could not discern from the presale report the fact that Duka had altered S&P's methodology. Here, Penner was aware that something was amiss, but was only able to refer to the discrepancy by reference to the visible attributes of the Goldman Sachs deal, i.e., the loan-to-value and credit support. What Penner did not know was that a blended constant was used to derive a lower DSCR, which resulted in the reduced credit support levels that caused him to question the accuracy and truthfulness of S&P's presale report.

The Division submits that the perspective of CMBS investors like Ethan Penner is relevant in this case. Ironically, after trying to exclude the Division's expert based on his purported lack of experience as a CMBS investor, Duka is now attempting to exclude an actual CMBS investor, by attempting to artificially segregate the loan constants from the overall credit enhancement levels in CMBS offering. The Court should reject this strained view of both relevance and materiality. First, both parties' experts acknowledge in their reports that CMBS investors consider credit enhancement levels in their investment analysis. Further, debt service coverage ratios are directly dependent on loan constants, and the credit enhancement levels can rise or fall significantly depending on which loan constant is used to arrive at the debt service coverage ratio. *See* Division Exhibits 365-366 (demonstrative exhibits illustrating relationship

between loan constants and credit enhancement levels). Duka's effort to have this court look at loan constants in a vacuum – *i.e.*, divorced from their relationship to CE levels – should be rejected.

Accordingly, for the reasons stated herein, the Division respectfully requests that this Court deny Duka's letter-motion to exclude the testimony of Ethan Penner.

Dated this 1st day of December, 2016.



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CERTIFICATE OF SERVICE

On December 1, 2016, the foregoing Notice was sent to the following parties and other persons entitled to notice as follows:

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