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15 IN THE UNITED STATES BANKRUPTCY COURT  
16 EASTERN DISTRICT OF WASHINGTON

17 In re METROPOLITAN  
18 MORTGAGE & SECURITIES CO.,  
19 INC.  
20 Debtor.

21 In re SUMMIT SECURITIES, INC.  
22 Debtor.

CASE No. 04-00757-W11 (Lead Case)  
CASE No. 04-00758-W11

**PROFESSIONAL DEFENDANTS'  
LIMITED OBJECTION TO  
DEBTORS' AND CREDITORS'  
COMMITTEES' MOTION FOR  
APPROVAL OF SETTLEMENT  
AGREEMENT BETWEEN THE  
DEBTORS AND CERTAIN OF  
DEBTOR'S DIRECTORS AND  
OFFICERS**

**[RE: DOCKET NO. 8600]**

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2 Pursuant to Local rule 2002, Defendants PricewaterhouseCoopers LLP  
3 ("PwC"), Ernst & Young LLP ("EY"), and Roth Capital Partners ("RCP"),  
4 collectively referred to herein as the "Professional Defendants," submit this joint,  
5 limited objection to Debtors and Creditors' Committees' Motion for Approval of  
6 Settlement Agreement Between the Debtors and Certain of Debtors' Directors and  
7 Officers ("Settling D&Os") (the "Motion"). This objection is not directed at the  
8 Settlement Agreement as a whole, but only to the Settlement's proposed "bar  
9 order." In its current form, the order seeks to bar third-party claims of indemnity  
10 or contribution against the settling directors, but offers no reciprocity for third  
11 parties from similar contribution and indemnity claims brought by the Settling  
12 D&Os. Such an inequitable arrangement runs contrary to federal law and would  
13 afford the Settling D&Os a potentially unfair result. The Professional Defendants  
14 therefore object and request that to the extent the Court issues a bar order affecting  
15 their rights as third parties, the bar order be made reciprocal by providing them with  
16 the same protections the Settling D&Os have afforded themselves.

17 The bar order in the proposed Settlement Agreement currently reads as  
18 follows:

19 If Debtors assert claims against third parties that would give rises under law  
20 to a right of contribution or indemnity by such third parties against Settling  
21 Directors of Officers, such third-party claims for contribution or indemnity  
22 are barred by this order. However, any judgment in such an action by the  
23 Debtors against such third parties shall be reduced or credited by an amount  
24 equal to the value of the claim for contribution or indemnity, if any, that the  
25 court or arbitrator in such action determines that such third parties would be  
26 entitled to assert against one or more on the Settling Directors and officers  
but for the operation of this Order's bar on such claims. If no such right to  
right to contribution or indemnity would exist under governing law, or if the  
third party fails to prove its entitlement to contribution or indemnity under  
governing law, then no reduction or credit against the judgment is necessary  
or required by this Order to avoid prejudice. (Motion at 48).

Notably, the scheme set forth by this proposed order would effectively

1 insulate the Settling D&Os from future claims for indemnity or contribution by  
2 third parties, but would offer no insulation for third-parties against indemnity or  
3 contribution claims brought by the settling defendants or their successors and  
4 assigns. To correct this inequity, the Professional Defendants have proposed the  
5 following alternate language:

6 *Effective immediately upon Final Approval (as that term is defined in the*  
7 *Settlement Agreement), any right of contribution or indemnity that the*  
8 *Settling Directors or Officers (including their successors and assigns) might*  
9 *be entitled to assert arising out of or relating to any claims released pursuant*  
10 *to the Settlement Agreement (including released unknown claims) shall be*  
11 *barred. Further, effective immediately upon Final Approval, if Debtors*  
12 *assert claims against third parties that would give rise under law to a right of*  
13 *contribution or indemnity by such third parties against Settling Directors or*  
14 *Officers, such third-party claims for contribution or indemnity are barred by*  
15 *this Order. However, any judgment in such an action by the Debtors against*  
16 *such third parties shall be reduced or credited by an amount equal to the*  
17 *value of the claim for contribution or indemnity, if any, that the court or*  
18 *arbitrator in such action determines that such third parties would be entitled*  
19 *to assert recover under governing law against one or more of the Settling*  
20 *Directors and Officers but for the operation of this Order's bar on such*  
21 *claims.* (emphasis added).

22 Under this alternate language, the Settlement Agreement is modified only enough  
23 to “substantially protect the rights of the non-settling [parties],” *In re*  
24 *Phenylpropanolamine Prods. Liability Litig.*, 227 F.R.D. 553 (W.D. Wash. 2004),  
25 thereby ensuring the bar order reaches the level of fairness and mutuality required  
26 under federal law. *See, e.g., Franklin v. Kaypro Corp. Sec. Litig.*, 884 F. 2d 1222,  
1231 (9th Cir. 1989) (referencing the “goal of equity” as between settling  
defendants and third-parties in ordering reconsideration of bar order). *See also In*  
*re MTC Electronics Technologies S’hlder Litig.*, 2005 WL 1322889 at \*1, \*5

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1 Counsel for the Professional Defendants and the Debtors also agreed to modify  
the last sentence of the bar order at the request of counsel for the Professional  
Defendants in an effort to further clarify the order.

1 (E.D.N.Y, May 31, 2005) (directing entry of mutual litigation bar in the interest of  
2 protecting the rights of third parties to the settlement agreement); *Denney v.*  
3 *Jenkins & Gilchrist*, 2005 WL 388562 (S.D.N.Y. Feb. 18, 2005) (acknowledging  
4 that “where the rights of third parties are affected their interests too must be  
5 considered”) (citations omitted).

6 Counsel for the Professional Defendants, the Debtors and the Settling D&Os  
7 have met and conferred as to these proposed changes. Counsel for the Debtors have  
8 no objection to this proposed language, but counsel for the Professional Defendants  
9 and the Settling D&Os had yet to reach agreement as of the time of filing of this  
10 objection. The Professional Defendants therefore enter this placeholder objection  
11 as contemplated by Local Rule 2002. The objecting parties reserve their right,  
12 pursuant to local Rule 9073, to further brief their objection to the Motion after the  
13 hearing date has been set.

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1 Dated: November 21, 2005 **FELTMAN, GEBHARDT, GREER &**  
2 **ZEIMANTZ**

3 /s/ Frank J. Gebhardt  
4 FRANK J. GEBHARDT, BAR NO. 4854

5 **ORRICK HERRINGTON & SUTCLIFFE**

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21 AND

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