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17 **UNITED STATES DISTRICT COURT**
18 **EASTERN DISTRICT OF WASHINGTON**

19 METROPOLITAN MORTGAGE &
20 SECURITIES CO., INC. and SUMMIT
21 SECURITIES, INC.,

22 v.

23 PRICEWATERHOUSECOOPERS, LLP

No. CV-05-290-FVS

PLAINTIFFS' RESPONSE TO
PRICEWATERHOUSECOOPER'S
REQUEST FOR JUDICIAL NOTICE

ORAL ARGUMENT REQUESTED

Hearing Date: Dec. 13, 2005, 10:00 a.m.

1 PriceWaterhouseCoopers LLP (“PwC”) filed a Request for Judicial Notice
2 in Support of PwC’s Motion to Dismiss Plaintiffs’ Complaint (respectively the
3 “Request” and “Motion”). This Memorandum opposes the Request.

4 There is a solidly grounded rule permitting a district court to consider, on a
5 Rule 12(b)(6) motion to dismiss, documents clearly referenced by a complaint but
6 not filed with it – referred to here as the “referenced documents” rule. PwC’s
7 Request attaches external documents, asks for notice of them, and cites cases
8 applying the referenced documents rule. But that rule does *not* support the Request.

9 PwC’s Request grasps piece-part elements of that rule and of FED. R. EVID.
10 201, wrenches them away from their context and logical foundation, and uses those
11 unanchored fragments in an effort to cobble together a new and baseless
12 evidentiary rule of its own. PwC’s Request should be denied in its entirety.

13 **I. ARGUMENT AND AUTHORITIES**

14 Ordinarily, if a Rule 12 motion refers to any material from beyond the four
15 corners of a complaint, it must be treated as a Rule 56 summary judgment motion.
16 The referenced document rule is a carefully circumscribed exception under which
17 external documents that are referred to in a complaint can properly be considered.

18 PwC’s Request asks the Court to take notice of eight documents. Request at
19 2. Of those, six are filings by Metropolitan or Summit with the Securities and
20 Exchange Commission (“SEC”) (numbers 1, 2, 5, 6, 7, and 8). The other two are
21 court filings – a complaint the SEC filed in the Western District of Washington,
22 No. 2:05-CV-01631-JCC (number 3) and a Motion for Entry of an Order
23 Approving a Compromise and Settlement with the IRS (number 4). Plaintiffs’
24 Complaint incorporates none of these documents, never names the SEC, and
25 neither refers to nor relies upon *any* of the documents identified in PwC’s Request.

1 PwC asserts the Court can take “judicial notice” of those external matters,
2 citing (in the Motion and Request) Rule 201 and decisions PwC says support its
3 Request. PwC cannot justify its Request on the basis of the referenced documents
4 rule given that *no* document covered by the Request was referenced – explicitly or
5 implicitly – in the Complaint. Because of that, PwC must advocate unrecognized
6 avenues for judicial notice, including one theory that allows any purportedly
7 “reliable” external document to be considered. The approaches promoted by PwC
8 are contrary to the principles governing the evaluation of a motion to dismiss.

9 PwC’s Request disregards three core constituent elements of the referenced
10 documents rule – *what circumstances* trigger taking notice of external documents;
11 *what effect* taking such notice can have in the pending case; and *what documents*
12 can be accorded notice, even if the rule’s other conditions have been satisfied.

13 **A. The Rule Reaches Only Documents *Referenced* In The Complaint**

14 For purposes of a Rule 12 motion, the triggering event for taking notice of a
15 document not attached to a complaint is that the complaint must expressly or
16 implicitly reference and in some way rely on a document that is not provided.

17 This is demonstrated by the decisions PwC itself cites. PwC offers a
18 creative but inaccurate interpretation of cases applying principles set out in *Branch*
19 *v. Tunnel*, 14 F.3d 449 (9th Cir. 1994). In *Branch*, the plaintiff alleged that a
20 deposition proved false statements were used to obtain a warrant and referred to
21 (but did not attach) the deposition. The court reasoned:

22 “Generally, a district court may not consider any material beyond the
23 pleadings in ruling on a Rule 12(b)(6) motion.” When “matters outside the
24 pleading are presented to and not excluded by the court,” a Rule 12(b)(6)
25 motion is to “be treated as one for summary judgment ..., and all parties
shall be given reasonable opportunity to present all material made pertinent
to such a motion by Rule 56.” Fed. R. Civ. P. 12(b). “However, material

1 which is properly submitted as part of the complaint may be considered” on
 2 a motion to dismiss.

3 ... [A] document is not “outside” the complaint if the complaint
 4 specifically refers to the document and if its authenticity is not questioned.
 5 ... [W]e hold that documents [1] whose contents are alleged in a complaint
 6 and [2] whose authenticity no party questions, but which are not physically
 7 attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
 8 motion to dismiss. Such consideration does “not convert the motion to
 9 dismiss into a motion for summary judgment.”

10 *Branch*, 14 F.3d at 453-54 (internal numbering added; citations omitted).¹

11 Most cases PwC cites involve a complaint *referencing* external documents.
 12 (PwC also cites four cases involving notice of court files, a topic examined below.)
 13 The “referenced documents” cases to which PwC points are: *Parrino v. FHP, Inc.*,
 14 146 F.3d 699, 705-06 (9th Cir. 1998) (ERISA plan documents on which complaint
 15 relied could be considered); *In re Silicon Graphics, Inc., Sec. Litig.*, 183 F.3d 970,
 16 986 (9th Cir. 1999) (plaintiff “allege[d] the contents of the SEC filings in her
 17 complaint”); *In re Network Commerce Inc. Sec. Litig.*, No. C01-0675L (W.D.
 18 Wash. Sept. 24, 2002) (2002 WL 3252268, at *8) (unpublished; cited in violation
 19 of Local Rule 7.1(g)) (contents of documents alleged in complaint could be
 20 considered); *Fetcht v. Price Co.*, 70 F.3d 1078, 1080 & n.1 (9th Cir. 1995)
 21 (complaint about “public statements” justified considering documents); *Mishler v.*
 22 *Clift*, 191 F.3d 998, 1008 n.7 (9th Cir. 1999) (disciplinary document “generally
 23 reference[d]” in complaint considered after plaintiff attached it to response to a
 24 motion to dismiss). (None of these decisions even *mentions* Rule 201.)
 25

23 ¹ Throughout this Response, underlined emphasis is added, and *italicized* emphasis
 24 appears in the original. *Branch* – but not this rule – was overruled on other
 25 grounds in *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

1 PwC's core argument fragments components of the referenced documents
2 rule into standalone tests, contending that a court can take notice of an unpleaded
3 document if it meets *any one* of the tests that are actually linked standards in that
4 rule. PwC thus argues that a court can, in evaluating a motion to dismiss,
5 "consider [1] documents that are attached to the complaint, [2] documents
6 (explicitly or implicitly) incorporated by reference ..., and [3] documents that are
7 capable of accurate and ready determination and not reasonably subject to
8 dispute." Request at 2-3 (internal numbering added). Under PwC's approach,
9 these are three alternative grounds for taking notice of a document, any one of
10 which can be satisfied independently. PwC plainly is misstating the law: Under
11 the precedent, in evaluating a motion to dismiss, a court can consider documents
12 (1) that are *either* attached to the complaint *or* that effectively were incorporated
13 into a complaint by reference, (2) for the purpose of determining if a relevant
14 "verbal act" has occurred (a point discussed below), but *only if* (3) the authenticity
15 of the document and the accuracy of any inference to be drawn from the existence
16 of the document are not reasonably subject to dispute.²

17 Because the Complaint does not refer to any of the documents PwC seeks to
18 inject into this proceeding, PwC fails to meet even the first requirement of this
19 rule. The Court thus can and should deny PwC's Request on this ground alone.

21 ² Other Circuits also follow the referenced documents rule. *See Kramer v. Time*
22 *Warner*, 937 F.2d 767, 773-74 (2d Cir. 1991) (SEC filings allegedly contained
23 misrepresentations); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (same);
24 *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276 (11th Cir. 1999) (same);
25 *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (same).

1 **B. Documents Referenced By A Complaint Can Be Reviewed**
2 **To Determine If Their *Existence* Has An Effect On The Motion,**
3 **But Not For The Truth Of Assertions Made In The Documents**

4 PwC seems to argue that Plaintiffs' claims are not cognizable because of
5 conclusions PwC asks the Court to draw from the documents PwC has referenced.

6 For example, PwC appears to assert that Plaintiffs cannot prevail because the
7 Court should consider – and accept as both true and preclusive – not only what the
8 SEC said in an action targeting former company officers in years after the events
9 that gave rise to the Complaint, but also PwC's inferences from what the SEC did
10 not include in that action. The basic premise of PwC's Request is that the Court
11 should notice and give some credence to what some other litigant has alleged or
12 failed to allege about a party to this proceeding, so long as those allegations were
13 in a complaint filed in some court somewhere. So stated, PwC's proposed principle
14 merits a pause for thoughtful consideration: If the standards PwC is advancing here
15 for judicial notice and admissibility were applied against PwC, this Court could
16 properly consider and take into account the myriad of lawsuits that have been filed
17 against PwC since the S&L era (if not earlier) alleging that it has engaged in
18 accounting malpractice and facilitated fraud. That evidently is proper under PwC's
19 proposed standard, suggesting there clearly is something amiss about it.³

21 ³ See, e.g., Motion at 5-6 (contending that SEC's focus on fraudulent actions two
22 years after events related to the Complaint means that PwC must be blameless); *id.*
23 at 6 (citing statements in SEC filings that the accuracy of financial statements "was
24 'the responsibility of ... management'" as if that were a complete defense to claims
25 of accounting malpractice). The documents identified by the Request are neither

1 1. Under the referenced documents rule, notice has limited effects: PwC is
2 misguided about the *effect* of taking notice of unpleaded documents. As precedent
3 makes clear, referenced external documents are typically viewed as “verbal acts”
4 (*cf.* FED. R. EVID. 801(c)) and are considered only for purposes parallel to those
5 where consideration of out-of-court statements is authorized by the evidentiary
6 rules (*e.g., id.* & 801(d)(2) (party’s statement offered against that party)).

7 If a complaint asserts that a disclosure was *not* made in a document,
8 examining the document may show the disclosure did occur (*see Kramer*, 937 F.2d
9 at 774). Conversely, if a complaint alleges statements were made, the court can
10 look at it to see if such statements *were made* (but cannot adopt them as truthful).⁴

11 The cases PwC cites abide by these principles. In both *Mullis v. United*
12 *States Bankr. Court*, 828 F.2d 1385 (9th Cir. 1987), and *MGIC Indem. Corp. v.*
13 *Weisman*, 803 F.2d 500 (9th Cir. 1986), the pleadings noticed were filed in other
14 courts *by parties in the pending case*.⁵

15
16 probative about nor dispositive of Plaintiffs’ claims, and evidently were offered for
17 some perceived prejudicial effect instead of for any relevant purpose.

18 ⁴ *Bryant, supra*, 187 F.3d at 1278 & n. 10 (court make take notice to determine
19 “what statements the documents contain [but] not to prove the truth of the
20 documents’ contents”); *Lovelace*, 78 F.3d at 1018 (same); *Kramer*, 937 F.2d at 774
21 (this form of notice is “not for the truth of the matters asserted in the other
22 litigation, but rather to establish the fact of such litigation and related filings.”).

23 ⁵ *Mullis* was a suit claiming bankruptcy court misconduct that relied on the
24 bankruptcy case file (828 F.2d at 1388 n.9). MGIC alleged it was unaware lawyers
25 were functioning in two roles, but pleadings MGIC had filed in another case

1 PwC's other two cited decisions – *In re Silicon Graphics, Inc., Sec. Litig.*,
2 183 F.3d 970 (9th Cir. 1999), and *Burbank-Glendale-Pasadena Airport Auth. v.*
3 *City of Burbank*, 136 F.3d 1360 (9th Cir.) – likewise allowed notice to be taken of
4 pleadings filed elsewhere by participants in the action where the court was being
5 asked to resolve a motion to dismiss.⁶

6
7
8 showed it was aware of that. 803 F.2d at 503-04; *id.* at 504 (memorandum from
9 other case showed “MGIC was fully aware of [the attorney’s] double role.”).

10 ⁶ *Burbank* held that federal law did not allow a state agency – the airport authority
11 – to challenge a state law as being unconstitutional. The court took notice of a case
12 filed in a state court by the defendant in the dismissed federal action (the City),
13 where the airport authority’s constitutional claim could be litigated. The court
14 described notice as an “administrative matter” and took the requested notice
15 without indicating in any way what effect that had on the original federal case or
16 the appeal the Ninth Circuit was resolving, given that the “state case was filed after
17 the district court entered its order of dismissal.” 136 F.3d at 1364. In *Silicon*
18 *Graphics*, the district court took notice of pleadings filed in other, similar cases by
19 attorneys representing the plaintiff. *See* 183 F.3d at 984 n.13 (noting the district
20 court, criticizing the “boilerplate” format of plaintiff’s securities law class action
21 complaint, wrote that “[o]ther complaints recently filed by plaintiff’s counsel
22 illustrate this problem. The [District] Court takes judicial notice of five securities
23 class action complaints that contain the same boilerplate allegations of ‘negative
24 internal reports’ found in paragraph thirty of the complaint in this case.”). In both
25 *Burbank* and *Silicon Graphics*, it is unclear whether the court’s “taking notice” of

1 PwC's Request does not ask for notice of the "fact" that the SEC filed an
2 enforcement action, or of the "fact" of a settlement with the IRS over the
3 legitimacy of a tax shelter (moreover, those "facts" are irrelevant to the
4 Complaint). Instead, PwC asks the Court to review those filings to see what they
5 allege, and to treat their allegations as dispositive of issues in this case. That
6 exceeds the bounds of the effect of taking notice of unpleaded documents under the
7 cases PwC cites.

8 PwC also disregards decisions directly forbidding what its Request seeks.
9 *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir.
10 1983), held that a trial court could not reach out to another case and, from it, take
11 judicial notice of any "facts essential to support a contention in a cause then before
12 it." Only two years ago, that holding was followed in *Wyatt v. Terhune*, 315 F.3d
13 1108, 1113-14 (9th Cir.) ("taking judicial notice of findings of fact from another
14 case exceeds the limits of Rule 201"), *cert. denied*, 540 U.S. 810 (2003).⁷

15 *M/V Am. Queen* and *Wyatt* forbid giving preclusive effect to findings of fact
16 from unrelated litigation. Taking notice of mere *allegations* from other cases –
17 which is precisely what PwC is seeking in this case – is even less justifiable.

18 2. Rule 201 does not authorize the notice PwC seeks: PwC asks for judicial
19 notice under Rule 201, but never explains how its Request fits within that rule.

20
21 the other filings had any *effect* on the pending litigation. Clearly, however, taking
22 notice precluded no claims that either plaintiff had asserted in either case.

23 ⁷ *See also id.* at 1114 n.5 (citing Wright & Miller and decisions from numerous
24 other circuits holding that it is improper to take notice even of *findings of fact* from
25 another proceeding).

1 The type of notice described in cases PwC cites is clearly *not* the same as Rule 201
2 notice, which has the same effect as a fact finding. *See* Rule 201(g) (a fact
3 judicially noticed is conclusive).⁸

4 The plain language of Rule 201(a) and (b) is quite clear – the Rule allows a
5 court to take notice of certain *adjudicative facts* that are relevant but not reasonably
6 subject to dispute, such as geography or when the sun rose on a given day.
7 Disregarding the Rule’s focus on such narrow matters, PwC asks the Court to
8 sweep into this proceeding entire documents – and everything they allege – instead
9 of any specific *facts*. The Request fails to invoke the correct standard for notice
10 under Rule 201. Judicial notice pursuant to Rule 201 would be improper in view
11 of the type of materials that PwC has asked the Court to notice.

12 **C. The Quality Standards For The Types Of External Documents**
13 **That Properly Can Be Noticed Are Not “Stand Alone” Tests**

14 In Rule 201, the reliability test (“sources whose accuracy cannot reasonably
15 be questioned”) is reached only *after* the court concludes it is being asked to take
16 notice of a “fact” and *after* deciding the fact is one that can be readily determined.
17 Cases applying the referenced documents rule use similar reliability tests, but *after*
18 other tests are met. PwC’s proposed rule severs the general concept of reliability

19
20 ⁸ *Mullis* is the only decision PwC cites that mentions Rule 201, and *Mullis* refers
21 only to subpart (f) of that rule (for the “timing” of when notice can be taken, not
22 the basis for taking notice). *See* 828 F.2d at 1388 n.9. As explained in *United*
23 *States v. Boyd*, 289 F.3d 1254, 1258 (10th Cir. 2002), “The effect of taking judicial
24 notice under [Rule] 201 is to preclude a party from introducing contrary evidence
25 and, in effect, directing a verdict against him as to the fact noticed.”

1 from all the other relevant standards, and treats it as a stand-alone basis for notice.
 2 If a document is available and at least arguably authentic, PwC contends, the court
 3 can take notice of it, for all purposes. Request at 2-3 (“courts consider ...
 4 documents that are capable of accurate and ready determination and not reasonably
 5 subject to dispute”). Reliability is not an independent ground for notice; it is a
 6 final test when other preliminary requirements for notice first have been satisfied,
 7 both under Rule 201 and in the “referenced documents” cases. PwC’s treatment of
 8 “reliability” as a stand-alone basis for notice is clearly contrary to governing law.

9 **II. CONCLUSION**

10 The Request cannot be supported on the basis of Rule 201, the decisions that
 11 PwC has cited, or – more generally – precedent correctly applying the referenced
 12 documents rule that PwC has distorted. PwC’s Request should be denied.

13 DATED this 16th day of November, 2005.

14 SUSMAN GODFREY LLP

15
 16 By /s/Parker C. Folse, III

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CERTIFICATE OF SERVICE

I hereby certify that on the date written above, that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The Court or the CM/ECF system will send notification of such filings to all CM/ECF participants. I further certify that a true and correct copy of this document was sent via U.S. first-class mail, postage pre-paid to all non-CM/ECF participants.

/s/ Parker C. Folsie, III